

# DEVELOPMENTS IN INDIANA APPELLATE PROCEDURE: RULE AMENDMENTS, NOTABLE CASE LAW, AND TIPS FOR APPELLATE PRACTITIONERS

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## INTRODUCTION

The Indiana Rules of Appellate Procedure (Appellate Rules) were adopted in 2000. Each year, the Appellate Rules are defined, refined, and enhanced by the Indiana Supreme Court (supreme court) and the Indiana Court of Appeals (court of appeals) through rule amendments and appellate decisions. This Article tracks notable developments in appellate procedure between October 1, 2007 and September 30, 2008, by summarizing rule amendments, examining court opinions affecting appellate procedure, and synthesizing the case law to provide tips to practitioners for improving their appellate practice.

## I. RULE AMENDMENTS

This past year the supreme court made substantive amendments to Appellate Rules 9, 15, 23, 53, and Form 15-1.<sup>1</sup> The supreme court added Appellate Rule 14.1, which creates a new expedited process for certain appeals involving juveniles.<sup>2</sup> The supreme court also added Administrative Rule 9(G), which addresses court records excluded from public access in appellate proceedings.<sup>3</sup> All of these amendments went into effect on January 1, 2009.

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1. See Order Amending Indiana Rules of Appellate Procedure, No. 94S00-0810-MS-15 (Ind. Oct. 6, 2008), available at <http://www.in.gov/judiciary/rule-amendments/2008/1008-appellate.pdf>; Order Amending Appellate Rules, No. 94S00-0809-MS (Ind. Sept. 9, 2008), available at <http://www.in.gov/judiciary/orders/rule-amendments/2008/0908-appellate.pdf>.

2. See Order Amending Indiana Rules of Trial Procedure and Indiana Rules of Appellate Procedure, No. 94S00-0801-MS-15 (Ind. Jan. 6, 2009), available at <http://www.in.gov/judiciary/orders/rule-amendments/2009/0109-trproapppro.pdf>.

3. See Order Amending Indiana Administrative Rules, No. 94S00-0810-MS-15 (Ind. Oct. 6, 2008), available at <http://www.in.gov/judiciary/orders/rules-amendments/2008/1008-admin.pdf>.

*A. Appellate Rule 23—The Rotunda Filing Drop Box*

The supreme court amended Appellate Rule 23 to include the location of the rotunda filing drop box in the State House. Specifically, amended Appellate Rule 23(A)(1) provides:

All papers will be deemed filed with the Clerk when they are: (1) personally delivered to the Clerk (which, when the Clerk's office is open for business, shall mean personally tendering the papers to the Clerk or the Clerk's designee; and at all other times (unless the Clerk specifies otherwise) shall mean properly depositing the papers into the "rotunda filing drop box" located in the vestibule of the east second-floor entrance to the State House).<sup>4</sup>

*B. Cases Involving Records Excluded from Public Access*

The majority of the supreme court's amendments to the Appellate Rules affect the requirements for cases involving records excluded from public access. The supreme court amended Appellate Rule 9, which governs the initiation of an appeal.<sup>5</sup> Amended Appellate Rule 9(J) directs parties to file documents and information excluded from public access in accordance with Indiana Trial Rule 5(G) and Administrative Rule 9(G)(4).<sup>6</sup>

The supreme court also amended Appellate Rule 15, which outlines the requirements for an appellant's case summary.<sup>7</sup> Pursuant to amended Appellate Rule 15, an appellant must set forth in its appellant's case summary "[w]hether or not all, or any portion, or none of the court records were sealed or excluded from public access by court order."<sup>8</sup> The party must also certify that it "has reviewed and complied, and will continue to comply, with the requirements of Indiana Administrative Rule 9(G)(4) to the extent it applies to the appeal."<sup>9</sup> Moreover, the party must attach "[a] copy of all trial court entries relating to the sealing of any court records excluded from public access."<sup>10</sup> The supreme court also amended the designated form for the appellant's case summary to add areas for the appellant to include this information.<sup>11</sup>

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4. IND. APP. R. 23(A).

5. Order Amending Indiana Rules of Appellate Procedure, No. 94S00-0810-MS-15, *supra* note 1.

6. IND. APP. R. 9(J). Administrative Rule 9(G)(4) is a new provision governing access to court records in appellate proceedings and will be discussed momentarily. *See infra* notes 11-17 and accompanying text.

7. Order Amending Indiana Rules of Appellate Procedure, No. 94S00-0810-MS-15, *supra* note 1.

8. IND. APP. R. 15(C)(2)(k).

9. IND. APP. R. 15(C)(4)(i).

10. IND. APP. R. 15(D)(7).

11. Order Amending Indiana Rules of Appellate Procedure, No. 94S00-0810-MS-15, *supra* note 1 (amending IND. FORM. APP. 15-1).

Additionally, the supreme court added Appellate Rule 53(H), which governs the procedures for oral arguments in cases with sealed records.<sup>12</sup> Appellate Rule 53(H) provides that “[i]n any appeal in which case records are deemed confidential or excluded from public access, the parties and their counsel shall conduct oral argument in a manner reasonably calculated to provide anonymity and privacy in accordance with the requirements of Administrative Rule 9(G)(4).”<sup>13</sup>

Many of the amended Appellate Rules reference Administrative Rule 9(G)(4). The supreme court added<sup>14</sup> this provision to the Administrative Rules to place certain obligations on parties in appellate proceedings regarding access to court records. Specifically, Administrative Rule 9(G)(4) provides:

(4) *Appellate Proceedings.* In appellate proceedings, parties, counsel, the courts on appeal, and the Clerk of the Supreme Court, Court of Appeals, and Tax Court (“Clerk”) shall have the following obligations.

(a) *Cases in which the entire record is excluded from public access by statute or by rule.* In any case in which all case records are excluded from public access by statute or by rule of the Supreme Court,

(i) the Clerk shall make the appellate chronological case summary for the case publicly accessible but shall identify the names of the parties and affected persons in a manner reasonably calculated to provide anonymity and privacy;<sup>15</sup> and

(ii) the parties and counsel, at any oral argument and in any public hearing conducted in the appeal, shall refer to the case and parties only as identified in the appellate chronological case summary and shall not disclose any matter excluded from public access.

(b) *Cases in which a portion of the record is excluded from public access by statute or by rule.* In any case in which a portion (but less than all) of the record in the case has been excluded from public access by statute or by rule of the Supreme Court,

(i) the parties and counsel shall not disclose any matter excluded from public access in any document not itself excluded from

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12. *Id.* (adding IND. APP. R. 53(H)).

13. IND. APP. R. 53(H).

14. Order Amending Indiana Administrative Rules, No. 94S00-0810-MS-15, *supra* note 3.

15. This portion of the Rule was likely added in response to the Clerk of the Court’s interpretation of Administrative Rule 9(G)(1)(b)(i), which was cited as support for the decision to remove the entire online appellate docket for certain appeals involving juveniles. See Posting of Marcia Oddi to Indiana Law Blog, <http://www.indianalawblog.com/> (Oct. 8, 2008, 19:34 EST).

public access; to the extent it is necessary to refer to excluded information in briefs or other documents that are not excluded from public access, the reference shall be made in a separate document filed in compliance with Trial Rule 5(G); and

(ii) the parties, counsel, and the Clerk shall have the respective obligations set forth in (a)(i) and (a)(ii) to the extent necessary to comply with the statute or rule.

(c) *Cases in which any public access is excluded by trial court order.* In any case in which all or any portion of the record in the case has been excluded from public access by trial court order (“TCO”),

(i) (A) the appellant shall provide notice in the appropriate place on the appellant’s case summary (see Ind. Appellate Rule 15) that all or a portion of the record in the case has been excluded from public access by TCO, and attach to the appellant’s case summary all TCOs concerning each exclusion; and

(B) the parties, counsel, and the Clerk shall have the respective obligations set forth in (a)(i), (a)(ii), and (b)(i) to the extent necessary to comply with the TCO.

(ii) if the notice and supporting orders referred to in (i)(A) are supplied, then the Clerk shall exclude the information from public access to the extent necessary to comply with the TCO unless the court on appeal determines that

(A) the TCO was improper or is no longer appropriate,

(B) public disclosure of the information is essential to the resolution of litigation, or

(C) disclosure is appropriate to further the establishment of precedent or the development of the law;

(iii) any party may supplement or challenge the appellant’s notice or attachments supplied under (i)(A) or request a determination from the court on appeal under (ii); and

(iv) if the appellant does not notify the court on appeal that all or a portion of the record in the case has been excluded from public access by TCO, and attach to the appellant’s case summary all TCOs concerning each exclusion, as required by (i)(A),

(A) the Clerk shall be under no obligation to exclude the information from public access; and

(B) the appellant and appellant's counsel shall be subject to sanctions.

(d) Orders, decisions, and opinions issued by the court on appeal shall be publicly accessible, but each court on appeal should endeavor to exclude the names of the parties and affected persons, and any other matters excluded from public access, except as essential to the resolution of litigation or appropriate to further the establishment of precedent or the development of the law.<sup>16</sup>

The supreme court's extensive amendments to the Appellate and Administrative Rules for cases involving records excluded from public access demonstrate the court's commitment to delineating a procedure for cases of this nature. Additionally, the intricacies of the amendments make one thing clear: Appellate practitioners representing parties in cases with records excluded from public access must be careful to comply with the rules or risk being subject to sanctions.<sup>17</sup>

### *C. Appellate Rule 14.1—Juvenile “Rocket Docket”*

Effective January 1, 2009, the supreme court issued an order adding Appellate Rule 14.1, which establishes an expedited appellate review process for certain cases involving appeals from juvenile proceedings.<sup>18</sup> Specifically, Appellate Rule 14.1 applies to appeals authorized by Indiana Code sections 31-34-4-7(f), 31-34-19-6.1(f), 31-37-5-8(g), and 31-37-18-9(d), which deal with determinations regarding Children in Need of Services (CHINS) and juvenile delinquency.<sup>19</sup> In these cases, the Department of Child Services (DCS) must file a notice of expedited appeal with the trial court clerk within five business days of the trial court's order of placement or services.<sup>20</sup> The supreme court added Form 14.1-1 for this purpose.<sup>21</sup> Any party who receives the notice of expedited appeal shall have five business days from service to file an appearance.<sup>22</sup> Failure to do so removes that party from the appeal.<sup>23</sup>

Appellate Rule 14.1(C) provides that the “completion of the Transcript and

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16. IND. ADMIN. R. 9(G)(4).

17. See IND. ADMIN. R. 9(G)(4)(c)(iv)(B).

18. Order Amending Indiana Rules of Trial Procedure and Indiana Rules of Appellate Procedure, No. 94S00-0801-MS-15, *supra* note 2.

19. IND. APP. R. 14.1(A).

20. IND. APP. R. 14.1(B)(1).

21. Order Amending Indiana Rules of Trial Procedure and Indiana Rules of Appellate Procedure, No. 94S00-0801-MS-15, *supra* note 2 (adding IND. FORM APP. 14.1-1).

22. IND. APP. R. 14.1(B)(5).

23. *Id.*

the Record on Appeal shall take priority over all other appeal transcripts and records.”<sup>24</sup> Consequently, the assembly of the clerk’s record shall be completed and the transcript filed within ten business days after the filing of the notice of appeal.<sup>25</sup> On the eleventh business day following the filing of the transcript, the trial court clerk shall transmit the transcript, and failure to meet this deadline shall require the trial court clerk to show cause to the court of appeals why he or she should not be held in contempt.<sup>26</sup>

Appellate Rule 14.1(D) provides that any party may file a memorandum in narrative form and exempts the memorandum from various formatting requirements found in other appellate rules.<sup>27</sup> Memoranda shall not exceed ten pages.<sup>28</sup> DCS shall have five business days from the filing of the notice of completion of transcript to file a memorandum stating why the trial court’s decision should be reversed, and any responding party shall have five business days after DCS has filed its memorandum to file a responsive memorandum.<sup>29</sup> No reply memorandum<sup>30</sup> or extension of time is allowed.<sup>31</sup> Additionally, a party may not seek rehearing of an appellate decision.<sup>32</sup> A petition to transfer to the supreme court must be filed within five business days after the adverse decision of the court of appeals, and the petition “shall not exceed one (1) page in length.”<sup>33</sup>

Appellate Rule 14.1 will certainly expedite the appellate process for the applicable juvenile cases. However, it will be interesting to find out how attorneys handling these cases adapt to its strict deadlines with no possibility for extensions of time.

## II. CASE LAW INTERPRETING THE APPELLATE RULES

The vast majority of case law applying the Appellate Rules is handed down by the court of appeals. While the supreme court occasionally has an opportunity to interpret the Appellate Rules, the sheer number of cases the court of appeals tackles each year gives it more chances to construe the Appellate Rules.

### *A. The Appellate Rules Trump*

The court of appeals issued two opinions this year reconciling conflicts between the Appellate Rules and either the Trial Rules or a statute. In both cases, the court of appeals concluded that the Appellate Rules trumped the

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24. IND. APR. R. 14.1(C)(1).

25. *Id.*

26. IND. APP. R. 14.1(C)(3).

27. IND. APP. R. 14.1(D)(1).

28. IND. APP. R. 14.1(D)(2).

29. IND. APP. R. 14.1(D)(3).

30. IND. APP. R. 14.1(D)(5).

31. IND. APP. R. 14.1(E).

32. IND. APP. R. 14.1(F).

33. IND. APP. R. 14.1(H).

conflicting provision.

In *Marlett v. State*,<sup>34</sup> the State argued on cross-appeal that Marlett's notice of appeal was untimely and, thus, his appeal should be dismissed.<sup>35</sup> The trial court sentenced Marlett for his criminal conviction on December 1, 2006.<sup>36</sup> Therefore, Marlett's notice of appeal was due to be filed on or before January 2, 2007.<sup>37</sup> Although Marlett had documentation that he mailed his notice of appeal to the trial court on December 29, 2006, it was not sent by registered, certified, or express mail, and the trial court did not receive the notice of appeal until January 3, 2007.<sup>38</sup>

In addressing the State's cross-appeal, the court of appeals noted that Trial Rule 5(F)(3) requires that in order for a filing by mail to be deemed to have occurred on the date of mailing, the mail must be sent by registered, certified, or express mail.<sup>39</sup> By contrast, however, Appellate Rule 23(A)(2) provides, "All papers will be deemed filed with the Clerk when they are . . . deposited in the United States Mail, postage prepaid, properly addressed to the Clerk . . . ."<sup>40</sup> Consequently, the court of appeals noted that Marlett's notice of appeal was timely pursuant to the Appellate Rules because the filing date would be December 29, 2006, but that his notice was untimely pursuant to the Trial Rules because it was not sent by registered, certified, or express mail and, thus, was not filed until January 3, 2007.

The court of appeals held that "for purposes of determining the timeliness of a filing required by the Appellate Rules, the filing provisions of those rules trump those of the Trial Rules."<sup>41</sup> Although the court acknowledged that "the Clerk" referred to in Appellate Rule 23(A) included the Clerk of the Supreme Court, court of appeals, and Tax Court but not the trial court clerk, the court held that "[n]onetheless, in crafting the Appellate Rules a conscious decision was made that filings made by any type of United States Mail service would be deemed filed on the date of mailing, so long as postage was paid and it was addressed correctly."<sup>42</sup> Because the notice of appeal is a requirement of appellate practice and not trial practice, the court concluded that "[a]pplying Appellate Rule 23(A)(2) in this case would not undermine the goals of strictly enforcing time limits for notice of appeals, among which are to ensure the expeditious processing of appeals and to ensure the finality of judgments."<sup>43</sup> Therefore, the

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34. 878 N.E.2d 860 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 43 (Ind. 2008).

35. *Id.* at 863-64.

36. *Id.* at 863.

37. *Id.* at 864 (citing IND. APP. R. 25(A)-(B)). Although the thirtieth day after Marlett's sentence fell on December 31, 2006, both it and the following day were non-business days. Thus, Marlett's notice of appeal was not due until January 2, 2007.

38. *Id.*

39. *Id.* (citing IND. TRIAL R. 5(F)(3)).

40. *Id.* (quoting IND. APP. R. 23(A)(2)).

41. *Id.*

42. *Id.*

43. *Id.*

court of appeals held that Marlett's notice of appeal was timely and declined to dismiss his appeal.<sup>44</sup>

In *Crist v. South-West Lake Maxinkuckee Conservancy District*,<sup>45</sup> the court of appeals reconciled a conflict between the Appellate Rules and Indiana Code section 14-33-2-28, regarding whether the court of appeals or the supreme court had jurisdiction over a direct appeal from a trial court order establishing a conservancy district.<sup>46</sup> Indiana Code section 14-33-2-28 provides that an order establishing a conservancy district "may be appealed to the supreme court within thirty (30) days."<sup>47</sup> However, the court of appeals noted that Appellate Rule 4 grants the supreme court both mandatory and discretionary jurisdiction, but "[a]n appellant seeking to have the Supreme Court exercise discretionary jurisdiction over a direct appeal pursuant to [Appellate] Rule 4(A)(2) must file a motion with our Supreme Court pursuant to Appellate Rule 56."<sup>48</sup> Additionally, the court noted that "Appellate Rule 5 provides that '[e]xcept as provided in Rule 4, the Court of Appeals shall have jurisdiction in all appeals from Final Judgments of Circuit, Superior, Probate, and County Courts, notwithstanding any law, statute or rule providing for appeal directly to the Supreme Court of Indiana.'"<sup>49</sup>

The court of appeals emphasized that the case "[did] not qualify for mandatory supreme court review pursuant to Appellate Rule 4(A)(1)."<sup>50</sup> Moreover, the court noted that the trial court's order establishing the conservancy district was a final judgment but the appellant did not file a motion seeking discretionary review with the supreme court pursuant to Appellate Rule 56.<sup>51</sup> Therefore, the court held that "[w]hile we agree that Indiana Code section 14-33-2-28 clearly states that an appellant can appeal the trial court's order establishing a conservancy district directly to our Supreme Court, Rule 5(A) trumps that statute and gives our court jurisdiction."<sup>52</sup> As support for its holding, the court of appeals cited Indiana Code section 34-8-1-3, which provides that rules adopted by the supreme court ultimately control, and "all laws in conflict with the supreme court's rules have no further force or effect."<sup>53</sup> Consequently, the court of appeals concluded that it had jurisdiction over the direct appeal pursuant to Appellate Rule 5(A) and addressed the merits of the case.

*B. The Effect of Trial Rule 53.3's "Deemed Denied" Provision on Appeal*

Trial Rule 53.3 provides that if a trial court does not set a hearing on a

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44. *Id.*

45. 875 N.E.2d 222 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 40 (Ind. 2008).

46. *Id.* at 227.

47. *Id.* (quoting IND. CODE § 14-33-2-28 (2004)).

48. *Id.*

49. *Id.* (quoting IND. APP. R. 5).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* (citing IND. CODE § 34-7-1-3).



motion to correct error within forty-five days of the motion or fails to rule on a motion to correct error within thirty days after the hearing (or forty-five days after it was filed if no hearing is required), the pending motion “shall be deemed denied [and a]ny appeal shall be initiated by filing the notice of appeal under Appellate Rule 9(A) within thirty (30) days after the Motion to Correct Error is deemed denied.”<sup>54</sup> During the reporting term, the supreme court and the court of appeals had three opportunities to construe and apply the effect of the Rule 53.3 “deemed denied” provision on pending appeals.

In *HomEq Servicing Corp. v. Baker*,<sup>55</sup> the defendants’ motion to correct error was deemed denied pursuant to Trial Rule 53.3 because the trial court did not rule on it within thirty days of the hearing.<sup>56</sup> However, the trial court attempted to belatedly grant the defendants’ motion to correct error eight days after the deadline had passed.<sup>57</sup> Plaintiff appealed the trial court’s attempt to grant the motion and argued that it had already been deemed denied. The defendants cross-appealed, asserting error in the denial of their motion.<sup>58</sup>

To resolve the parties’ dispute, the supreme court emphasized a footnote from a previous opinion,<sup>59</sup> *Cavinder Elevators, Inc. v. Hall*:<sup>60</sup>

If the trial court belatedly grants a motion to correct error before the party filing the motion to correct error initiates an appeal but during the time period within which such party is entitled to appeal from the deemed denial, the party may assert as cross-error the issues presented in its “deemed denied” motion to correct error.<sup>61</sup>

The *Homeq* court reasoned that “[t]his exception recognizes the probable correctness of a trial court’s decision modifying its own previous ruling and permits the proponent of the belatedly-granted motion to delay initiating a possibly unnecessary appeal until ascertaining whether the opponent of the motion chooses to acquiesce in the belated ruling.”<sup>62</sup> In other words, the exception outlined in *Cavinder Elevators* “permit[s] the defendants to initially forego commencing an appeal to see if the plaintiff would agree with the merits of the trial court’s belated ruling and choose not to assert its invalidity on grounds of tardiness.”<sup>63</sup> However, if the opponent of the motion appeals the trial court’s belated grant of the motion, the proponent of the motion is entitled to proceed by cross-appeal to obtain appellate review of the merits of the issues

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54. IND. TRIAL R. 53.3(A).

55. 883 N.E.2d 95 (Ind. 2008).

56. *Id.* at 96-97.

57. *Id.* at 96.

58. *Id.* at 96-97.

59. *Id.* at 97.

60. 726 N.E.2d 285, 289 n.4 (Ind. 2000).

61. *Homeq*, 883 N.E.2d at 97 (quoting *Cavinder*, 726 N.E.2d at 289 n.4).

62. *Id.*

63. *Id.*

raised in the motion.<sup>64</sup>

In *Paulsen v. Malone*,<sup>65</sup> the plaintiff filed a motion to correct error after the trial court entered a defense verdict.<sup>66</sup> The trial court held a hearing on the motion and, after the hearing, made an entry on the Chronological Case Summary that the plaintiff would submit additional authority for the trial court's consideration.<sup>67</sup> Although the plaintiff ultimately filed supplemental authority and the defendant filed a response, the trial court did not grant the plaintiff's motion to correct error until sixteen days after it had been deemed denied by Trial Rule 53.3.<sup>68</sup>

The defendant appealed the trial court's belated grant of the motion, arguing that the plaintiff's motion had been deemed denied pursuant to Trial Rule 53.3.<sup>69</sup> Although the plaintiff did not dispute the language of the rule, she argued that the thirty-day time period did not begin to run until the additional authority and response had been submitted to the trial court.<sup>70</sup> In other words, the plaintiff claimed that the trial court had essentially kept the hearing record open by allowing the submission of additional authority, stopping the Trial Rule 53.3 clock.<sup>71</sup> The court of appeals disagreed, citing the specific language of the rule and concluding that

[t]he plain language of this rule states that the allotted time period to rule on the motion begins to run at the conclusion of the hearing itself, and not at some later date. Nothing in the language of this rule suggests that the matter is still being "heard" after the hearing terminates and while supplemental authority is being offered.<sup>72</sup>

Additionally, the court noted that pursuant to Trial Rule 53.3(D), "the trial court was capable of granting itself an additional thirty days to rule, if, after reviewing the parties' post-hearing submissions, the trial court deemed such an extension was necessary."<sup>73</sup> Because the trial court did not do so and failed to rule on the motion to correct error within the confines of Trial Rule 53.3, the court of appeals held that the motion was deemed denied thirty days after the hearing and, consequently, the "trial court lost its power to rule on the motion to correct error."<sup>74</sup>

In *Johnson v. Johnson*,<sup>75</sup> the court of appeals addressed the effect of Trial

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64. *Id.*

65. 880 N.E.2d 312 (Ind. Ct. App. 2008).

66. *Id.* at 313.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 314.

71. *Id.*

72. *Id.* at 314-15.

73. *Id.* at 315.

74. *Id.*

75. 882 N.E.2d 223 (Ind. Ct. App. 2008).

Rule 53.3 on a trial court's *nunc pro tunc* order granting a motion to correct error.<sup>76</sup> In *Johnson*, the petitioner filed a motion to correct error regarding the trial court's dissolution decree.<sup>77</sup> A magistrate judge presided over the hearing on the motion and informed the parties at the end of the hearing that she was going to grant the petitioner's motion.<sup>78</sup> However, the trial court did not enter an order granting the motion until seventy-nine days after the hearing, when it issued a *nunc pro tunc* order amending the dissolution decree in favor of the petitioner; accordingly, the respondent appealed.<sup>79</sup>

Before addressing the effect of Trial Rule 53.3 on the motion to correct error, the court of appeals held that although the magistrate conveyed her intent to grant the motion at the end of the hearing, she “did not have the authority to actually grant [the] motion or enter a final appealable order [pursuant to Indiana Code sections 33-23-5-8 and 33-23-5-9].”<sup>80</sup> Turning to the trial court's *nunc pro tunc* order entered seventy-nine days after the hearing, the court of appeals noted that the trial court had not extended the ruling deadline pursuant to Trial Rule 53.3(D) and followed the *Paulsen* court's holding that “the thirty-day ‘time period to rule on the motion begins to run at the conclusion of the hearing itself, not at some later date.’”<sup>81</sup> Because there was no evidence that the trial court granted the motion within thirty days of the hearing, the court of appeals concluded that the trial court could not issue a *nunc pro tunc* order seventy-nine days after the hearing.<sup>82</sup> The court of appeals acknowledged that “the facts of this case require us to choose between the lesser of two evils[, . . and because Trial] Rule 53.3 may create numerous potholes into which a litigant can stumble, the burden should be on the party seeking to correct the trial court's alleged error to preserve its claims.”<sup>83</sup>

### C. Appellate Attorney Fees

1. *Applying Appellate Rule 66(E).*—Appellate Rule 66(E) provides that “[t]he Court may assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the Court's discretion and may

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76. *Id.* at 225.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 226.

81. *Id.* at 227 (quoting *Paulsen v. Malone*, 880 N.E.2d 312, 314 (Ind. Ct. App. 2008)).

82. *Id.* at 227-28.

83. *Id.* at 229. Judge Darden authored a dissenting opinion arguing that he “would not find Trial Rule 53.3 to have a dispositive effect here . . . [because] the parties understood that the trial court had granted [the petitioner's] motion.” *Id.* at 229-30 (Darden, J., dissenting). The majority responded by noting that “[w]hile we sympathize with the dissent's penchant for equity, we cannot disregard the magistrate's lack of authority to issue a final ruling and, thus, must conclude that the trial court abused its discretion by issuing an untimely *nunc pro tunc* order.” *Id.* at 229 n.3.

include attorneys' fees. The Court shall remand the case for execution."<sup>84</sup> During the reporting term, the court of appeals had numerous opportunities to deny parties' requests for appellate attorney fees.<sup>85</sup> However, it chose to award fees in some cases.<sup>86</sup>

In *Lesjak v. New England Financial*,<sup>87</sup> the court of appeals noted that appellate attorney fees are typically awarded for either substantive or procedural bad faith.<sup>88</sup> "Substantive bad faith 'implies the conscious doing of a wrong because of dishonest purpose or moral obliquity.'"<sup>89</sup> "Procedural bad faith is present 'when a party flagrantly disregards the form and content requirements of the Rules of Appellate Procedure, [and] omits and misstates relevant facts appearing in the record . . .'"<sup>90</sup> The court of appeals found the substance of the appeal to be moot because, although the appellee had represented to the trial court that it could not engage in arbitration because the claim was not arbitrable, the parties began arbitration during the pendency of the appeal.<sup>91</sup> After analyzing the appellees' conduct before the trial court and court of appeals, the court concluded:

We have little trouble concluding that [the appellee] has engaged in both procedural and substantive bad faith during this appeal, if not the entire litigation. After fighting arbitration for months and informing the trial court that, in fact, arbitration . . . was impossible, [the appellee] dramatically reversed course and simply initiated the arbitration on the eve of the due date of its appellee's brief. Although it likely hoped that it would not have to incur the financial and temporal expense of drafting an appellate brief, [the appellee] was ordered to do so by this court. When, however, the final due date arrived, [the appellee] defied this court's order and filed a motion for extension of time rather than a brief, which arrived a week later. And in the end, after [the appellant] has incurred over \$19,000 in attorney fees seeking to compel arbitration[, the appellee] adds a final insult to injury by suggesting that [the appellant] should be grateful for this outcome.<sup>92</sup>

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84. IND. APP. R. 66(E).

85. See *Rovai v. Rovai*, 891 N.E.2d 177, 181 n.4 (Ind. Ct. App. 2008), *trans. granted*, 898 N.E.2d 1231 (Ind. 2008); *Pardue v. Smith*, 875 N.E.2d 285, 292 (Ind. Ct. App. 2007); *Pramco III, LLC v. Yoder*, 874 N.E.2d 1006, 1014-15 (Ind. Ct. App. 2007); *Wholesalers, Inc. v. Hobson*, 874 N.E.2d 622, 627 (Ind. Ct. App. 2007).

86. See *infra* notes 87-116 and accompanying text.

87. 879 N.E.2d 1129 (Ind. Ct. App. 2008).

88. *Id.* at 1132-35.

89. *Id.* at 1133 (quoting *Wallace v. Rosen*, 765 N.E.2d 192, 201 (Ind. Ct. App. 2002)).

90. *Id.* (quoting *Wallace*, 765 N.E.2d at 201).

91. *Id.* at 1134-35.

92. *Id.* at 1134. Additionally, the court of appeals opined that [w]hether [the appellant] is entitled to attorney fees for [the appellee's] conduct prior to this appeal is not, we think, a close call. But it is a call more appropriately made by

Consequently, the court of appeals awarded the appellant appellate attorney fees pursuant to Appellate Rule 66(E).

In *Knowledge A-Z, Inc. v. Sentry Insurance*,<sup>93</sup> the court of appeals noted that its discretion for awarding appellate attorney fees “is limited to instances ‘when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay.’”<sup>94</sup> The court noted that as a general matter, it is cautious to award appellate attorney fees “because of the potentially chilling effect the award may have upon the exercise of the right to appeal.”<sup>95</sup> However, the court of appeals concluded that the appellant “has litigated this matter to an unreasonable extreme [and, u]nremitting to logic or sensibility, [the appellant] and its attorney trudge on.”<sup>96</sup> Consequently, the court of appeals ordered the appellant to compensate the appellee for attorney fees it incurred defending the appeal.

2. *Trial Rule 65(C)*.—In *Bigley v. MSD of Wayne Township Schools*,<sup>97</sup> taxpayers sued a local school board, challenging the competitive bidding process it utilized to build a swimming pool.<sup>98</sup> The trial court granted a temporary restraining order (TRO) to the taxpayers and ordered them to post security.<sup>99</sup> However, a few days later, the trial court sua sponte vacated the TRO because the taxpayers’ motion failed to comply with Trial Rule 65(B)(2).<sup>100</sup> The trial court held a hearing and ultimately denied the taxpayers’ motion for preliminary injunction, dissolving the TRO. The taxpayers appealed, and the court of appeals affirmed the trial court’s decision.<sup>101</sup>

On remand, the school board filed a motion for the attorney fees it incurred defending the taxpayers’ preliminary injunction motion to the trial court.<sup>102</sup> The trial court concluded that the school board was entitled to some of the attorney fees it requested, and the taxpayers appealed. After analyzing the trial court’s decision to award certain attorney fees but deny others, the court of appeals turned to the school board’s request to recover the appellate attorney fees that it incurred defending the award. The court of appeals noted that “[n]either party cites, nor does our own research reveal, any Indiana cases in which the recovery

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the trial court or, if the trial court sees fit to direct the arbitrator to consider the issue, the arbitrator.

*Id.*

93. 891 N.E.2d 581 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1230 (Ind. 2008).

94. *Id.* at 586 (quoting *Boczar v. Meridian St. Found.*, 749 N.E.2d 87, 95 (Ind. Ct. App. 2001)).

95. *Id.*

96. *Id.*

97. 881 N.E.2d 77 (Ind. Ct. App. 2008).

98. *Id.* at 79.

99. *Id.*

100. *Id.* at 80.

101. *Id.*

102. *Id.* at 80-81.

of attorney's fees incurred in defending an appeal of a Trial Rule 65(C) award of attorney's fees was examined."<sup>103</sup> However, the court noted that the rule "prohibits the trial court from issuing a restraining order or preliminary injunction 'except upon the giving of security by the applicant.'"<sup>104</sup> Additionally, Trial Rule 65(C) permits a "party who is found to have been wrongfully enjoined or restrained" to recover costs and damages it incurred.<sup>105</sup> Therefore, the *Bigley* court concluded that the school board was entitled to recover attorney fees it incurred defending the trial court's award on appeal because "[r]equiring the Board to absorb any fees or costs incurred in protecting the awarded fees would not fully compensate the Board for defending against the TRO."<sup>106</sup> As a result, the court of appeals remanded to the trial court for a hearing to determine the attorney fees the school board sustained defending the taxpayers' appeal granting the school board's attorney fees.

3. "*Additional Items As Permitted By Law*" in Appellate Rule 67.—In *Natare Corp. v. Cardinal Accounts, Inc.*,<sup>107</sup> a party that had prevailed in a previous appeal<sup>108</sup> filed a motion seeking costs for that appeal pursuant to Appellate Rule 67, which provides, in relevant part:

(B) Components. Costs shall include:

- (1) the filing fee, including any fee paid to seek transfer or review;
- (2) the cost of preparing the Record on Appeal, including the Transcript, and appendices; and
- (3) postage expenses for service of all documents filed with the Clerk.

The Court, in its discretion, may include additional items as permitted by law. Each party shall bear the cost of preparing its own briefs.

(C) Party Entitled to Costs . . . . When a judgment has been reversed in whole, the appellant shall recover costs in the Court on Appeal and in the trial court or Administrative agency as provided by law. . . .<sup>109</sup>

The party that lost the previous appeal did not challenge the award of costs such as the filing fee, transcript preparation, appendix production, or postage, so the court of appeals granted the prevailing party's motion regarding those fees.<sup>110</sup> However, the prevailing party also observed that Appellate Rule 67 grants the

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103. *Id.* at 84.

104. *Id.* at 85 (quoting IND. TRIAL R. 65(C)).

105. IND. TRIAL R. 65(C).

106. *Bigley*, 881 N.E.2d at 86.

107. 878 N.E.2d 1290 (Ind. Ct. App. 2008).

108. *See Natare Corp. v. Cardinal Accounts, Inc.*, 874 N.E.2d 1055 (Ind. Ct. App. 2007).

109. IND. APP. R. 67(B)-(C).

110. *Natare*, 878 N.E.2d at 1292.

court of appeals discretion to award “additional items as permitted by law.”<sup>111</sup> Therefore, the prevailing party moved for appellate attorney fees for the previous appeal.<sup>112</sup> The *Natare* court noted that a previous panel had held that “‘additional items as permitted by law’ does include attorney fees ‘when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay.’”<sup>113</sup> The court noted that “[i]t is well established that in pursuing a lawsuit, attorneys are expected to ‘determine expeditiously’ the propriety of continuing the litigation and are expected to dismiss promptly claims that are found to be frivolous, unreasonable, or groundless.”<sup>114</sup> If a party litigates a case past that point, “the litigation becomes frivolous and attorney fees for the other party ‘from that point in the litigation at which pursuing the claim became frivolous’ are warranted.”<sup>115</sup> After analyzing the case’s timeline of events, the court of appeals concluded that the prevailing party had been “forced to appeal the erroneous result of the frivolous litigation and should not have to bear the financial burden of its attorneys’ services during the appellate process.”<sup>116</sup> Consequently, the court of appeals awarded the prevailing party its appellate attorney fees pursuant to the “additional items as permitted by law” language of Appellate Rule 67.

#### *D. Applying Appellate Rules to Arguments in Reply Briefs*

Generally, new arguments made in a reply brief are waived pursuant to Appellate Rule 46(C), which provides that “[n]o new issues shall be raised in the reply brief.”<sup>117</sup> In *Burns-Kish Funeral Homes, Inc. v. Kish Funeral Homes, LLC*,<sup>118</sup> the court of appeals noted that although there are four requirements for obtaining a preliminary injunction, the appellant had only discussed two of them in its opening brief.<sup>119</sup> Consequently, although it elaborated on all four requirements in its reply brief, the court of appeals declined to address the new arguments raised on reply and only responded to the appellant’s “two main arguments.”<sup>120</sup>

At least two cases issued by the court of appeals suggest that a party cannot waive an argument regarding the applicable standard of review. In *Town of*

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111. IND. APP. R. 67(B).

112. *Natare*, 878 N.E.2d at 1292.

113. *Id.* (quoting *Commercial Coin Laundry Sys. v. Enneking*, 766 N.E.2d 433, 442 (Ind. Ct. App. 2002)).

114. *Id.* (quoting *Kahn v. Cundiff*, 543 N.E.2d 627, 629 (Ind. 1989)).

115. *Id.* (quoting *Kahn*, 543 N.E.2d at 629).

116. *Id.* at 1292-93.

117. IND. APP. R. 46(C); *see also* *Hardley v. State*, 893 N.E.2d 1140, 1145 n.5 (Ind. Ct. App. 2008), *aff’d*, 905 N.E.2d 399 (Ind. 2009); *Cain v. Back*, 889 N.E.2d 1253, 1259 n.6 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1230 (Ind. 2008).

118. 889 N.E.2d 15 (Ind. Ct. App. 2008).

119. *Id.* at 22.

120. *Id.* (citing IND. APP. R. 46(C)).

*Chandler v. Indiana-American Water Co.*,<sup>121</sup> the appellant provided a standard of review in its opening brief but advocated for a more favorable standard of review in its reply brief. The appellee filed a motion to strike the new standard of review argument from the appellant's reply brief.<sup>122</sup> Initially, the court of appeals observed that Appellate Rule 46(C) provides that no new "issues" can be raised on reply and that the appellant was simply presenting a "new argument" but "the *issue* of standard of review was presented to this court . . . in appellant's [opening] brief."<sup>123</sup> Of note is the court's holding that

the issue of the standard of review is always before us as an appellate court in every case. The parties need not present the standard of review as an issue before we may address it. To apply Appellate Rule 46(C) in the manner which [the appellee] urges would mean that this court could not apply the appropriate standard of review if a party misstated the standard of review in its briefs. The parties may choose their arguments, but they do not choose the standard of review applicable to their case.<sup>124</sup>

Additionally, in *Kendall v. State*,<sup>125</sup> the court of appeals noted that the defendant had not cited the standard of review for his argument regarding the ineffectiveness of counsel and that "strict reading of our appellate rules would render this standard waived and the more deferential standard . . . would apply."<sup>126</sup> However, the court of appeals ultimately addressed the defendant's argument "under the most defendant friendly standard used by our Supreme Court."<sup>127</sup>

#### *E. A Motion to Reconsider Does Not Extend Notice of Appeal Deadline*

In *Fry v. State*,<sup>128</sup> a criminal defendant filed a civil action against the Department of Correction (DOC) and, after Fry disregarded the discovery rules, the trial court granted the DOC's motion for judgment by default. Fry filed a motion for the trial court to reconsider its judgment, which the trial court later denied. Fry subsequently appealed.<sup>129</sup>

The court of appeals agreed with the State's assertion that the trial court's order could be construed as an interlocutory order and not a final judgment

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121. 892 N.E.2d 1264 (Ind. Ct. App. 2008).

122. *Id.* at 1267-68.

123. *Id.*

124. *Id.* at 1268 (citing *Dominiack Mech., Inc. v. Dunbar*, 757 N.E.2d 186, 188 n.1 (Ind. Ct. App. 2001)) ("[A]ppellee's failure to challenge issue upon appeal does not relieve [the court] of [its] obligation to correctly apply the law to the facts in the record.").

125. 886 N.E.2d 48 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1219 (Ind. 2008).

126. *Id.* at 53 n.3 (quoting IND. APP. R. 46(A)(8)(b)).

127. *Id.*

128. 893 N.E.2d 1089 (Ind. Ct. App. 2008), *decision clarified on reh'g*, 901 N.E.2d 83 (Ind. Ct. App. 2009).

129. *Id.* at 1090-91.



disposing of all claims.<sup>130</sup> Even assuming that the trial court's judgment was a final appealable order, the court of appeals noted that Trial Rule 53.4 "provides that a motion to reconsider does not 'delay the trial or any proceedings in the case, or extend the time for any further required or permitted action, motion, or proceedings under these rules.'"<sup>131</sup> Additionally, the court observed that "it has long been held that the time for appeal is not extended by motions to reconsider."<sup>132</sup> Thus, although Appellate Rule 9 "provides that appeals from final judgments must be filed within thirty days after the entry . . . the motion to reconsider is not the same as a motion to correct error and does not work to extend the time period for filing the notice of appeal."<sup>133</sup> Consequently, because Fry did not file his notice of appeal within thirty days of the final judgment and the motion to reconsider did not extend the deadline, the court of appeals dismissed the action as untimely without addressing the merits of Fry's appeal.<sup>134</sup>

*F. Appellant Cannot Seek Rehearing from Denial of Motion to Accept Interlocutory Appeal*

In *Merck & Co. v. Kantner*,<sup>135</sup> the motions panel of the court of appeals issued a published order denying a party's motion for the panel to reconsider the denial of a motion to accept an interlocutory appeal.<sup>136</sup> Appellate Rule 54(A) provides that "[a] party may seek Rehearing from the following: (1) a published opinion; (2) a not-for-publication memorandum decision; (3) an order dismissing an appeal; and (4) an order declining to authorize the filing of a successive petition for post-conviction relief."<sup>137</sup> The motions panel noted that

[t]he denial of a Petition for Acceptance Of Interlocutory Appeal under Indiana Appellate Rule 14(B) is not an opinion, published or otherwise, or an order declining to authorize the filing of a successive petition for post-conviction relief. Furthermore, the denial of a request to accept a discretionary interlocutory appeal is not a dismissal, rather it is a decision that does not allow an appeal to begin. Because it is not one of the rulings that Indiana Appellate Rule 54 allows to be reheard by this Court, a Petition for Rehearing cannot be taken from the denial of a request to accept a discretionary interlocutory appeal under Indiana Appellate Rule 14(B).<sup>138</sup>

Senior Judge George B. Hoffman, Jr. dissented from the motion panel's

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130. *Id.* at 1091.

131. *Id.* at 1091-92 (citing IND. TRIAL R. 53.4(A)).

132. *Id.* at 1092 (citing *Strate v. Strate*, 269 N.E.2d 568, 569 (Ind. Ct. App. 1971)).

133. *Id.*

134. *Id.*

135. 883 N.E.2d 846 (Ind. Ct. App. 2008).

136. *Id.*

137. IND. APP. R. 54(A).

138. *Merck*, 883 N.E.2d at 846.

decision, arguing that Trial Rule 14(B) “clearly states that the only prerequisite for this Court to accept a discretionary interlocutory appeal is certification of the order by the trial court.”<sup>139</sup> In support of his position, Judge Hoffman cited *Bridgestone Americas Holding Inc. v. Mayberry* (*Bridgestone I*), a case in which the court of appeals’s motions panel initially denied the appellant’s petition to accept jurisdiction but subsequently reconsidered its decision and accepted jurisdiction after the appellant filed a motion to reconsider.<sup>140</sup> The *Bridgestone I* court noted that Appellate Rule 54(A)(3) “permit[s] a petition for rehearing from ‘an order dismissing an appeal’”<sup>141</sup> and

[h]ere, the first motions panel’s refusal to accept jurisdiction of Bridgestone’s discretionary interlocutory appeal is the functional equivalent of an order dismissing an appeal. That is, our refusal to accept jurisdiction has the same practical effect on litigants as an order dismissing an appeal. Thus, because Bridgestone petitioned for rehearing within 30 days of the first motions panel’s order, and there is no evidence that the trial court had . . . reassumed jurisdiction, the second motions panel was not precluded from reconsidering and accepting jurisdiction of Bridgestone’s interlocutory appeal.<sup>142</sup>

Although the supreme court granted transfer on *Bridgestone I*, it explicitly “summarily affirm[ed] the Court of Appeals’ treatment” of the motion to reconsider the denial of the motion to accept the interlocutory appeal.<sup>143</sup> Therefore, in *Merck*, Judge Hoffman concluded that “[a]s our supreme court noted, the reasoning set forth in [*Bridgestone I*] is persuasive. I believe that we have jurisdiction to reconsider a motions panel’s decision.”<sup>144</sup>

*Merck* sought transfer to the supreme court after the court of appeals denied rehearing. On June 5, 2008, the supreme court issued an order concluding that *Merck*’s petition to transfer was improper<sup>145</sup> because Appellate Rule 57(B) expressly provides that “an order denying a motion for [a discretionary] interlocutory appeal . . . shall not be considered an adverse decision for the purpose of petitioning to transfer, regardless of whether rehearing by the Court of Appeals was sought.”<sup>146</sup> Accordingly, the supreme court concluded *Merck*’s

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139. *Id.* at 847 (Hoffman, J., dissenting) (quoting *Bridgestone Ams. Holding, Inc. v. Mayberry*, 854 N.E.2d 355, 359 (Ind. Ct. App. 2006) (*Bridgestone I*), *vacated on other grounds but issue summarily affirmed* by *Bridgestone Ams. Holding, Inc. v. Mayberry*, 878 N.E.2d 189 (Ind. 2007) (*Bridgestone II*)).

140. *Bridgestone I*, 584 N.E.2d at 358.

141. *Id.* at 360 (quoting IND. APP. R. 54(A)(3)).

142. *Id.*

143. *Bridgestone II*, 878 N.E.2d at 191 n.2.

144. *Merck*, 883 N.E.2d at 847.

145. See Indiana Clerk of Courts Docket, <http://hats.courts.state.in.us/ISC3RUS/ISC2menu.jsp> (Cause No. 49A04-0712-CV-00706) (last visited June 14, 2009). Justice Frank Sullivan, Jr. voted to remand the case to the court of appeals for consideration of the rehearing petition. *Id.*

146. IND. APP. R. 57(B)(4).

petition to transfer was “procedurally improper” and ordered the petition and response to be returned to the parties.<sup>147</sup>

*G. Judicial Notice of Independent Electronic Research*

The ease with which judges can conduct independent electronic research has led to the question of whether courts should be allowed to do so. Before turning to recent developments in this area, some background information is necessary. Indiana Evidence Rule 201(a) provides:

A court may take judicial notice of a fact. A judicially-noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.<sup>148</sup>

Additionally, the commentary to Canon 3B of the 2008 Indiana Code of Judicial Conduct<sup>149</sup> advised that “[a] judge must not independently investigate facts in a case and must consider only the evidence presented.”<sup>150</sup> These provisions have been construed as authorizing judicial notice of matters of common knowledge and matters that may not be common knowledge<sup>151</sup> but are easily verified by unquestionably reliable sources.<sup>152</sup> Additionally, the *Indiana Practice* treatise lists examples where courts have taken judicial notice of “verifiable facts,” including geography, “the whereabouts of Indiana counties,” the “distances between cities, . . . standard mortality tables,” and election results.<sup>153</sup>

In *Fisher v. State*,<sup>154</sup> the court of appeals resolved as an issue of first impression whether an appellate court could take judicial notice in a post-conviction relief case of a record from the defendant’s direct criminal appeal even though the trial court had affirmatively declined the opportunity to examine the record from the direct appeal. The court of appeals relied on Evidence Rule

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147. *Id.*

148. IND. EVID. R. 201(a).

149. The 2008 Code of Judicial Conduct has been superseded by the 2009 version. *See infra* notes 162-65 and accompanying text.

150. *A.B. v. State*, 885 N.E.2d 1223, 1224 (Ind. 2008).

151. *See, e.g., Journal-Gazette Co., Inc. v. Bandido’s, Inc.*, 712 N.E.2d 446, 460 n.20 (Ind. 1999) (taking judicial notice of the fact that the words “rats” and “rodents” are frequently used interchangeably); *Haley v. State*, 736 N.E.2d 1250, 1253 (Ind. Ct. App. 2000) (affirming the trial court’s decision to take judicial notice that a local institution was a school).

152. *See, e.g., Wright v. Spinks*, 722 N.E.2d 1278, 1279 (Ind. Ct. App. 2000) (affirming the trial court’s decision to take judicial notice of the word “mulligan” because it is defined in a dictionary and cases from other jurisdictions); *Griffin v. Acker*, 659 N.E.2d 659, 663 (Ind. Ct. App. 1995) (concluding that it would have been proper for the trial court to take judicial notice of interest tables to determine present value of a damage award).

153. 12 ROBERT L. MILLER, INDIANA PRACTICE § 201.104 (2007).

154. 878 N.E.2d 457 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 41 (Ind. 2008).

201 and concluded that “based on the facts of this case, we may examine the record from Fisher’s direct appeal to the extent it contains factual information not subject to reasonable dispute.”<sup>155</sup> The *Fisher* court also made interesting observations regarding new technology and its potential effect on judicial notice:

We take this opportunity to note that on December 17, 2007, Odyssey, a new computerized case management system, was implemented in Monroe county, pursuant to a project of our Supreme Court’s Judicial Technology Automation Committee (“JTAC”). This system will allow courts to exchange and share information with other courts and state agencies, pursuant to JTAC’s belief that “it is in the best interest of Indiana’s citizens, trial courts, court clerks, law enforcement officials, and lawyers that all of Indiana’s courts maintain their records in a statewide computerized case management system that connects courts across county lines and connects courts with local and state entities that need court information.” *The implementation of this project demonstrates the growing trend of allowing trial courts to access and consider reliable information stored in court or other government records. We speculate that along with this access will undoubtedly come more permissive use of judicial notice, as it would be fairly unproductive to allow courts to access this information but not consider it.*

We also note that in 2000, our supreme court adopted family court rules for temporary use by trial courts participating in the Indiana Supreme Court Family Court Project. Pursuant to these rules, a family court “may take judicial notice of any relevant orders or Chronological Case Summary (CCS) entry issued by any Indiana Circuit, Superior, County, or Probate Court.” Additionally, parties to a family court proceeding are permitted access to all cases within the proceeding, except that in the case of confidential records in a case to which they are not a party, parties must file a written petition identifying relevancy and need. *These rules also demonstrate the increasing liberal allowance of judicial notice and use of court records in related proceedings.*<sup>156</sup>

In *A.B. v. State*,<sup>157</sup> the supreme court was presented with an issue of first impression regarding the propriety of criminal charges brought against a juvenile who posted “a vulgar tirade” about her school principal on the Internet site MySpace.com.<sup>158</sup> As a preliminary matter, the supreme court noted that “the evidence presented at the fact-finding hearing was extremely sparse, uncertain, and equivocal regarding the operation and use of [MySpace], which is central to this case.”<sup>159</sup> After citing to the commentary of Canon 3B of the 2008 Indiana

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155. *Id.* at 462.

156. *Id.* at 462 n.2 (emphases added) (citations omitted).

157. 885 N.E.2d 1223 (Ind. 2008).

158. *Id.* at 1225.

159. *Id.* at 1224.

Code of Judicial Conduct,<sup>160</sup> the supreme court stated: “Notwithstanding this directive, in order to facilitate understanding of the facts and application of relevant legal principles, this opinion includes information regarding the operation and use of MySpace from identified sources outside the trial record of this case.”<sup>161</sup> The court subsequently explained how MySpace worked, citing various protocols and articles written about the site.

On September 9, 2008, the supreme court issued a press release regarding the adoption of a new Code of Judicial Conduct, effective January 1, 2009.<sup>162</sup> The 2009 Code of Judicial Conduct is modeled after the 2007 American Bar Association Model Code of Judicial Conduct.<sup>163</sup> Rule 2.9(C) of the newly-adopted code provides that “[a] judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.”<sup>164</sup> Although this language is similar to the language from Canon 3B of the 2008 Indiana Code of Judicial Conduct, the commentary in the newly-adopted code explicitly provides that “[t]he prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.”<sup>165</sup> It certainly will be interesting to monitor how courts reconcile the accessibility of independent electronic research with the new judicial notice provisions in future decisions.

### III. TIPS FOR APPELLATE PRACTITIONERS

#### *A. Failure to Comply with Appellate Rules May Result in Dismissal*

In *Galvan v. State*,<sup>166</sup> the court of appeals dismissed a criminal defendant’s appeal “[d]ue to flagrant violations of the appellate rules.”<sup>167</sup> The court noted that although it had previously warned Galvan’s attorney “on at least three occasions regarding his inadequate appellate advocacy . . . [he] has inexplicably chosen to ignore our advice.”<sup>168</sup> Specifically, the court of appeals noted that the statement of facts did not comply with Appellate Rule 46(A)(6); the statement of the case did not comply with Appellate Rule 46(A)(5); the brief did not include a copy of the sentencing order as required by Appellate Rule 46(A)(10); the summary of the argument section merely copied the argument heading in violation of Appellate Rule 46(A)(7); the “paltry table of contents provided in the appendix has further hampered our review” in violation of Appellate Rule 50(C);

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160. *See supra* note 149 and accompanying text.

161. *A.B.*, 885 N.E.2d at 1224.

162. Press Release, Indiana Supreme Court, Indiana Supreme Court Adopts 2009 Judicial Code of Conduct (Sept. 8, 2008), *available at* <http://www.in.gov/judiciary/press/2008/0908.html>.

163. *Id.*

164. IND. CODE OF JUDICIAL CONDUCT Rule 2.9(C) (2009).

165. *Id.* cmt. 6.

166. 877 N.E.2d 213 (Ind. Ct. App. 2007).

167. *Id.* at 215.

168. *Id.*

and the argument section was not supported by cogent reasoning as required by Appellate Rule 46(A)(8)(a).<sup>169</sup> “In light of the numerous and flagrant violations of [the] appellate rules,” the court of appeals concluded that it “must dismiss [the] appeal.”<sup>170</sup>

While the court of appeals had previously rejected appeals for noncompliance with the Appellate Rules,<sup>171</sup> the *Galvan* court took it further and ordered that Galvan’s attorney was “not entitled to a fee for his appellate services in this case, and we direct him to return to the payor any fee he may have already received.”<sup>172</sup> The court also cautioned Galvan’s attorney that “future violations such as this may result in additional consequences, such as referral to the Supreme Court Disciplinary Commission for investigation, as Indiana Professional Conduct Rule 1.1 requires attorneys to represent their clients competently.”<sup>173</sup>

Of note is that the *Galvan* court chose to take away counsel’s attorney fees before invoking the other consequences it had described in *Keeney v. State*.<sup>174</sup> In *Keeney*, the court of appeals admonished counsel for a brief that contained a gross amount of uncited material in violation of Appellate Rule 46(A)(8)(a).<sup>175</sup> Although the *Keeney* court chose to admonish counsel without further consequence, it noted that it could have taken away counsel’s attorney fees, stricken the brief entirely, ordered counsel “to show cause . . . [as to] why she should not be held in contempt,” and referred the matter to the Supreme Court Disciplinary Commission for investigation.<sup>176</sup>

### B. Check the Online Docket

During the reporting term, the court of appeals reminded counsel that the Clerk of Courts maintains an online docket for counsel to monitor their appellate cases.<sup>177</sup> A link to the online docket is available at <http://www.in.gov/judiciary/cofc/>. The court of appeals noted that counsel can use the online docket to

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169. *Id.* at 215-16.

170. *Id.* at 216.

171. *See, e.g.,* Ramsey v. Review Bd. of Ind. Dep’t of Workforce Dev., 789 N.E.2d 486, 490 (Ind. Ct. App. 2003); Smith v. State, 610 N.E.2d 265, 267 n.2 (Ind. Ct. App. 1993).

172. *Galvan*, 877 N.E.2d at 217.

173. *Id.*

174. 873 N.E.2d 187 (Ind. Ct. App. 2007). *Keeney* was profiled in last year’s appellate procedure survey. Bryan H. Babb & Stephen A. Starks, *Developments in Indiana Appellate Procedure: Appellate Rule Amendments, Remarkable Case Law, and Refining Our Indiana Practice*, 41 IND. L. REV. 853, 877-79 (2008).

175. *Keeney*, 873 N.E.2d at 189.

176. *Id.* at 190.

177. *See, e.g.,* Hieston v. State, 885 N.E.2d 59, 59 n.1 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1226 (Ind. 2008); Williams v. State, 883 N.E.2d 192, 192 n.1 (Ind. Ct. App. 2008). The online appellate docket first became available in October 2001. Douglas E. Cressler, *Appellate Practice: A Year of Transition in Appellate Practice*, 35 IND. L. REV. 1133, 1154 (2002).

monitor filings in cases and confirm that a case, once fully briefed, has been transmitted from the clerk's office to the court.<sup>178</sup>

### *C. Know When to Cite*

Pursuant to Appellate Rule 65(D), unpublished memorandum decisions “shall not be cited to any court except by the parties to the case to establish res judicata, collateral estoppel, or law of the case.”<sup>179</sup> The court of appeals had various opportunities to direct counsel to Appellate Rule 65 to remind them not to cite unpublished decisions.<sup>180</sup> Additionally, in *Jackson v. State*,<sup>181</sup> the court noted that counsel had cited an unpublished decision contrary to Appellate Rule 65(D) and cautioned that “[a]lthough our memorandum decisions are now available online at <http://www.in.gov/judiciary/opinions/>, and have recently become available through commercial providers such as Westlaw, they are still unpublished memorandum decisions. Practitioners cannot assume that a decision from this court found online or in a commercial database is citable as precedent.”<sup>182</sup>

In other decisions, the court of appeals reminded counsel that they risk having their arguments deemed waived if they do not cite to authority,<sup>183</sup> or the record,<sup>184</sup> as required by Appellate Rule 46(A)(8). Additionally, “[w]hen 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” pursuant to Appellate Rule 22.<sup>185</sup> In other words, when drafting appellate briefs, counsel should be mindful to appropriately cite authority to ease the appellate court's consideration of the issues or risk having the argument deemed waived.

### *D. Include Copy of Appealed Order with Notice of Appeal and Brief of Appellant*

In *Newman v. Jewish Community Center Ass'n of Indianapolis*,<sup>186</sup> the appellant did not attach a copy of the trial court's order she was appealing to her notice of appeal, as required by Appellate Rule 9(F)(1).<sup>187</sup> The appellees argued

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178. See *Hieston*, 885 N.E.2d at 59 n.1; *Williams*, 883 N.E.2d at 192 n.1

179. IND. APP. R. 65(D).

180. See, e.g., *In re Paternity of C.H.W.*, 892 N.E.2d 166, 173 n.2 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1229 (Ind. 2008); *Weidman v. State*, 890 N.E.2d 28, 31 n.1 (Ind. Ct. App. 2008).

181. 890 N.E.2d 11 (Ind. Ct. App. 2008).

182. *Id.* at 21 n.4.

183. *Midwest Biohazards Servs., LLC v. Rodgers*, 893 N.E.2d 1074, 1078 n.2 (Ind. Ct. App. 2008), *trans. denied*, No. 41A05-CV-290, 2009 Ind. LEXIS 178, at \*1 (Ind. Feb. 26, 2009).

184. *Davis v. State*, 892 N.E.2d 156, 163 (Ind. Ct. App. 2008).

185. *Webb v. Schleutker*, 891 N.E.2d 1144, 1155 n.7 (Ind. Ct. App. 2008).

186. 875 N.E.2d 729 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 42 (Ind. 2008).

187. *Id.* at 734.

that, consequently, she had waived her arguments. The court of appeals noted that the appellees

do not direct us to case precedent holding that such error is fatal to an appellant's claim. . . . Because of our penchant for addressing an appellant's claims on the merits, we decline to find that [appellant] has waived this issue on appeal and, instead, turn to the merits of her claim.<sup>188</sup>

Appellate Rule 46(A) requires an appellant to include a copy of the appealed order with the appellant's brief.<sup>189</sup> Additionally, the court of appeals observed that a party's "attempt to incorporate the trial court's findings of fact and conclusions into her brief 'by reference'" instead of attaching the trial court's order "is not sufficient" to satisfy Appellate Rule 46(A).<sup>190</sup>

#### *E. Adequate Briefing*

The supreme court and court of appeals cited Appellate Rule 46(A)(8) countless times for the premise that a party's failure to make a cogent argument results in waiver of the argument.<sup>191</sup> The court of appeals also cited Appellate Rule 46 to warn parties who inadequately drafted the statement of facts<sup>192</sup> and the statement of case<sup>193</sup> sections of their brief. Although Appellate Rule 46(B)(1) "permits the appellee to omit the statement of issues, statement of the case, and the statement of facts if the appellee agrees with those statements as expressed in the appellant's brief," the court of appeals emphasized that the rule "requires the appellee to *expressly state its agreement* with appellant's statement."<sup>194</sup> Additionally, all text in all briefs should be double spaced, except for "lengthy

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188. *Id.*

189. *Allen v. State*, 893 N.E.2d 1092, 1095 n.3 (Ind. Ct. App. 2008), *trans. denied*, No. 49A04-0710-CR-598, 2009 Ind. LEXIS 137, at \*1 (Ind. Feb. 19, 2009); *In re* Petition for the Establishment of the Millpond Conservancy Dist., 891 N.E.2d 54, 55 n.1 (Ind. Ct. App. 2008).

190. *Gleeson v. Preferred Sourcing, LLC*, 883 N.E.2d 164, 171 n.5 (Ind. Ct. App. 2008). Nevertheless, the *Gleeson* court addressed the merits of the case. *Id.* at 171.

191. *See, e.g., Overstreet v. State*, 877 N.E.2d 144, 153 n.4 (Ind. 2007), *cert. denied*, 129 S. Ct. 458 (2008); *Triplett v. USX Corp.*, 893 N.E.2d 1107, 1117 (Ind. Ct. App. 2008), *trans. denied*, No. 93A02-0803-EX-300, 2009 Ind. LEXIS 87, at \*1 (Ind. Jan. 29, 2009); *Engram v. State*, 893 N.E.2d 744, 747 (Ind. Ct. App. 2008), *trans. denied*; *Patel v. United Inns, Inc.*, 887 N.E.2d 139, 149 n.6 (Ind. Ct. App.), *reh'g denied*, 897 N.E.2d 945 (Ind. Ct. App. 2008).

192. *Wolljung v. Sidell*, 891 N.E.2d 1109, 1110 n.1 (Ind. Ct. App. 2008) (cautioning party that Appellate Rule 46(A)(6) requires a brief to include a statement of facts).

193. *Progressive Halcyon Ins. Co. v. Petty*, 883 N.E.2d 854, 855 n.1 (Ind. Ct. App.) (reminding party that statement of case must contain citations to the record pursuant to IND. APP. R. 46(A)(5)), *trans. denied*, 898 N.E.2d 1217 (Ind. 2008).

194. *J.R.W. ex rel. Jemerson v. Watterson*, 877 N.E.2d 487, 488 n.1 (Ind. Ct. App. 2007) (emphasis added).



quotes and footnotes.”<sup>195</sup> One panel expressly cited *Galvan*<sup>196</sup> for the premise that not complying with the Appellate Rules can lead to dismissal of the appeal.<sup>197</sup> Appellate practitioners should make sure they comply with the Appellate Rules when drafting their briefs so that they do not waive arguments or risk having their appeal dismissed.

#### *F. Transcripts*

When ordering a transcript for the record on appeal, it is better to include more rather than less. In *Titone v. State*,<sup>198</sup> the court of appeals dismissed an appeal because the appellant did not include a complete copy of the transcript.<sup>199</sup> Pursuant to Appellate Rule 9(F)(4), the general rule is that a transcript of all the evidence must be requested in criminal cases, unless the appeal is limited to an issue that does not require a transcript.<sup>200</sup> However, “[s]ufficiency of the evidence is simply not one of those issues where the transcript of all the evidence cannot be requested.”<sup>201</sup> The *Titone* court concluded:

As such, we hold that when a defendant challenges the sufficiency of the evidence, the defendant must request the transcript of all the evidence in the Notice of Appeal. And despite [the defendant’s] suggestion on appeal, the State does not have an obligation to present the rest of the evidence. It is true that Appellate Rule 9(G) provides a mechanism whereby any party to an appeal may file a request for additional portions of the transcript. However, Appellate Rule 9(G) speaks in terms of “may,” while Appellate Rule 9(F)(4) speaks in terms of “must.” [The defendant] has not met his obligation of presenting a sufficient record for us to fairly decide his sufficiency of the evidence challenge[; thus], we dismiss his appeal.<sup>202</sup>

In *Center Townhouse Corp. v. City of Mishawaka*,<sup>203</sup> the appellant included a limited portion of the transcript from the jury trial on damages but did not

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195. *Decker v. Zengler*, 883 N.E.2d 839, 840 n.1 (Ind. Ct. App.) (citing IND. APP. R. 43(E)), *trans. denied*, 898 N.E.2d 1224 (Ind. 2008).

196. *Galvan v. State*, 877 N.E.2d 213, 216 (Ind. Ct. App. 2007); *see also supra* notes 166-76 and accompanying text.

197. *Wolljung*, 891 N.E.2d at 1110 n.1.

198. 882 N.E.2d 219 (Ind. Ct. App. 2008).

199. *Id.* at 222-23.

200. *Id.* at 222. This is not true in the civil context. As the court of appeals noted in *Fields v. Conforti*—a case profiled in last year’s appellate procedure article—although “appellants did not submit a transcript of the bench trial [on] which the trial court’s findings . . . and conclusions . . . were based,” the court held that it would “‘attempt’ to address the appellants’ arguments.” *Titone*, 882 N.E.2d at 222 n.4 (citing *Fields v. Conforti*, 868 N.E.2d 507, 511 (Ind. Ct. App. 2007)).

201. *Titone*, 882 N.E.2d at 222.

202. *Id.* at 222-23.

203. 882 N.E.2d 762 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1218 (Ind. 2008).

include the transcript from the bench trial where “the trial court determined a taking had occurred.”<sup>204</sup> Because the court of appeals “[did] not know what evidence was presented on the taking[s] claim, nor whether it supports the trial court’s findings[,]” the court held that the appellant had waived its argument that there had not been a taking.<sup>205</sup>

While the court of appeals typically considers an argument waived if the applicable transcripts are not included in the record on appeal, the *Bailey v. State Farm Mutual Auto Insurance Co.*<sup>206</sup> panel cited its penchant for addressing cases on the merits, despite its recognition of the “incomplete nature of the record.”<sup>207</sup> Therefore, the court went on to address the appellant’s arguments “as best we can through our examination of the portion of the trial record provided.”<sup>208</sup>

In *Baxter v. State*,<sup>209</sup> the court of appeals noted “some deficiencies with the transcript and volume of exhibits that were filed with this court.”<sup>210</sup> The transcript did not contain a separately-bound table of contents as required by Appellate Rule 28(A)(8) or a “cover page as required by Appellate Rule 28(A)(7) and Appellate Form 28-1.”<sup>211</sup> However, what the court found

[m]ost problematic . . . is the state of the exhibits volume, which does not appear to be in any discernible order and which lacks an overall index of exhibits, as required by Appellate Rule 29(A). This has made it difficult to find highly relevant exhibits. It is unclear whether responsibility for the disorderly exhibit volume rests upon the court reporter or a party who used the volume after the reporter filed it. We urge greater care in ensuring that orderly records are presented.<sup>212</sup>

### G. Appendix Materials

“[I]t is incumbent upon the parties to present [the court] with a complete appellate appendix.”<sup>213</sup> An appendix should include a table of contents<sup>214</sup> and all confidential documents should be printed on green paper pursuant to Appellate

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204. *Id.* at 769.

205. *Id.* at 769-70 (citing IND. APP. R. 9(F)(4)).

206. 881 N.E.2d 996 (Ind. Ct. App. 2008).

207. *Id.* at 999 n.1.

208. *Id.*

209. 891 N.E.2d 110 (Ind. Ct. App. 2008).

210. *Id.* at 113 n.2.

211. *Id.*

212. *Id.*

213. *Kovach v. Alpharma, Inc.*, 890 N.E.2d 55, 65 (Ind. Ct. App. 2008) (noting that the appellant’s appendix fell “woefully short” and that the appellees had “omitted to rectify this oversight”), *trans. granted*, No. 49S04-0902-CV-88, 2009 Ind. LEXIS 160, at \*1 (Ind. Feb. 27, 2009).

214. *Adams v. State*, 890 N.E.2d 770, 771 n.4 (Ind. Ct. App. 2008) (citing Appellate Rule 50(C)), *trans. denied*, 901 N.E.2d 1094 (Ind. 2009).

Rule 9(J).<sup>215</sup> Additionally, pursuant to Appellate Rule 50(A)(2)(f), it “is inappropriate for an appellant to include only its own documents in the appendix; instead, it must include *all* relevant documents, including those filed by the opposing party.”<sup>216</sup> That said, parties should not include unnecessary materials in an appendix. For example, when a transcript is included in the record on appeal, it is unnecessary to include lengthy portions of the transcript in the appendix:

In cases like this, with numerous issues and a multivolume transcript, it is far more helpful (not to mention far more economical) for all parties to cite to the transcript and not to include large portions of the transcript in their appendices. . . . As a final consideration, it is also helpful for each volume of a multi-volume appendix to have a table of contents for the entire appendix.<sup>217</sup>

“‘The appellate rules do not permit material to be included in a party’s appendix that was not presented to the trial court.’”<sup>218</sup> Although an appellant included several motions and trial court orders in its appendix that had been filed before the appellee had become involved in the litigation at the trial court level, the court of appeals noted that “our appellate rules instruct a party to include, among other things, ‘pleadings and other documents from the Clerk’s Record in chronological order that are necessary for the resolution of the issues raised on appeal[.]’”<sup>219</sup> As a result, the court found it “difficult to fault [the appellant] for including such motions and orders.”<sup>220</sup>

In *American Family Mutual Insurance Co. v. Matusiak*,<sup>221</sup> the appellee asked the court of appeals to dismiss an appeal and impose sanctions on the appellant because the appellant’s appendix allegedly misrepresented the facts and required the appellees to expend an “unwarranted amount of time” to provide a “proper record.”<sup>222</sup> Although the court of appeals acknowledged Appellate Rule 50 and found that the appellant had failed to comply with the provision, it declined to dismiss the appeal or impose appellate sanctions. Interestingly, the court advised

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215. See, e.g., *Ramon v. State*, 888 N.E.2d 244, 249 n.7 (Ind. Ct. App. 2008); *Forgey v. State*, 886 N.E.2d 16, 22 n.15 (Ind. Ct. App. 2008); *Gale v. State*, 882 N.E.2d 808, 812 n.3 (Ind. Ct. App. 2008).

216. *Plaza Group Props., LLC v. Spencer County Plan Comm’n*, 877 N.E.2d 877, 880 n.2 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d (Ind. 2008); see also *Kopka Landau & Pinkus v. Hansen*, 874 N.E.2d 1065, 1069 n.3 (Ind. Ct. App. 2007).

217. *Dennerline v. Atterholt*, 886 N.E.2d 582, 587 n.3 (Ind. Ct. App.) (construing Appellate Rule 50(A)), *trans. dismissed*, 898 N.E.2d 1230 (Ind. 2008).

218. *Bailey v. State Farm Mut. Auto Ins.*, 881 N.E.2d 996, 999 n.1 (Ind. Ct. App. 2008) (quoting *In re Contempt of Wabash Valley Hosp., Inc.*, 827 N.E.2d 50, 57 n.6 (Ind. Ct. App. 2005)).

219. *Id.* (quoting IND. APP. R. 50(A)(2)(f)).

220. *Id.*

221. 878 N.E.2d 529 (Ind. Ct. App. 2007), *trans. denied*, 898 N.E.2d 1218 (Ind. 2008).

222. *Id.* at 533 n.5.

the appellee that “[i]nstead of requesting dismissal and sanctions, perhaps the better practice would have been to file a Motion for Conforming Appendix with this court, which almost certainly would have been granted, thereby saving [the appellees] ‘the cost of completing the work that should have been done by [the appellant].’”<sup>223</sup>

*H. Decorum*<sup>224</sup>

During the reporting term, the court of appeals had the opportunity to critique behavior it considered inappropriate. In *City of East Chicago v. East Chicago Second Century, Inc.*,<sup>225</sup> the court of appeals reminded counsel that the statement of facts should be “a concise narrative of the facts stated in accordance with the standard of review appropriate to the judgment or order being appealed, and it should not be argumentative.”<sup>226</sup> By contrast, the court of appeals observed that the appellant’s statement of facts was “a transparent attempt to discredit both the judgment and the opponents’ character, and was plainly not intended to be a vehicle for informing this court.”<sup>227</sup> Additionally, the court noted that throughout its brief, the appellant had characterized its opponent’s arguments as “bait and switch,” a “transparent effort at legal ‘sleight of hand,’” a “slick device,” “specious,” “a scattershot of undeveloped arguments,” an “incredible position,” “fiction,” “ludicrous,” and “silly.”<sup>228</sup> Although the court of appeals ultimately addressed the appellant’s arguments on their merits, it reaffirmed statements from a prior case in which it chastised inappropriate conduct:

Throughout the parties’ briefs, they have launched rhetorical broadsides at each other which have nothing to do with the issues in this appeal. Counsels’ comments concern their opposite numbers’ intellectual skills, motivations, and supposed violations of the rules of common courtesy. Because similar irrelevant discourse is appearing with ever-increasing frequency in appellate briefs, we find it necessary to discuss the easily-answered question of whether haranguing condemnations of opposing counsel for supposed slights and off-record conduct unrelated to the issues at hand is appropriate fare for appellate briefs.

At the outset, we point to the obvious: the judiciary, in fact and of necessity, has absolutely no interest in internecine battles over social

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223. *Id.* (citations omitted).

224. The authors realize that the supreme court has granted transfer on both of the cases cited in the decorum section. However, it is their belief that comments regarding appropriate counsel behavior warrant citation.

225. 878 N.E.2d 358 (Ind. Ct. App. 2007) (citing IND. APP. R. 46(A)(6)), *trans. granted*, 898 N.E.2d 1219 (Ind. 2008).

226. *Id.* at 365 n.2.

227. *Id.*

228. *Id.* (citations omitted).

etiquette or the unprofessional personality clashes which frequently occur among opposing counsel these days. Irrelevant commentary thereon during the course of judicial proceedings does nothing but waste valuable judicial time. On appeal, it generates a voluminous number of useless briefing pages which have nothing to do with the issues presented, as in this appeal.

Further, appellate counsel should realize, such petulant grouching has a deleterious effect on the appropriate commentary in such a brief. Material of this nature is akin to static in a radio broadcast. It tends to blot out legitimate argument.

On a darker note, if such commentary in appellate briefs is actually directed to opposing counsel for the purpose of sticking hyperbolic barbs into his or her opposing numbers' psyche, the offending practitioner is clearly violating the intent and purpose of the appellate rules. In sum, we condemn the practice, and firmly request the elimination of such surplusage from future appellate briefs.<sup>229</sup>

After condemning counsel's behavior, the *City of East Chicago* court concluded that

[a] brief should not only present the issues to be decided on appeal, but it should be of material assistance to the court in deciding those issues. A brief is far more helpful to this court, and it advocates far more effectively for the client, when its focus is on the case before the court and not on counsel's opponent.<sup>230</sup>

The court of appeals commended opposing counsel "to the extent they have avoided responding in a similar tone to [the appellant's] arguments."<sup>231</sup>

The court of appeals had another opportunity to criticize objectionable behavior in *Henri v. Curto*.<sup>232</sup> In the underlying action, Henri filed a civil suit against Curto, alleging that Curto raped her while they were students at Butler University. Although criminal charges were never filed, a Butler University "judicial official concluded that Curto had violated University rules and suspended [him] for four years."<sup>233</sup> Curto filed a counterclaim against Henri, "alleging that [she] tortiously interfered with [his] contract with Butler University as a student enrolled in a degree program."<sup>234</sup> After a trial, "the jury returned a unanimous verdict finding that Curto had not raped Henri, and that Henri tortiously interfered with Curto's contract with [the] University . . . [and]

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229. *Id.* (quoting *Amax Coal Co. v. Adams*, 597 N.E.2d 350, 352 (Ind. Ct. App. 1992)).

230. *Id.* (citing *Young v. Butts*, 685 N.E.2d 147, 151 (Ind. Ct. App. 1997)).

231. *Id.*

232. 891 N.E.2d 135 (Ind. Ct. App. 2008), *rev'd*, 2009 Ind. LEXIS 489 (Ind. 2009).

233. *Id.* at 136.

234. *Id.* at 137.

award[ed] Curto \$45,000 on his counterclaim.”<sup>235</sup>

On appeal, Henri included an introduction section in her brief of appellant and “contend[ed] that Henri was raped once by Curto and then raped again by the judicial system.”<sup>236</sup> Curto filed a motion to strike the introduction, which the court of appeals granted after noting that Appellate Rule 42 gives the court discretion to “strike from documents matter that is ‘redundant, immaterial, impertinent, scandalous’ or otherwise inappropriate.”<sup>237</sup> The court of appeals concluded that “[t]he Introduction does not aid our consideration of the issues and is inappropriate[;]” therefore, it should be stricken.<sup>238</sup> *City of East Chicago* and *Henri* demonstrate that the court of appeals will not tolerate inappropriate attacks on appeal.

#### IV. INDIANA’S APPELLATE COURTS

##### A. Case Data from the Supreme Court

During the 2008 fiscal year,<sup>239</sup> the supreme court disposed of 1200 cases, issuing 168 majority opinions and published orders<sup>240</sup> and 42 non-dispositive opinions.<sup>241</sup> The supreme court heard oral argument in 74 cases—30 criminal cases and 44 civil cases.<sup>242</sup> It decided seven capital cases—five on direct appeal and two on petitions for post-conviction relief.<sup>243</sup> Of the supreme court’s 1200 dispositions, 657 were in criminal cases, 387 were in civil cases, 108 were attorney discipline matters, 41 were original actions, five were tax cases, one was a mandate of funds, and one was a petition for review of the State Board of Law Examiners.<sup>244</sup> “[P]rior to 2006, the United States Supreme Court had not decided an appeal from the Indiana Supreme Court in approximately 25 years.”<sup>245</sup> However, in the past three years, the United States Supreme Court has decided two such appeals—*Davis v. Washington*<sup>246</sup> and *Indiana v. Edwards*.<sup>247</sup>

In the 2008 Annual Report, the supreme court observed that of its 1200

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235. *Id.*

236. *Id.* at 137 n.3.

237. *Id.* (quoting IND. APP. R. 42).

238. *Id.*

239. The supreme court 2008 fiscal year ran from July 1, 2007 through June 30, 2008. See INDIANA SUPREME COURT ANNUAL REPORT 2007-08, at 2 (2008), available at <http://www.in.gov/judiciary/supremeadmin/docs/0708report.pdf> [hereinafter 2008 ANNUAL REPORT].

240. *Id.* at 43-44.

241. *Id.* at 44 (non-dispositive opinions include concurring, dissenting, and concurring in part or dissenting in part opinions).

242. *Id.* at 45.

243. *Id.*

244. *Id.* at 47.

245. *Id.* at 2.

246. 547 U.S. 813 (2006).

247. 128 S. Ct. 2379 (2008).

dispositions, 1105 had first been appealed to the court of appeals.<sup>248</sup> Of the 1015 petitions for transfer, “[t]he [s]upreme [c]ourt accepted jurisdiction and issued opinions in approximately 8% [of the cases] (12% in civil cases and 7% in criminal cases).”<sup>249</sup> In the remaining 92% of cases, the supreme court declined review, certifying the decision of the court of appeals.<sup>250</sup> After conveying these statistics, the supreme court recognized that “[t]he appellate work of the Indiana Supreme Court would not be possible without the outstanding foundational work provided by the Indiana Court of Appeals, trial courts, and Tax Court.”<sup>251</sup>

### *B. Other Supreme Court Endeavors*

On February 24, 2008, the five justices currently serving on the supreme court became the longest-serving supreme court in Indiana’s history at 3040 consecutive days.<sup>252</sup> Technology was in the spotlight during the 2008 fiscal year, as evidenced by improvements made to the “Odyssey” case management system that “will eventually connect all Indiana courts and state agencies and improve public access to court records.”<sup>253</sup> At the close of the fiscal year, the nine Monroe County Circuit Courts and the Washington Township Small Claims Court began using Odyssey to store and manage information on their cases.<sup>254</sup> Additionally, the Courts in the Classroom project webcasted every supreme court oral argument and select court of appeals arguments, adding 87 arguments to the online archive where more than 460 oral arguments can be viewed.<sup>255</sup>

### *C. Case Data from the Court of Appeals*

During the 2008 calendar year, the court of appeals disposed of 2752 cases—2739 by majority opinion and 13 by order.<sup>256</sup> The court of appeals heard 78 oral arguments, including one stay hearing, and the average age of cases pending on December 31, 2007 was 1.6 months.<sup>257</sup> The court handed down 7115 miscellaneous orders, mainly on motions for additional time.<sup>258</sup> Judge John T.

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248. 2008 ANNUAL REPORT, *supra* note 239, at 2.

249. *Id.*

250. *Id.*

251. *Id.* at 2-3.

252. *Id.* at 5. The five justices that currently comprise the supreme court are : Chief Justice Randall T. Shepard and Justices Brent E. Dickson, Frank Sullivan, Jr., Theodore R. Boehm, and Robert D. Rucker. *Id.*

253. *Id.* The Supreme Court’s Judicial Technology and Automation Committee (JTAC) is responsible for the Odyssey program. *Id.*

254. *Id.*

255. *Id.* at 6. These oral arguments can be found at <http://www.indianacourts.org/apps/webcasts/>.

256. COURT OF APPEALS OF INDIANA 2008 ANNUAL REPORT, at 1 (2008), *available at* <http://www.in.gov/judiciary/appeals/docs/2008report.pdf>

257. *Id.*

258. *Id.*

Sharpnack retired to become a Senior Judge on May 4, 2008, and Judge Elaine B. Brown was sworn in as a member of the court of appeals on May 5, 2008.<sup>259</sup>

The court of appeals continued its "Appeals on Wheels" program in 2008, which is the court's traveling oral argument program designed to familiarize Indiana residents with the court.<sup>260</sup> For example, last year the court held oral arguments in the cities of Hammond, Lafayette, French Lick, Valparaiso, Muncie, Crawfordsville, Bloomington, and Evansville.<sup>261</sup>

#### *D. Clever Prose from the Court of Appeals*

The court of appeals invoked humor and vivid imagery during the reporting term. For example, in his dissent to an unpublished memorandum decision, Judge James S. Kirsch summarized the facts of *Gunkel v. Renovations, Inc.*<sup>262</sup> as follows:

Multiple motions. Multiple hearings. Multiple judges. Parties admitting they entered into a contract, then denying that they entered into a contract. Bifurcated trials. Inconsistent positions. Inconsistent rulings. Summary judgments granted. Summary judgments denied. Summary judgments granted but not followed. Three appeals. Eight years and still unresolved. Attorney fees in excess of the amount in controversy.

It will soon be ten years since the Gunkels entered into a contract for construction of their new home. During this decade, they have not been served well by either their contractors or our legal system. Were Dante Alighieri alive today, this case would provide him with the material to add a tenth circle to his *Inferno* and call it "Litigation Hell."<sup>263</sup>

In *Henri v. Curto*,<sup>264</sup> the court of appeals analyzed the effect of a bailiff's comment to a holdout juror in response to her question regarding whether the jury's verdict had to be unanimous. Citing the classic legal film "12 Angry Men," the court noted:

A plausible effect of the judge's instruction would be that jurors in the minority who are adamant that the majority is wrong may hold out to prevent a verdict. However, the statement by the bailiff conveys that jurors in the minority would face the daunting task of swaying all the other jurors if they are to stick to their convictions, a task surmountable

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259. *Id.* at 2.

260. *See* Indiana Court of Appeals, Oral Arguments, <http://www.in.gov/judiciary/appeals/arguments.html> (last visited June 18, 2009).

261. *Id.*

262. No. 76A03-0609-CV-407, slip op. at 28-29 (Ind. Ct. App. Jun. 27, 2008), *trans. denied*, No. 76S03-0901-CV-19, 2009 Ind. LEXIS 237 (Ind. Mar. 4, 2009).

263. *Id.*

264. 891 N.E.2d 135 (Ind. Ct. App. 2008), *rev'd*, 2009 Ind. LEXIS 489 (Ind. 2009).



in less than two hours on the silver screen if you are Henry Fonda, but a task that could be overwhelming in real life for the average juror.<sup>265</sup>

In his dissent in *Gray v. State*,<sup>266</sup> an unpublished memorandum decision, Judge Michael P. Barnes expounded upon a clever observation he made in *Davis v. State*.<sup>267</sup> The issue in *Davis* was whether a BB gun could serve as a deadly weapon for purposes of elevating the crime from a class C to a class B felony based on the defendant's use of a deadly weapon.<sup>268</sup> Rebuking the tendency to rely heavily on the victim's belief or fear that the perpetrator was armed with a deadly weapon, Judge Barnes argued in *Davis* that

[t]o the extent that the victims here were afraid of Davis and his accomplice, that is already a necessary element of the base offense of robbery as a class C felony. . . . The key factor, I believe, that distinguishes using a "deadly weapon" to commit robbery and elevates it to a Class B felony is that there is an actual heightened risk of harm to the victim.<sup>269</sup>

Judge Barnes observed that taken to its extreme, the majority position in *Davis* "could lead a finger or a stick of butter to be found a 'deadly weapon,' if a robber were to point the finger or stick of butter from underneath a coat and was able to convince the victim that it was actually a gun."<sup>270</sup>

In *Gray*, Judge Barnes applied his logic from *Davis* and noted that "although this case does not involve a finger or a stick of butter, here an electric shaver has been converted into a gun. . . . There is no claim or argument on appeal that an electric shaver could be a deadly weapon."<sup>271</sup> Consequently, Judge Barnes dissented from the majority's decision and concluded that "[b]ecause of the lack of proof that Gray committed these crimes while armed with a deadly weapon, I vote to reduce his robbery convictions to Class C felonies."<sup>272</sup> Regardless of whether one agrees with Judge Barnes's legal conclusion, the thought of a stick of butter serving as a deadly weapon does present a comical image to make his point.

#### CONCLUSION

This survey term marked another productive year for Indiana's appellate courts. Although the Appellate Rules were reworked almost ten years ago, the supreme court and court of appeals continue to interpret and apply the rules to

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265. *Id.* at 142 (citing 12 ANGRY MEN (Orion-Nova Productions 1957)).

266. No. 10A01-0708-CR-356, slip op. at 22-24 (Ind. Ct. App. June 6, 2008), *aff'd*, 903 N.E.2d 940 (Ind. 2009).

267. 835 N.E.2d 1102 (Ind. Ct. App. 2005).

268. *Gray*, No. 10A01-0708-CR-356, slip op. at 22.

269. *Id.* at 23 (quoting *Davis*, 835 N.E.2d at 1117-18 (Barnes, J., concurring)).

270. *Id.* (citing *Davis*, 835 N.E.2d at 1117).

271. *Id.* at 24.

272. *Id.* at 24-25.

refine appellate practice in Indiana and enhance the efficiency of our judicial system. Indiana's citizens, bench, and bar all benefit from the efforts of our appellate courts in this arena.