

A NEW ERA DAWNS IN APPELLATE PROCEDURE

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INTRODUCTION

This Article examines recent developments in the area of appellate procedure in Indiana. For appellate practitioners, the two-year time frame¹ surveyed in this Article was one of the most significant periods in Indiana history. Two events of monumental importance to appellate law occurred during the time period covered herein.

On January 1, 2001, an amendment to the appellate rule governing the jurisdiction of the Indiana Supreme Court became effective.² That amendment, made possible through a change to the Indiana Constitution, made the docket of the state's high court almost exclusively discretionary.³ On that same date, an entirely new set of Rules of Appellate Procedure went into effect.⁴

In addition to these far-reaching developments, a number of opinions of great significance were issued during the survey period, including two decisions of the United States Supreme Court that affect appellate practice in Indiana.

I. A CHANGE IN SUPREME COURT JURISDICTION

The Indiana Constitution formerly required the Indiana Supreme Court to exercise direct appellate jurisdiction over all appeals in which a sentence of death, life in prison, or a term in excess of fifty years on one count was imposed.⁵

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1. The analysis of relevant case law will encompass a two-year survey period, rather than the usual one-year time frame. This additional review is included because last year's survey Article on appellate procedure was dedicated to an examination of the newly promulgated Rules of Appellate Procedure. See George T. Patton, Jr., *Recent Developments in Indiana Appellate Procedure: New Appellate Rules, a Constitutional Amendment, and a Proposal*, 33 IND. L. REV. 1275 (2000).

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

3. See *infra* notes 5-26 and accompanying text.

4. See *infra* notes 32-33 and accompanying text. The survey period spans a time frame during which the older, superceded Rules of Appellate Procedure were in effect. In order to avoid confusion about which version of the rules is being referenced, the superceded rules will be referred to as "former Appellate Rule." Any citation that does not use the word "former" will be a reference to the new rules effective January 1, 2001.

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

However, on November 7, 2000, Indiana voters took the final step in amending the state's constitution. Now, the Indiana Constitution requires that the state's high court exercise direct appellate jurisdiction only where a sentence of death has been imposed.⁶ Some background to the amendment may help underscore its importance.

In 1995, the legislature raised the presumptive sentence for murder to fifty-five years.⁷ This change increased the number of criminal appeals transmitted directly to the supreme court from a low of thirty-seven cases in 1992⁸ to 112 cases in 1997.⁹ The effect of this increase was to substantially inhibit the ability of the Indiana Supreme Court, as the court of last resort, to accept jurisdiction over discretionary civil appeals.¹⁰ The "tide of direct appeals" of criminal convictions pushed aside cases of importance to all Indiana citizens, such as those involving family law, landlord-tenant disputes, and consumer rights.¹¹

The only way the problem could be remedied was to amend the Indiana Constitution. The constitution itself sets out the procedures for change: any amendment must be proposed as legislation, successfully pass two sessions of the General Assembly, and then be approved by the voters in the next general election.¹² After being approved almost unanimously during the legislative sessions in 1998 and 1999,¹³ the proposed amendment to the Indiana Constitution was placed on the ballot for the general election in November 2000 as Public Question One. The voters approved the amendment by a sixty-four percent to thirty-six percent margin and the Indiana Constitution was changed.¹⁴

As mentioned above, the Indiana Supreme Court now has constitutionally-mandated direct jurisdiction over only those appeals in which a sentence of death is imposed.¹⁵ However, the amendment still allowed the supreme court to

6. The amendment to article VII, § 4 reads in substantive part as follows, with the old language which was removed shown in parenthesis: "The Supreme Court shall exercise appellate jurisdiction under such terms and conditions as specified by rules except that appeals from a judgment imposing a sentence of death, (life imprisonment, or imprisonment for a term greater than fifty years) shall be taken directly to the Supreme Court."

7. See Act of July 1, 1995, Pub. L. 148-1995, § 4, 1995 Ind. Legis. Serv. P.L. 148-1995, H.E.A. 1004 (amending IND. CODE § 35-50-2-3(a) by substituting "fifty-five (55)" for "fifty (50)").

8. See IND. JUD. REP. 1992, vol. I, at 12 (Exec. Summ. 1993).

9. See IND. JUD. REP. 1997, vol. I, at 18 (Exec. Summ. 1998).

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

11. *Id.*

12. See IND. CONST. art. XVI, § 1.

13. See Act of Feb. 17, 1998, Pub. L. No. 132-1998, 1998 Ind. Legis. Serv. P.L. 132-1998, H.J.R. 1; Act of Mar. 30, 1999, Pub. L. No. 274-1999, 1999 Ind. Legis. Serv. P.L. 274-1999 H.J.R. 13.

14. See CERTIFICATION OF RATIFICATION (Nov. 7, 2000) (on file with the Indiana Secretary of State); *Public Question Outreach Effort Produced Benefits*, IND. LAW., Dec. 6, 2000, at 4.

15. See IND. CONST. art. VII, § 4(A)(1)(a).

exercise jurisdiction over non-capital appeals if it elected to do so by rule.¹⁶ The court quickly adopted rule changes reflecting this new jurisdictional flexibility. For example, although all appeals in which a definite term of years is imposed will go first to the Indiana Court of Appeals, the Indiana Supreme Court elected to retain jurisdiction over appeals from sentences of life imprisonment without parole.¹⁷

The court promulgated the rule change effectuating this new division of appellate jurisdiction by order dated November 9, 2000.¹⁸ Under the terms of the order, any appeal that was initiated with the filing of a praecipe before January 1, 2001 will be jurisdictionally governed by the old rule.¹⁹ In other words, the supreme court will continue to take appeals in which a sentence on one count in excess of fifty years was entered so long as the praecipe initiating the appeal was filed before January 1, 2001.²⁰ This date marks the effectuation of the new appellate rules.²¹ The new rules, among other things, abolish the “praecipe”²² as the document used to initiate an appeal in favor of a “Notice of Appeal.”²³ Any appeal commenced by the filing of the new notice of appeal on or after January 1, 2001, will be jurisdictionally governed by the new rule.²⁴

The court elected to retain jurisdiction over cases in which a sentence of life imprisonment without parole is entered, even though it was not constitutionally obligated to do so. This relatively minor addition to the court’s mandatory appellate jurisdiction seems sensible because sentences of death and life imprisonment without parole are governed by the same sentencing statute.²⁵ Further, the jurisprudence of the two sentences is similar.²⁶

The net effect of the constitutional amendment and accompanying rule change is that for the first time in Indiana history, the state’s high court will have almost complete control over its appellate docket. As soon as the last group of fixed-term criminal direct appeals works its way through the system sometime in the year 2002, the Indiana Supreme Court will have the freedom to pick and chose, through the transfer process, the cases that will fill its docket. In other words, the court will be able to speak more frequently about a wider variety of important issues in civil and criminal practice, as befits the state’s highest court.

Of course, those hundred-plus appeals no longer handled by the supreme

16. *See id.* § 4(A)(2).

17. *See* Ind. Court Order No. 00-18 (Nov. 9, 2000).

18. *See id.*

19. *See id.*

20. *See generally id.*

21. *See id.*; *see also infra* notes 32-36 and accompanying text.

22. *See* IND. APPELLATE RULE 9(A)(4).

23. *See* IND. APP. R. 9(A)(1).

24. *See* Ind. Court Order No. 00-18 (Nov. 9, 2000).

25. *See* IND. CODE § 35-50-2-9 (1999).

26. *See, e.g.,* Ajabu v. State, 693 N.E.2d 921, 937 (Ind. 1998) (“Although this case involves life without parole, death penalty jurisprudence is instructive in construing subsection (b)(1) because subsection (b)(1) applies equally and without differentiation to both sentences.”).

court are not going to just disappear. They now will be the responsibility of an Indiana Court of Appeals that is already laboring under a growing caseload. In 2000, there were 2160 appeals transmitted to the Indiana Court of Appeals.²⁷ That number is certain to climb not simply because of the change in jurisdiction but because of general growth trends.²⁸ Consider this fact: (conservatively) assuming a caseload of 2150 cases per year, just to stay current, each judge on a fifteen-member appellate court will have to write an average of 143 opinions per year and actively participate in another 286 appeals as a panel member.

A combination of creative leadership, new technology, the assistance of senior judges,²⁹ and hard work has made it possible for the court of appeals to stay remarkably current in its work. The average age of cases pending before the court of appeals at the end of 1999 was only 1.3 months,³⁰ an incredible achievement given the volume of cases coming before the court. However, it seems likely that the growing workload will require the Indiana General Assembly to eventually create another panel of the court of appeals.³¹ The only real question is when.

II. THE NEW RULES OF APPELLATE PROCEDURE TAKE EFFECT

Culminating an effort that began several years ago, the new Indiana Rules of Appellate Procedure took effect on January 1, 2001,³² replacing the old version that had been in effect since January 1, 1970.³³ Generally, the new rules govern all appeals that are initiated on or after January 1, 2001, and the old rules govern those initiated before that date.³⁴ There are, however, two exceptions. First, if a party files a petition for rehearing, a petition to transfer an appeal to the supreme court, or a petition for supreme court review of a tax court case on or after January 1, 2001, that part of the appeal will be governed by the new rules,

27. See INDIANA COURT OF APPEALS, 2000 ANNUAL REPORT (2001) [hereinafter 2000 ANNUAL REPORT].

28. For example, as recently as 1995 there were only 1803 appeals transmitted to the court of appeals. See IND. JUD. REP. 1995, vol. I, at 32 (Exec. Summ. 1996). The last time a panel was added to the court of appeals was 1990. See Act of Mar. 13, 1990, Pub. L. No. 158-1990, 1990 Ind. Legis. Serv. P.L. 158-1990, H.E.A. 1070. In 1988 and 1989, the two years preceding that legislative action, the number of fully briefed appeals coming before the court of appeals was 1222 and 1516, respectively. See IND. JUD. REP. 1988, vol. I, at 28 (Exec. Summ. 1989); IND. JUD. REP. 1989, vol. I, at 26 (Exec. Summ. 1990).

29. See *infra* notes 118-19 and accompanying text.

30. See IND. JUD. SERV. REP. 1999, vol. I, at 17 (Exec. Summ. 2000).

31. "The Court of Appeals shall consist of as many geographic districts . . . as the General Assembly shall determine to be necessary [and e]ach geographic district . . . shall consist of three judges." IND. CONST. art. VII, § 5.

32. See Order No. 94500-0002-MS-77 (Feb. 4, 2000).

33. See IND. APPELLATE RULES (repealed Jan. 1, 2001).

34. See Order No. 94500-0002-MS-77 (Feb. 4, 2000).

regardless of when the appeal was originally initiated.³⁵ Second, the change in the automatic extension of time to respond to certain documents (discussed under Timing Changes below) applies to all responses to documents filed on or after January 1, 2001.³⁶

Because last year's survey Article provided a detailed discussion of the new appellate rules,³⁷ this Article will only highlight some of the major changes from the old rules.

A. Timing Changes

The new rules contain two timing changes that are less generous than those under the old rules. First, there is now just a three day automatic extension of time to respond to certain documents that are served by mail or third-party commercial carrier.³⁸ This makes the automatic extension applicable in appellate proceedings consistent with the provision governing trial court proceedings,³⁹ but may catch some appellate practitioners who are accustomed to the previous five day automatic extension off-guard.⁴⁰ Second, motions for extension of time must now be filed seven days prior to the deadline sought to be extended,⁴¹ rather than the five days allowed by the old rules.⁴²

On the other hand, some timing changes are more generous than those under the old rules. The briefing schedule for interlocutory appeals is now the same as for appeals from final judgments, replacing the old ten-ten-five day schedule⁴³ with a less onerous thirty-thirty-fifteen day schedule.⁴⁴ If a reply brief also served as a cross-appellee's brief, the deadline is thirty days rather than fifteen days from the service of the appellee's brief.⁴⁵ A party responding to a petition to transfer now has twenty days, rather than fifteen days, from service of the petition within which to file a responsive brief.⁴⁶

B. Nomenclature Changes

The new rules change the names of some familiar documents. The old

35. *See id.*

36. *See id.*

37. *See* Patton, *supra* note 1, at 1275.

38. *See* IND. APP. R. 25(C).

39. *See* IND. TRIAL RULE 6(E).

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

41. *See* IND. APP. R. 35(A).

42. *See* IND. APP. R. 14(A), INDIANA RULES OF COURT, STATE AND FEDERAL 297-308 (2000) (repealed Jan. 1, 2001).

43. *See* IND. APP. R. 8.1(B), INDIANA RULES OF COURT, STATE AND FEDERAL 297-308 (2000) (repealed Jan. 1, 2001).

44. *See* IND. APP. R. 45(B).

45. *See* IND. APP. R. 45(B)(3); Ind. App. R. 8.1(A), INDIANA RULES OF COURT, STATE AND FEDERAL 297-308 (2000) (repealed Jan. 1, 2001).

46. *See* IND. APP. R. 57(D).

“praecipe” that initiated an appeal⁴⁷ is now called the “Notice of Appeal.”⁴⁸ This change necessitated renaming the old “Notice of Appeal”⁴⁹ as the “Appellant’s Case Summary.”⁵⁰ The term “petition” is now reserved for a petition for rehearing, a petition to transfer an appeal to the supreme court, or a petition for supreme court review of a tax court case.⁵¹ Any other request for relief is now termed a “motion.”⁵²

C. Initiating an Appeal

A party initiating an appeal now has a few additional responsibilities. The appellant must pay the filing fee when the notice of appeal is filed, rather than being able to wait up to ninety days.⁵³ The appellant must also make satisfactory payment arrangements when requesting a transcript.⁵⁴ Finally, the appellant must monitor the deadlines for the trial court clerk and the court reporter to complete their duties and seek an order to compel if necessary.⁵⁵

D. The Record on Appeal and Appendices

Conceptually, the biggest changes in the new rules are the way in which the record of the proceeding below is prepared as well as the way in which relevant parts of the record are presented to the appellate court. The old “Record of Proceedings” has been abolished,⁵⁶ replaced by a “Record on Appeal,” which is broadly defined as consisting of two parts—the “clerk’s record” and all proceedings below, whether or not transcribed or transmitted to the appellate court.⁵⁷ The clerk’s record—the chronological case summary and file maintained by the trial court clerk⁵⁸—is assembled and retained by the trial court clerk throughout the entire appeal.⁵⁹ The parties present relevant portions of the clerk’s record to the appellate court by including copies in appendices.⁶⁰

The court reporter is responsible for preparing the “transcript” by transcribing the proceedings requested in the notice of appeal.⁶¹ The court

47. See IND. APP. R. 2(A) (repealed Jan. 1, 2001).

48. See IND. APP. R. 2(I).

49. See IND. APP. R. 2(C) (repealed Jan. 1, 2001).

50. See IND. APP. R. 15.

51. See IND. APP. R. 2(J).

52. See *id.*

53. See IND. APP. R. 9(E).

54. See IND. APP. R. 9(H).

55. See IND. APP. R. 10(F), 10(G), 11(D).

56. See IND. APP. R. 27.

57. See IND. APP. R. 2(L).

58. See IND. APP. R. 2(E).

59. See IND. APP. R. 10(B), 12(A).

60. See IND. APP. R. 50.

61. See IND. APP. R. 2(K), 11(A).

reporter is also responsible for requesting extensions of time.⁶² Once completed, the court reporter files the transcript with the trial court clerk,⁶³ where it remains during the appellant's briefing time in criminal appeals and during the entire briefing time in other cases.⁶⁴ It is then transmitted to the appellate court clerk,⁶⁵ where it is available for the appellate court's review. Certain parts of the transcript should also be included in the appellant's appendix.⁶⁶

E. Briefing

There are three especially important changes in the briefing procedures. First, the time period for filing the appellant's brief is no longer triggered by an act of the appellant. Under the old rules, the time period began when the appellant filed the record of proceedings.⁶⁷ Now the time period begins when the trial court clerk issues a notice that the transcript is complete.⁶⁸ Second, a party seeking transfer or review is now allowed to file a reply brief within ten days after the brief opposing transfer or review is served.⁶⁹ Third, there is no longer a separate brief in support of a petition for rehearing, transfer, or review. Instead, legal arguments are included in the petition itself, which is bound as a brief.⁷⁰

In addition, the cover colors for some petitions and briefs have changed. Covers for petitions for rehearing and briefs in response are now white.⁷¹ Things get colorful on transfer or review: orange for the petition for transfer or review, yellow for the brief in response, and tan for the reply brief.⁷²

III. CHANGES IN MEMBERSHIP OF THE APPELLATE COURTS

On November 19, 1999, the Honorable Robert D. Rucker was sworn in as the 105th justice of the Indiana Supreme Court, filling the vacancy created by the departure of former Justice Myra C. Selby. Justice Rucker spent the previous eight-plus years serving as a judge on the Indiana Court of Appeals.

The year 2000 saw three new judges join the court of appeals. Justice Rucker's selection for the Indiana Supreme Court created a vacancy that was filled by Judge Nancy H. Vaidik, former judge of the Porter Superior Court. The retirements of Judge Robert H. Staton and Judge William I. Garrard created two additional vacancies that were filled by Judge Michael P. Barnes, an attorney from South Bend, and Judge Paul D. Mathias, former judge of the Allen Superior

62. See IND. APP. R. 11(C).

63. See IND. APP. R. 11(A).

64. See IND. APP. R. 12(B).

65. See *id.*

66. See IND. APP. R. 50.

67. See IND. APP. R. 8.1(A).

68. See IND. APP. R. 45(B)(1).

69. See IND. APP. R. 57(E), 63(E).

70. See IND. APP. R. 54(E), 57(F), 63(G).

71. See IND. APP. R. 43(H).

72. See *id.*

Court.

These appointments were just the latest in a series that saw the appointment of seven court of appeals judges in less than three years.⁷³ Remarkably, only one of the fifteen judges currently on the court of appeals joined the court before 1989.⁷⁴ The court, however, continues to tap the judicial experience of five retired court of appeals judges⁷⁵ who assist the court as senior judges.

IV. IMPORTANT DEVELOPMENTS IN CASE LAW

In addition to the developments discussed above, there were many noteworthy decisions in the area of appellate procedure during the two-year survey period. The following sections discuss the most important of those opinions.

A. *There Is No Federal Constitutional Right to Proceed Pro Se on Appeal*

In *Faretta v. California*,⁷⁶ a 1975 case, the U.S. Supreme Court held that a criminal defendant has a constitutional right under both the Sixth Amendment and long-standing historical practices to defend himself at trial without counsel, so long as the defendant voluntarily and knowingly elects to do so.⁷⁷ A question left unanswered by *Faretta* was whether the right to defend oneself *pro se*—that is, without the benefit of counsel, extended to appellate proceedings. Both state and federal courts had reached conflicting views on that point.⁷⁸ In *Martinez v. Court of Appeal*,⁷⁹ the U.S. Supreme Court granted certiorari to resolve that particular question.⁸⁰

Salvador Martinez, who described himself as a self-taught paralegal, represented himself in a California state proceeding on charges of grand theft and embezzlement.⁸¹ Though acquitted on the grand theft count, he was convicted of embezzlement and was also found to be a habitual offender under California law.⁸²

Martinez also wanted to represent himself on appeal, and he filed a motion

73. Judges L. Mark Bailey, Melissa S. Mattingly, Sanford M. Brook, and Margaret G. Robb joined the court of appeals in 1998.

74. Judge Patrick D. Sullivan joined the Indiana Court of Appeals (formerly the Appellate Court) in 1969. Seven current members were appointed from 1989 to 1994.

75. The five retired court of appeals judges are Senior Judges Wesley W. Ratliff, Jonathan J. Robertson, George B. Hoffman, Jr., Robert H. Staton, and William I. Garrard. See also *infra* notes 117-18.

76. 422 U.S. 806 (1975).

77. See *id.* at 835-36.

78. See *Martinez v. Court of Appeal*, 528 U.S. 152, 155 n.2 (2000) and the cases cited therein.

79. 528 U.S. 152 (2000).

80. See *id.*

81. See *id.* at 154-55.

82. See *id.* at 155.

to that effect.⁸³ The California Court of Appeals denied the motion and the California Supreme Court denied his writ of mandate.⁸⁴ The courts in California had previously held that the denial of self-representation at the appellate level does not violate the due process or equal protection guarantees of the U.S. Constitution, and it continued to follow that rule in the *Martinez* case.⁸⁵ The U.S. Supreme Court agreed with the California state courts, unanimously concluding that there is no federal constitutional right to self-representation on appeal.⁸⁶ There were three principal bases for the Court's decision including, in part, its analysis of the Sixth Amendment right to counsel.⁸⁷

First, unlike trial proceedings, there is no historical practice of self-representation in appellate proceedings, for the simple reason that appeals themselves are of fairly recent origin.⁸⁸ Second, because the Sixth Amendment itself creates no right to an appeal, it therefore cannot logically provide a basis for finding a right to self-representation on appeal.⁸⁹ Third, because the Sixth Amendment does not apply to appellate proceedings, any right to represent oneself on appeal could only be grounded in the Due Process Clause.⁹⁰ However, the court was "entirely unpersuaded" that such a right was "a necessary component of a fair appellate proceeding."⁹¹

The Court concluded by noting that it is within the discretion of state and federal courts to allow convicted defendants to proceed without counsel on appeal.⁹² Further, states are not precluded from recognizing a right to self-representation on appeal under their own constitutions.⁹³ There is simply no federal constitutional right to proceed *pro se* on appeal.⁹⁴ Thus, states are free to require criminal appellants to be represented by counsel even if the appellant objects.⁹⁵

In *Webb v. State*,⁹⁶ a 1980 case, the Indiana Supreme Court stated that an appellant *does* have a constitutional right to self-representation on appeal. The court noted that the U.S. Supreme Court had not yet addressed the issue, but expressed the view that "[t]here is no meaningful distinction between conducting a defense at trial and prosecuting an appeal that prevents the application of the *Faretta* rationale to the case of an appellant who wishes to reject representation

83. *See id.*

84. *See id.*

85. *Id.* (citing *People v. Scott*, 75 Cal. Rptr. 2d 315, 318 (1998)).

86. *See id.* at 163.

87. *See id.* at 156.

88. *See id.* at 156-59.

89. *See id.* at 160.

90. *See id.* at 161.

91. *Id.*

92. *See id.* at 163.

93. *See id.*

94. *See id.*

95. *See id.*

96. 412 N.E.2d 790, 792 (Ind. 1980).

by counsel and instead represent himself on appeal.”⁹⁷ There is no clear indication in the opinion that *Webb* was decided on anything other than federal constitutional grounds, so it has seemingly been overruled by *Martinez*. Nevertheless, the question of any right to self-representation on appeal under the Indiana Constitution remains open.

We cannot predict what the Indiana Supreme Court would say about this issue if faced with it on appeal. However, it may be worth noting that the Indiana Constitution, unlike its federal counterpart, *does* create a constitutional right to an appeal for criminal defendants.⁹⁸ However, *Martinez* makes good sense, both analytically and administratively. Moreover, a fundamental difference exists between a person who has yet to be convicted, and thus presumed innocent, and a person who has been convicted, and thus presumed guilty. Those guilty of crimes surrender a number of rights,⁹⁹ and the right to self-representation could be one of those lost upon conviction.

Indiana trial courts will likely continue to occasionally allow convicted persons to represent themselves on direct appeal from their convictions, even though they are not obligated to do so by the federal Constitution.

B. The Filing of a Petition to Transfer Is Required to Exhaust State Remedies Under Federal Law

Another U.S. Supreme Court opinion of significance to the state appellate system is *O’Sullivan v. Boerckel*.¹⁰⁰ Before a person convicted of a crime in a state court can obtain review of that conviction by a federal court through the habeas corpus process, the convicted person must have exhausted all state remedies.¹⁰¹ Many states, like Indiana, have a two-tiered appellate system with an intermediate appellate court that handles the vast majority of criminal appeals and a state supreme court employing a discretionary appellate review process.

In *O’Sullivan*, a case arising out of the similarly two-tiered state appellate system in Illinois, the Seventh Circuit Court of Appeals took the position that seeking discretionary review by the state’s highest court was *not* a necessary component of the exhaustion requirement,¹⁰² an issue on which federal appellate courts have reached conflicting views.¹⁰³ The U.S. Supreme Court granted certiorari to resolve the conflict and it reversed the holding of the Seventh Circuit.¹⁰⁴

97. *Id.* at 792.

98. *See* IND. CONST. art. VII, § 6.

99. *See, e.g.,* *Bullock v. State*, 397 N.E.2d 310, 312 (Ind. Ct. App. 1979).

100. 526 U.S. 838 (1999).

101. *See id.* at 839; 28 U.S.C.A. § 2254(b)(1), (c).

102. *See* *Boerckel v. O’Sullivan*, 135 F.3d 1194 (7th Cir. 1998), *rev’d*, 526 U.S. 838 (1999).

103. *Compare, e.g.,* *Richardson v. Procnier*, 762 F.2d 429 (5th Cir. 1985) (requiring a petition seeking discretionary review by the state high court), *with* *Dolny v. Erickson*, 32 F.3d 381 (8th Cir. 1994) (petition for discretionary review not required).

104. *O’Sullivan*, 526 U.S. at 838.

In a 6-3 decision authored by Justice O'Connor, the Supreme Court held that a person convicted of a state crime *must* seek discretionary review from the state's highest court in order to exhaust all state remedies and thus preserve for habeas corpus review any federal constitutional issues.¹⁰⁵ Because the appellant failed to present his federal constitutional claims in a petition for discretionary review to the Illinois Supreme Court, the Supreme Court determined that he had procedurally defaulted on his federal constitutional claims and they were therefore not available for federal habeas corpus review.¹⁰⁶

In *Hogan v. McBride*,¹⁰⁷ the Seventh Circuit held in 1996 that seeking transfer to the Indiana Supreme Court from an opinion of the Indiana Court of Appeals was not a procedural prerequisite to seeking federal habeas corpus relief.¹⁰⁸ However, it seems clear that *O'Sullivan* also overrules *Hogan*. In other words, if a person convicted in Indiana wishes to preserve a federal constitutional issue for possible federal review in a habeas corpus petition, that person must seek transfer to the Indiana Supreme Court from an adverse opinion by the Indiana Court of Appeals on that issue.

The U.S. Supreme Court recognized that it may be handing state supreme courts an "increased burden [that] may be unwelcome."¹⁰⁹ The Court did, however, leave open the possibility that states like Indiana could, either by opinion, order, or rule, obviate the effects of *O'Sullivan*.¹¹⁰ This could be accomplished by plainly stating that under state law, the seeking of discretionary review by the state's high court of a decision by the intermediate appellate court is *not* a requirement in exhausting state remedies.¹¹¹ Justice Souter's concurring opinion even gives an example of a state high court that has taken this approach, quoting an order of the Supreme Court of South Carolina.¹¹²

At the time this Article went to press, the Indiana Supreme Court was still considering whether to adopt such a rule in Indiana. In the months following the issuance of *O'Sullivan*, the number of criminal petitions to transfer filed with the Indiana Supreme Court increased steadily.¹¹³

Whether the adoption of such a rule would be good for Indiana is a matter of debate. The *O'Sullivan* opinion creates an incentive for attorneys to raise even

105. *See id.* at 848.

106. *See id.*

107. 74 F.3d 144 (7th Cir. 1996).

108. *See id.* at 147.

109. *O'Sullivan*, 526 U.S. at 847.

110. *See id.* at 847-48.

111. *See generally id.*

112. *See id.* at 849 (Souter, J., concurring).

113. The Indiana Supreme Court received 193 petitions to transfer in the six month period immediately preceding the issuance of *O'Sullivan* (from January 1, 1999 to June 30, 1999). In the six month period immediate following *O'Sullivan* (July 1, 1999 to December 31, 1999), a total of 218 petitions to transfer in criminal cases were filed; from January 1, 2000 to June 30, 2000 that number increased to 243. From July 1, 2000 through December 31, 2000, the number rose again to 256 (reports on file with author).

very weak federal issues in a petition to transfer. When the Indiana Supreme Court considers a petition to transfer in a criminal appeal, each justice examines the court of appeals' opinion, the briefs filed in the court of appeals, all the materials submitted on transfer, and the record of proceedings to review.¹¹⁴ Only then is a vote taken.¹¹⁵ The review and individual voting on each petition to transfer is a time-consuming task. One of the grounds for accepting transfer is that the court of appeals "has decided an important federal question in a way that conflicts with a decision of the Supreme Court of the United States or a United States Court of Appeals."¹¹⁶ The *O'Sullivan* opinion potentially increases the court's workload without necessarily increasing the number of "important" federal questions presented.

On the other hand, the state's high court wants to encourage the filing of petitions to transfer jurisdiction where important federal issues are involved. Adopting a rule that would allow a court of appeals' opinion to stand as the final opinion from which habeas corpus relief could be sought runs somewhat contrary to that policy.

However, it seems reasonable to think that in any case where a potentially important federal constitutional issue is involved, the appellant will seek transfer to the Indiana Supreme Court regardless of *O'Sullivan*. The reason transfer is likely to be sought is because it is in the client's best interest to do so. First and foremost, the transfer process allows an appellant a second chance to obtain relief. Moreover, the likelihood of getting relief from the Indiana Supreme Court is probably higher than the likelihood of obtaining federal habeas corpus relief.

Therefore, adopting a rule similar to the order issued in South Carolina would be a positive development in Indiana. It would obviate the need for appointed appellate counsel to seek transfer in all criminal cases involving federal constitutional rights, regardless of the strength of the issue, as a matter of routine. In that way, the Indiana Supreme Court would be better able to focus on those cases that may involve important issues.

C. Use of Senior Judges to Decide Appeals Passes Constitutional Muster

The appellate court's decision in *McCullough v. McCullough*,¹¹⁷ appearing to be a routine appeal, was disposed of in an unpublished memorandum decision authored by a retired senior judge of the court of appeals, Judge Wesley W. Ratliff, Jr.

Following the issuance of the opinion, however, the appellant filed a motion seeking to disqualify Senior Judge Ratliff and to require re-submission of the appeal to a new panel. The appellant argued on various grounds that the appointment of Judge Ratliff in particular and the use of senior judges in the

114. See Justice Frank Sullivan, Jr., *Petitions to Transfer: New Rules, New Procedures*, RES GESTAE, Feb. 1996, at 8, 10.

115. See *id.*

116. IND. APPELLATE RULE 57(H)(3).

117. 696 N.E.2d 895 (Ind. Ct. App. 1998) (unpublished table decision).

court of appeals in general was unlawful.¹¹⁸

By statute, the court of appeals is authorized to use senior judges from that court to assist with the appellate workload.¹¹⁹ Since 1998, senior appellate judges have played a role in the appellate decision-making arena.¹²⁰

A different panel of court of appeals' judges issued a published opinion rejecting the appellant's arguments and denying the requested relief.¹²¹ Among the holdings of first impression announced by the court in *McCullough* were: (1) the Indiana Supreme Court had the statutory authority to appoint Judge Ratliff at the time of his appointment;¹²² (2) the statutes authorizing the appointment of special judges to the court of appeals are not in violation of article VII of the Indiana Constitution;¹²³ and (3) Judge Ratliff's appointments as both a senior appellate judge and as a senior trial court judge did not violate the prohibition against concurrently holding two lucrative state offices, which is found in article II, section 9 of the Indiana Constitution.¹²⁴

D. Developments in the Area of Published vs. Unpublished Opinions

The full text of most of the opinions of the court of appeals—about seventy-five percent of the total opinions issued—are not published in the advance sheets or bound volumes of West's Northeastern Reporter.¹²⁵ Rather, they are issued

118. See *McCullough v. McCullough*, 705 N.E.2d 190, 191 (Ind. Ct. App. 1999), *trans. denied*, 726 N.E.2d 302 (Ind. 1999).

119. See IND. CODE § 33-4-8 (1999). That statute was amended in 1998 to specifically allow the Indiana Supreme Court to appoint former judges of the Indiana Court of Appeals to serve as senior judges on that court. See Act of Mar. 11, 1998, Pub. L. No. 33-1988, §§ 1-3, 1998 Ind. Legis. Serv. P.L. 33-1998, S.E.A. 385. However, even prior to that enactment, the Indiana Code empowered the Indiana Supreme Court "to authorize retired justices and judges to perform temporary judicial duties in any court of the state." IND. CODE § 33-2.1-5-1 (1999). Thus, as the court of appeals holds in the opinion discussed in this section, even prior to the specific authorization now found in section 33-4-8 of the Indiana Code, the supreme court had the statutory authority to appoint senior judges to the court of appeals. See *McCullough*, 705 N.E.2d at 192.

120. There were no opinions issued by senior judges in 1997. In 1998, senior judges on the court of appeals issued 168 opinions. See IND. JUD. SERV. REP. 1998, at 25 (Exec. Summ. 1999). In 1999, senior judges issued 138 opinions. See IND. JUD. SERV. REP. 1999, at 28 (Exec. Summ. 2000). In 2000, senior judges on the court of appeals wrote 191 majority opinions. See 2000 ANNUAL REPORT, *supra* note 27.

121. See *McCullough*, 705 N.E.2d at 192.

122. See *id.*

123. See *id.* at 192-96.

124. See *id.* at 196-97.

125. In 1998, the court of appeals published twenty-four percent of its opinions. See IND. JUD. SERV. REP. 1998, vol. I, at 27 (Exec. Summ. 1999). In 1999, twenty-seven percent of the court of appeals' opinions were published. See IND. JUD. SERV. REP. 1999, vol. I, at 30 (Exec. Summ. 2000). In 2000, twenty-six percent of the court of appeals' opinions were published. See 2000 ANNUAL REPORT, *supra* note 27.

as unpublished memorandum decisions.¹²⁶ By rule, the court of appeals only publishes opinions that establish, modify, clarify, or criticize existing law or involve a legal or factual issue of unique interest or substantial public importance.¹²⁷ Unpublished opinions resolve the rights of the parties, but cannot be cited by others as precedent.¹²⁸ The Indiana Court of Appeals has held that there is no due process violation in the issuing of an unpublished memorandum decision.¹²⁹

The Eighth Circuit Court of Appeals created a stir in the area of published versus unpublished opinions with its initial opinion in *Anastasoff v. United States*.¹³⁰ The opinion was vacated on rehearing *en banc* and would have had no legal effect in Indiana in any event. Nevertheless, the vacated opinion warrants attention because of the questions it raised.

Circuit Rule 28(A)(i) of the Eighth Circuit, like its Indiana counterpart, states that unpublished opinions have no precedential value and should not be cited by parties in other appeals.¹³¹ In the initial *Anastasoff* opinion, the Eighth Circuit concluded that its own rule was unconstitutional.¹³²

The court reasoned that the power constitutionally vested in the federal judiciary in Article III of the U.S. Constitution is founded in substantial part on a duty of courts to follow their own precedent.¹³³ According to the court, a departure from the system of following precedent would have been deemed by the framers of the Constitution as “an approach to tyranny” and an “abandonment of all the just checks upon judicial authority.”¹³⁴ Thus, the court concluded, because Rule 28A(i) allowed the court to ignore other decisions of that court simply because they are discretionarily labeled “unpublished,” Rule 28A(i) expanded the judicial power beyond the limits set by Article III.¹³⁵ Insofar as it limited the precedential effect of the court’s prior decisions, the rule was deemed unconstitutional.¹³⁶

The decision quickly sparked interest and debate.¹³⁷ Although now vacated as moot, it seems highly likely that the issues raised in *Anastasoff* will be raised again in the Eighth Circuit and elsewhere.

126. See IND. APPELLATE RULE 65.

127. See IND. APP. R. 65(A).

128. See IND. APP. R. 65(D).

129. See *Worldcom Network Servs., Inc. v. Thompson*, 698 N.E.2d 1233 (Ind. Ct. App. 1998).

130. 223 F.3d 898 (8th Cir. 2000), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (2000).

131. Compare IND. APP. R. 65 (D).

132. See 223 F.3d at 905.

133. See *id.* at 903.

134. *Id.* at 904.

135. See *id.* at 905.

136. See *id.*

137. See, e.g., Jerome I. Braun, *Eighth Circuit Decision Intensifies Debate over Publication and Citation of Appellate Opinions*, JUDICATURE, Sept.-Oct. 2000, at 90; *Panel Says Unpublished Decisions Are Precedent*, FED. LITIGATOR, Oct. 2000, at 246.

E. Mootness Issues Revisited

Mootness issues arise in appellate proceedings with regularity. The general rule is well-settled that moot appeals should be dismissed unless they involve an issue of great public interest that is likely to recur.¹³⁸ Two cases from the survey period are of particular interest for their perspectives on the application of the mootness doctrine.

Indiana appellate courts generally follow a policy of deciding constitutional decisions only when necessary.¹³⁹ The court of appeals, however, departed from this doctrine of judicial restraint in *Walker v. Campbell*.¹⁴⁰ There, the husband of a child's mother filed a petition to adopt the mother's child. The putative biological father contested the adoption and the putative paternal grandparents sought visitation rights.¹⁴¹ The trial court granted the adoption petition, and the putative father and grandparents appealed.¹⁴² Before the court of appeals issued an opinion, the appellants moved to dismiss, reporting that a settlement had been reached.¹⁴³

The court of appeals denied the motion and issued an opinion on the merits, reversing the trial court and holding that certain aspects of Indiana's adoption statutes are unconstitutional.¹⁴⁴ The court opined that the settlement gave the father and the grandparents only an illusory promise of visitation.¹⁴⁵ Moreover, the court found, even if the case were moot, it was appropriate to decide the issues presented because they were of great public interest.¹⁴⁶ Indeed, in other recent cases, the court of appeals followed the precept that even if an appeal is moot, the court may still review issues under a "public interest exception" if the case involves a question of great public importance and is likely to recur.¹⁴⁷

The appellees in *Walker* petitioned for transfer.¹⁴⁸ The supreme court granted the petition for transfer, noted that the court of appeals' opinion was thereby vacated, and then, having jurisdiction over the case, granted the appellants' motion to dismiss.¹⁴⁹

In a different case, the supreme court decided the merits of an issue over which the trial court lacked jurisdiction and another issue that had become moot.

138. See *In re Lawrance*, 579 N.E.2d 32, 37 (Ind. 1991).

139. See *Daugherty v. Allen*, 729 N.E.2d 228, 233 (Ind. Ct. App. 2000), *trans. denied*, No. 30A01-9909-CV-309, 2000 Ind. LEXIS 1038, at *1 (Ind. Oct. 17, 2000).

140. 711 N.E.2d 42 (Ind. Ct. App. 1999), *vacated by* 719 N.E.2d 1248 (Ind. 1999).

141. See *id.* at 46-47.

142. See *id.* at 48.

143. See *id.*

144. See *id.* at 49, 56-57.

145. See *id.* at 48.

146. See *id.* at 48-49.

147. *Union Township Sch. Corp. v. State ex rel. Joyce*, 706 N.E.2d 183, 187 (Ind. Ct. App. 1998); *Bd. of Comm'rs v. Wagoner*, 699 N.E.2d 1196, 1199 (Ind. Ct. App. 1998).

148. *Walker v. Campbell*, 719 N.E.2d 1248, 1248 (Ind. 1999).

149. See *id.* at 1249.

*Cincinnati Insurance Co. v. Wills*¹⁵⁰ involved a challenge to representation of an insured by an attorney employed by the insurer's "captive law firm."¹⁵¹ The trial court ruled that the representation violated the Rules of Professional Conduct, disqualified the attorney, and issued an injunction against various practices of the insurer.¹⁵²

The insurer and the attorney appealed, and the supreme court accepted immediate transfer under former Appellate Rule 4(A)(9).¹⁵³ The supreme court held that the trial court lacked jurisdiction to issue the broad order directed at the insurer.¹⁵⁴ Moreover, the issue regarding the particular attorney was moot because the claim against the insureds had been settled.¹⁵⁵ Still, the supreme court noted that issues relating to the unauthorized practice of law are within the trial court's original jurisdiction.¹⁵⁶ The supreme court decided to address the issue because it was fully developed by the parties and amici curiae, it was important to many members of the bar and their clients, and it affected a number of pending cases.¹⁵⁷ The court observed that there is no case or controversy requirement limiting the jurisdiction of the Indiana Supreme Court, and this case addressed issues that were specifically within the power of the court—regulation of the practice of law.¹⁵⁸

F. An Appellate Court's Discretion to Overlook Significant Procedural Defects

The trial court in *Pope by Smith v. Pope*¹⁵⁹ denied a motion to remove an administratrix from an estate but did not certify the order for interlocutory appeal.¹⁶⁰ The order was also not made final and appealable by use of the finality language of Trial Rule 54(B).¹⁶¹ Nevertheless, the parties proceeded forward as if the order was appealable as a matter of right, and the court of appeals issued an opinion on the merits.¹⁶² The court noted the defect, but elected to exercise its discretion to review this appeal under former Appellate Rule 4(E).¹⁶³ The

150. 717 N.E.2d 151 (Ind. 1999).

151. *Id.* at 153.

152. *See id.* at 153-54.

153. *See id.* at 154. The emergency transfer rule is now IND. APP. R. 56(A).

154. *See Cincinnati Ins. Co.*, 717 N.E.2d at 154.

155. *See id.*

156. *See generally id.*

157. *See id.*

158. *See id.* at 154 n.2.

159. 701 N.E.2d 587 (Ind. Ct. App. 1998).

160. *See id.* at 588 n.1.

161. *See id.* "[T]he court may direct the entry of a final judgment as to one or more but fewer than all the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." IND. TRIAL RULE 54(B).

162. *See Pope*, 701 N.E.2d at 588 n.1.

163. *See id.* The rule has been moved to Appellate Rule 66(B), but it is not substantively

rarely cited rule states:

No appeal shall be dismissed as of right because the case was not finally disposed of in the trial court or Administrative Agency as to all issues and parties, but upon suggestion or discovery of such a situation, the Court may, in its discretion, suspend consideration until disposition is made of such issues, or it may pass upon such adjudicated issues as are severable without prejudice to parties who may be aggrieved by subsequent proceedings in the trial court or Administrative Agency.¹⁶⁴

Former Appellate Rule 4(E) was invoked again in at least two other cases during the survey period wherein the court of appeals elected to take a case despite a procedural defect.

In *National General Insurance Co. v. Riddell*,¹⁶⁵ arbitrators entered a damage award against National General in the amount of \$220,000.¹⁶⁶ The insurance policy at issue had an “escape clause” which allowed either party to demand a trial if the arbitration award exceeded the policy limits. The insurer invoked the clause and brought suit to resolve the damages issue.¹⁶⁷ The trial court entered an order of partial summary judgment determining that the “escape clause” was void as against public policy and an appeal ensued.¹⁶⁸

The trial court did not certify its summary judgment order for interlocutory appeal, nor was it made otherwise appealable by the finality language found in Trial Rule 56(C).¹⁶⁹ National General nevertheless argued that the appeal was from an order “for the payment of money” and was thus appealable as a matter of right pursuant to former Appellate Rule 4(B)(1).¹⁷⁰ The court of appeals rejected this argument, and in so doing collected several cases illustrating the types of appeals that the “payment of money” provision contemplates.¹⁷¹ The court of appeals also concluded that, procedural defect notwithstanding, it would accept jurisdiction over the appeal pursuant to former Appellate Rule 4(E).¹⁷²

A similar procedural situation arose in *Nass v. State ex rel. Unity Team*,

modified.

164. IND. APPELLATE RULE 66(B).

165. 705 N.E.2d 465 (Ind. Ct. App. 1998).

166. *See id.* at 466.

167. *See id.*

168. *See id.*

169. *See generally id.* Trial Rule 56(C) provides:

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

IND. TRIAL RULE 56(C).

170. *Riddell*, 705 N.E.2d at 466 n. 1. Former Appellate Rule 4(B)(1) may now be found at Appellate Rule 14(A)(1).

171. *See id.*

172. *See id.*

Local 9212.¹⁷³ In this case, unions representing executive branch state employees brought a complaint for mandamus seeking to compel the state auditor to process wage assignments by non-union employees for “deduction of fair share” payments to the unions.¹⁷⁴ The auditor appealed partial summary judgment in favor of the unions. The auditor did not seek certification to appeal under former Appellate Rule 4(B)(6), but contended that the appeal was a proper interlocutory appeal of right under former Appellate Rule 4(B)(1)—an appeal of an interlocutory order for the payment of money.¹⁷⁵

The court of appeals was reluctant to declare that the appeal was one of right under former Appellate Rule 4(B)(1), because the auditor admitted that she had no ultimate interest in whether the money at issue was retained by the employees or distributed to the unions.¹⁷⁶ The court of appeals, however, decided that even if the appeal was not properly before the court, it had, in the past, declined to dismiss improperly-brought appeals in cases of significant public interest and where the same issue would be raised in a new appeal.¹⁷⁷ The court of appeals therefore exercised its discretion under former Appellate Rule 4(E) and decided the case on its merits.¹⁷⁸

G. What Happens When a Court of Appeals Panel Splits Three Ways?

In *Miller v. State*,¹⁷⁹ the defendant was charged with three counts of attempted murder.¹⁸⁰ After a bench trial, the trial court found the defendant guilty of criminal recklessness.¹⁸¹ On appeal, the court of appeals’ three-member panel could not agree on the disposition of the defendant’s challenge to these convictions.¹⁸² Judge Mattingly, writing the lead opinion, believed that the defendant’s criminal recklessness convictions must be reversed, but that the trial court could resentence the defendant to three convictions of attempted battery with a deadly weapon.¹⁸³ Judge Baker believed the criminal recklessness convictions should be affirmed.¹⁸⁴ Judge Bailey believed the criminal recklessness convictions must be reversed and that double jeopardy principles precluded resentencing for attempted battery with a deadly weapon.¹⁸⁵

173. 718 N.E.2d 757 (Ind. Ct. App. 1999), *trans. denied.*, 735 N.E.2d 224 (Ind. 2000).

174. *Id.* at 760.

175. *See id.* at 761-62.

176. *See id.* at 762.

177. *See id.*

178. *See id.*

179. 726 N.E.2d 349 (Ind. Ct. App. 2000), *trans. granted*, No. 49A02-9904-CR-289, 2000 Ind. LEXIS 792, at *1 (Ind. Aug. 25, 2000).

180. *See id.* at 350.

181. *See id.*

182. *See id.* at 350-51.

183. *See id.* at 353-55.

184. *See id.* at 356 (Baker, J., concurring in part and dissenting in part).

185. *See id.* at 356-58 (Bailey, J., concurring in part and dissenting in part).

The Indiana Supreme Court granted transfer, vacating the court of appeals' opinion, and has not issued an opinion as of the date of this writing.¹⁸⁶ Still, of interest from an appellate practice standpoint is the manner in which the court of appeals handled this three-way split of opinion—an issue of apparent first impression in Indiana. The lead opinion stated:

We believe the correct resolution is that articulated in *Smith v. United States*. Under the *Smith* approach, where a majority of the judges votes that a judgment should be reversed the judgment will be reversed, even though there are several opinions presented which state different grounds for reversal and even though no majority favors any one of the opinions. The effect of a reversal in that situation is to annul the judgment below. The reversal is an adjudication only of the matters expressly discussed and decided—the matters that are decided on appeal become the law of the case in future proceedings on remand and re-appeal. In *Smith*, a majority of the Court found no error with regard to each individual allegation of error. However, “on the question of reversal, the minorities unite, and constitute a majority of the court.” The Court reversed the judgment below and remanded for further proceedings in conformity with its opinion.¹⁸⁷

The court of appeals rejected the holding of cases such as *State v. Gustafson*,¹⁸⁸ in which the Wisconsin Supreme Court held that when a majority concludes there is prejudicial error but no majority agrees on some specific ground of error fatal to the judgment, the judgment must be affirmed.¹⁸⁹ The *Gustafson* approach could, in some cases, lead to a fundamentally unfair result, and it would be inappropriate in this particular case because a majority agreed on the specific nature of the trial court error, but was unable to agree only on the further disposition of the case in light of that error.¹⁹⁰

The court of appeals would have remanded to the trial court, presumably “for further proceedings in conformity with its opinion.”¹⁹¹ The majority, however, decided only that the defendant’s criminal recklessness convictions must be vacated.¹⁹² If the supreme court had not granted transfer, it apparently would have been up to the trial court to decide which path to follow on remand. The correctness of that decision presumably could have been challenged in another appeal, but the same deadlock would occur if that appeal were assigned to the same panel.

186. See *Miller v. State*, No. 49502-0008-CR-505, 2000 Ind. LEXIS 792, at *1 (Ind. Aug. 25, 2000).

187. *Miller*, 726 N.E.2d at 355 (internal citations omitted).

188. 359 N.W.2d 920 (Wis. 1985).

189. See *Miller*, 726 N.E.2d at 355.

190. See *id.* at 355-56.

191. *Id.* at 355.

192. See *id.*

H. Date of File-mark Controls, Sometimes

Two opinions issued during the survey period offer a contrast in the significance of a trial court clerk's file-mark date in perfecting an appeal.

One of the issues raised in *Edwards v. Edwards*¹⁹³ was whether the record was timely filed, which in turn depended on the date the praecipe was filed.¹⁹⁴ The praecipe was alleged to have been hand-delivered to the trial court clerk on January 23, 1999, and thus arguably should have been file-marked with that date.¹⁹⁵ If that was the proper date to rely upon, then the record of proceedings was not timely filed.¹⁹⁶ However, the actual file-mark date on the praecipe was January 26, 1999, which, if used, made the filing of the record of proceedings timely.¹⁹⁷ The court of appeals determined that the appeal had been perfected, stating: "We use the date file-stamped by the clerk for determining the date filed."¹⁹⁸

The timing of the filing of the praecipe was at issue in *Cooper v. State*.¹⁹⁹ In *Cooper*, the praecipe was due to be filed July 16, 1999.²⁰⁰ The file-mark on the praecipe bore a July 20, 1999 date, and the State argued that it was therefore untimely and that the appeal should be dismissed.²⁰¹ As in *Edwards*, the file-mark date was apparently erroneous.²⁰² The praecipe should have been shown as filed July 15, 1999, because that was the day it was mailed.²⁰³ In somewhat of a contrast to the *Edwards* decision, the appellate court in *Cooper* did not consider itself bound by the file-mark date on the praecipe, but instead relied upon the date of mailing, finding that appellate jurisdiction had been properly perfected.²⁰⁴

Edwards and *Cooper* both demonstrate how the Indiana Court of Appeals will often go to some lengths to address the merits of an appeal, rather than find a technical default.

I. Standards of Review

A number of opinions during the survey period state the variously applicable standards of appellate review. Only a few stand out as noteworthy.

193. 709 N.E.2d 1055 (Ind. Ct. App. 1999).

194. *See id.* at 1057.

195. *See* IND. TRIAL RULE 5(E).

196. *See generally id.*

197. *See Edwards*, 709 N.E.2d at 1057.

198. *Id.*

199. 714 N.E.2d 689 (Ind. Ct. App. 1999), *trans. denied*, 726 N.E.2d 303 (Ind. 1999).

200. *See id.* at 690.

201. *See id.*

202. *See id.*

203. *See id.* (citing Indiana Trial Rule 5(E), made applicable in criminal proceedings by Indiana Criminal Rule 21).

204. *See id.* at 690-91.

In *Sturgeon v. State*²⁰⁵ the Indiana Supreme Court addressed for the first time the standard of review for decisions to grant or deny a change of judge under the new version of Indiana Criminal Rule 12. The supreme court noted that under the prior version of this rule, the “abuse of discretion” standard was applied.²⁰⁶ However, “[s]ince Criminal Rule 12 is now neither ‘automatic’ nor ‘discretionary,’ . . . a different standard of review is appropriate.”²⁰⁷ Now the standard for reviewing a trial judge’s decision to grant or deny a motion for change of judge under Criminal Rule 12 is whether the judge’s decision was clearly erroneous.²⁰⁸ The court concluded that the historical facts presented in this case did not support a reasonable inference of trial court bias or prejudice.²⁰⁹ Thus, the trial judge’s decision to deny a change of judge was not clearly erroneous.²¹⁰

In *Anthem Insurance Cos. v. Tenet Healthcare Corp.*,²¹¹ the Indiana Supreme Court clarified a standard of review issue that divided the court of appeals.²¹² In *Anthem*, an insurer sued a parent corporation of a chain of psychiatric hospitals along with several subsidiaries and affiliated providers.²¹³ The trial court granted the motions to dismiss for lack of personal jurisdiction for some but not all of the defendants.²¹⁴ The supreme court clarified the standard of review for such determinations. It first noted that court of appeals’ decisions conflict on this issue, with some applying de novo review, and others, including the court of appeals in this case, using an abuse of discretion standard.²¹⁵ The supreme court noted that the court of appeals cited as support *Mid-States Aircraft Engines, Inc. v. Mize Co.*,²¹⁶ a case reviewing the *procedure* by which a trial court resolves a jurisdictional issue.²¹⁷ However, the issue in this case was not the procedure used by the trial court, but the result.²¹⁸ Therefore, a de novo standard should be employed to review the question of whether personal jurisdiction exists.²¹⁹ Thus, the court of appeals in this case used the incorrect standard of review.²²⁰

The supreme court then paused to distinguish between findings of fact and

205. 719 N.E.2d 1173 (Ind. 1999).

206. *Id.* at 1182.

207. *Id.*

208. *See id.*

209. *See id.*

210. *See id.*

211. 730 N.E.2d 1227 (Ind. 2000).

212. *See id.*

213. *See id.* at 1230.

214. *See id.*

215. *See id.* at 1237.

216. 467 N.E.2d 1242, 1247 (Ind. Ct. App. 1984).

217. *See Anthem*, 730 N.E.2d at 1237.

218. *See id.*

219. *See id.* at 1238.

220. *See id.*

conclusions of law in the context of personal jurisdiction.²²¹ “The legal question of whether personal jurisdiction exists given a set of facts is reviewable de novo.”²²² The trial court’s findings of jurisdictional facts, however, are reviewed for clear error.²²³

The final case in this category is perhaps more noteworthy for the question it raises rather than for any answer it provides. In *D.B. v. State*,²²⁴ a juvenile found to be delinquent contended that certain evidence should have been suppressed because the search producing the evidence was unconstitutional.²²⁵ The court of appeals upheld the adjudication, stating: “A trial court possesses broad discretion in ruling on the admissibility of evidence, and we will not disturb its decision absent a showing of an abuse of discretion. We find no abuse of discretion here”²²⁶ This was not the first time the court of appeals used an abuse of discretion standard in cases where the issue was admissibility of evidence obtained through allegedly unconstitutional search and seizure.²²⁷ *Harless v. State* cited an Indiana Supreme Court case as supporting authority for an abuse of discretion standard of review.²²⁸ However, that case concerned the admissibility of a redacted transcript, which was not a constitutional issue.²²⁹ If the admission of unconstitutionally seized evidence is prohibited, it seems that the trial court lacks discretion to admit it. The supreme court denied transfer in *D.B.*, but Justice Sullivan voted to grant transfer, “believing it worthwhile to correct the standard of review applicable to the claim at issue here.”²³⁰

*J. Failure to File Appellee’s Brief Did Not Preclude Appellee
from Seeking Transfer*

In the case of *Weinberg v. Bess*,²³¹ a medical malpractice defendant moved for summary judgment, contending that the action was time-barred.²³² The trial court denied the motion, and the defendant brought an interlocutory appeal.²³³ The plaintiff failed to file an appellee’s brief. The court of appeals, applying “a

221. *See id.*

222. *Id.*

223. *See id.*

224. 728 N.E.2d 179 (Ind. Ct. App. 2000), *trans. denied.*, No. 49A04-9911-JV-504, 2000 Ind. LEXIS 831, at *1 (Ind. Aug. 15, 2000).

225. *See id.* at 181.

226. *Id.* at 182 (internal citation omitted).

227. *See, e.g., D.I.R. v. State*, 683 N.E.2d 251, 252 (Ind. Ct. App. 1997); *Harless v. State*, 577 N.E.2d 245, 247 (Ind. Ct. App. 1991).

228. *Harless*, 577 N.E.2d at 247.

229. *See Kremer v. State*, 514 N.E.2d 1068, 1073 (Ind. 1987).

230. *D.B. v. State*, No. 49A04-9911-JV-504, 2000 Ind. LEXIS 831, at *1 (Ind. Aug. 15, 2000). *See also* 741 N.E.2d 1249 (2000) (table).

231. 717 N.E.2d 584 (Ind. 1999).

232. *See id.* at 588.

233. *See id.*

‘less rigorous’ standard of review,” reversed and remanded with instructions to enter summary judgment in favor of the defendant.²³⁴ After the court of appeals denied the plaintiff’s petition for rehearing, the plaintiff filed a petition for transfer, which the supreme court granted.²³⁵ There was no true majority opinion in the usual sense. Instead, two justices joined a plurality opinion, two justices concurred in the result, and one justice did not participate.²³⁶

The plurality rejected the defendant’s argument that the plaintiff was required to file an appellee’s brief to preserve her claim on transfer.²³⁷ The plurality stated that under Indiana case law, an appellee is not required to file a brief.²³⁸ If the appellee opts to not file a brief, the court may “1) order the appellee to file a brief, 2) consider the issues presented by appellant without aid of appellee’s arguments, or 3) reverse the lower court’s judgment if appellant shows apparent or prima facie error.”²³⁹ Apparently finding the failure to file an appellee’s brief no bar to seeking rehearing, the plurality concluded that a party whose petition for rehearing is denied was entitled to seek transfer under former Appellate Rule 11(B) (now Appellate Rule 57).²⁴⁰

K. Interlocutory Appeals—Orders or Issues?

*Budden v. Board of School Commissioners*²⁴¹ is a significant case interpreting Trial Rule 23, which governs class actions. But the case also clarifies exactly what is being certified when a trial court grants leave to seek interlocutory appellate review under current Appellate Rule 14(B).²⁴² The rule itself states that discretionary interlocutory appeals may be taken from certified “orders” of the trial courts.²⁴³ Nevertheless, the courts have occasionally spoken in terms of certified “issues” or “questions” for interlocutory appeal.²⁴⁴

In *Budden*, the trial court certified an order for interlocutory appeal, but had also certified five questions to accompany the certified order.²⁴⁵ The parties clashed in the trial court over the propriety of the additionally certified

234. *Id.* at 589 n.7.

235. *See id.* at 589.

236. *See generally id.* at 591.

237. *See id.* at 589 n.9.

238. *See id.*

239. *Id.* (citation omitted).

240. *See id.*

241. 698 N.E.2d 1157 (Ind. 1998).

242. *See id.*

243. *See* IND. APPELLATE RULE 14(B).

244. *See, e.g.,* Figert v. State, 686 N.E.2d 827, 829 (Ind. 1997) (trial court certified “questions for interlocutory appeal”); Rita v. State, 674 N.E.2d 968, 969 (Ind. 1996) (“trial court certified several issues for interlocutory appeal”); Irvine v. Rare Feline Breeding Ctr., Inc., 685 N.E.2d 120, 123 (Ind. Ct. App. 1997) (trial court certified “three issues for interlocutory appeal”).

245. *See Budden*, 698 N.E.2d at 1160.

questions.²⁴⁶ The supreme court gave a definitive procedural reply:

We affirm today what has been implicit in these and other decisions: although the trial court certifies an order, there is nothing to prohibit the trial court from identifying the specific questions of law presented by the order for the appellate court's review. Indeed, it is often helpful if this occurs. Certification of a question, rather than the technically proper certification of an order, is inconsequential error as long as it is clear what order is affected. Any decisional law suggesting the contrary is disapproved.²⁴⁷

These statements are a further clarification of the supreme court's prior holding that the appellate rules do not permit certification of particular issues, only orders, but that issues properly raised in certified orders are available for appellate review.²⁴⁸

L. Issues Raised and Not Raised in Earlier Appeals Involving the Same Case

One opinion of the Indiana Supreme Court during the survey period made clear that when an issue is squarely raised in an earlier appeal involving the same parties and proceeding, the decision on that issue becomes law of the case. In *State v. Farber*,²⁴⁹ a pre-trial interlocutory appeal was initiated, and the court of appeals ruled that certain evidence of the defendant's conversation with the police was properly admissible.²⁵⁰ Farber was ultimately convicted of murder and robbery and he appealed those judgments to the supreme court.²⁵¹ Among the allegations of error in the appeal to the supreme court was the assertion that the conversation with the police was inadmissible.²⁵² Referring to the earlier interlocutory appeal, the court stated that "the question Farber seeks to litigate has already been adjudicated. . . . [W]e will not relitigate it."²⁵³

But what about issues that *might have been*, but were not raised in an earlier appeal? The general rule is that if an issue is available but not raised for appellate review in an earlier appeal, it cannot be raised in a subsequent appeal.²⁵⁴ Although this principle was affirmed in *Sleweon v. Burke, Murphy, Constanza & Cuppy*,²⁵⁵ the court of appeals carved out an exception to the

246. *See id.* at 1166 n.14.

247. *Id.*

248. *See Harbour v. Arelco, Inc.*, 678 N.E.2d 381, 385-86 (Ind. 1997).

249. 677 N.E.2d 1111 (Ind. Ct. App. 1997).

250. *See id.* at 1115.

251. *See Farber v. State*, 703 N.E.2d 151, 152 (Ind. 1998).

252. *See id.*

253. *Id.* at 153.

254. *See, e.g., Citizens Action Coalition of Ind., Inc. v. NIPSCO*, 582 N.E.2d 387, 391 (Ind. Ct. App. 1991).

255. 712 N.E.2d 517, 521 (Ind. Ct. App. 1999), *trans. denied*, 726 N.E.2d 310 (Ind. 1999).

general rule during the survey period in *Mafnas v. Owen County Office of Family & Children*.²⁵⁶

The mother and father in the Mafnas family attempted to appeal an order of the trial court that found their children to be in need of governmental services (CHINS) and directed them to pay for services provided by the county.²⁵⁷ The appeal was dismissed, however, when they failed to timely file a record of proceedings.²⁵⁸ Later, the Mafnases brought a separate, subsequent appeal of an order finding them in contempt for failing to make the ordered payments.²⁵⁹

In the second appeal, the Mafnases again attempted to challenge the propriety of the initial CHINS determination and payment order.²⁶⁰ The Owen County Office of Family and Children asserted that the Mafnases were precluded from raising those issues because they were available in the initial appeal that had been dismissed.²⁶¹ The court of appeals acknowledged the general rule but distinguished this case on the basis that the issue never got a review on the merits in the first appeal.²⁶² The court of appeals held that “[w]hen the first appeal is dismissed for failure to meet jurisdictional requirements, the appellant may be allowed, in a subsequent appeal, to raise issues which were raised in the initial appeal.”²⁶³

M. The Role of the Appellate Court in Revising Criminal Sentences

Scholars of criminal law and appellate procedure may want to read *Bluck v. State*,²⁶⁴ and in particular the dissenting opinion.²⁶⁵ In short, the dissent questioned the propriety of the court of appeals, as an intermediate appellate court, reducing criminal sentences found to be “manifestly unreasonable” absent the adoption of more objective criteria for so doing.²⁶⁶

The possibility for conflicting views among members of the court of appeals on this topic takes on added weight in light of the jurisdictional change effective January 1, 2001. The court of appeals will now be reviewing all criminal appeals

256. 699 N.E.2d 1210 (Ind. Ct. App. 1998).

257. *See id.* at 1211.

258. *See id.*

259. *See id.*

260. *See id.*

261. *See id.* at 1211-12.

262. *See id.* at 1212.

263. *Id.*

264. 716 N.E.2d 507 (Ind. Ct. App. 1999).

265. *See id.* at 516 (Garrard, J., dissenting).

266. *Id.* at 517 (citation omitted). The state constitution expressly grants to the supreme court and court of appeals the power to review and revise criminal sentences. *See* IND. CONST. art. VII, §§ 4, 6. That authority is implemented and limited by rule in Indiana Appellate Rule 7(B) (former Appellate Rule 17(B)), which provides that a reviewing court “shall not revise a sentence authorized by statute unless the sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.” IND. APPELLATE RULE 7(B).

except those involving a sentence of death or life without parole.²⁶⁷ Some criminal sentences falling into this new category will be of extraordinary length,²⁶⁸ posing potential questions about manifest reasonableness.

*N. The Denial of Relief in an Original Action Is Not Res Judicata
in a Later Appeal*

*Vermillion v. State*²⁶⁹ was a direct criminal appeal in which the defendant contended that the trial court erroneously denied his motions for discharge under Indiana Criminal Rule 4(C).²⁷⁰ The defendant's original action sought a writ of mandamus ordering his discharge, and the supreme court denied the defendant's request.²⁷¹ In the criminal appeal, the State argued that the supreme court's denial of a writ of mandamus constituted law of the case, thus barring the defendant from raising the issue on appeal.²⁷² The supreme court rejected this argument.²⁷³ In the original action, the supreme court concluded that the defendant was not entitled to mandamus after examining both the materials submitted and the law governing original actions.²⁷⁴ The court noted that an original action may not be used as a substitute for an appeal, and that the face of the record in the original action did not support the defendant's assertion that certain continuances were made necessary by the prosecutor's action.²⁷⁵

On the direct appeal, the supreme court concluded that the original action ruling did not foreclose the presentation of the speedy trial claim on appeal.²⁷⁶ This seems correct because a writ of mandamus is appropriate only if "the remedy available by appeal will be wholly inadequate."²⁷⁷ It would seem incongruous if a party that was denied a writ of mandamus because its appellate remedy was adequate was later denied any appellate remedy based on the denial of a writ of mandamus.

267. See *supra* text accompanying notes 5-17.

268. See, e.g., *Byers v. State*, 709 N.E.2d 1024, 1025 (Ind. 1999) (total sentence of 200 years); *Greer v. State*, 684 N.E.2d 1140, 1140 (Ind. 1997) (total sentence of 220 years); *McReynolds v. State*, 460 N.E.2d 960, 961 (Ind. 1984) (total sentence of 270 years).

269. 719 N.E.2d 1201 (Ind. 1999).

270. See *id.* at 1203-04. Criminal Rule 4(C) provides for the discharge of defendants who are made to answer criminal charges for longer than a year, unless the delay is caused by the defendant or due to congestion of the court calendar. See *id.*

271. See *id.* at 1204.

272. See *id.* at 1204 n.5.

273. See *id.*

274. See *id.*

275. See *id.*

276. See *id.*

277. IND. ORIGINAL ACTION RULE 3(A)(6).

O. Clarity on Timeframe for Seeking Review of IDEM Orders

In *Wayne Metal Products Co. v. IDEM*,²⁷⁸ the commissioner of the Indiana Department of Environmental Management (IDEM) issued an order to Wayne Metal Products Company to cease and desist its violations of certain regulations and to pay a civil fine.²⁷⁹ Twenty days after receiving the order, Wayne Metal filed a written request for further administrative review of the order.²⁸⁰ The environmental law judge dismissed the petition as untimely, the trial court agreed, and an appeal was taken.²⁸¹ The statute at issue reads:

Except as otherwise provided in a notice issued under subsection (c) or in a law relating to emergency orders, an order of the commissioner under this chapter takes effect twenty (20) days after the alleged violator receives the notice, unless the alleged violator requests a review of the order before the twentieth day after receiving the notice by the filing of a written request with the commissioner on a form prescribed by the commissioner.²⁸²

Noting that the statute says “before” the twentieth day and not “on” or “within” the twentieth day, the court of appeals found the statute unambiguous, and it affirmed the decisions of the lower tribunals.²⁸³

P. Late Ruling on Motion to Correct Error Voidable, Not Void

The supreme court weakened a trap for the unwary or confused in *Cavinder Elevators, Inc., v. Hall*.²⁸⁴ Indiana Trial Rule 53.3(A) declares that a motion to correct error is deemed denied if the trial court fails to rule within certain time limits.²⁸⁵ In *Cavinder Elevators*, the trial court granted summary judgment to the defendant, the plaintiff filed a motion to correct error, and the trial court failed to timely rule on the motion.²⁸⁶ The plaintiff filed a praecipe to initiate an appeal from the deemed denial.²⁸⁷ Shortly thereafter the trial court granted the plaintiff’s motion based on newly discovered evidence and set aside the prior ruling granting summary judgment.²⁸⁸ The plaintiff did not further pursue his appeal from the deemed denial of his motion. The defendant, however, initiated an appeal from the order belatedly granting the motion.²⁸⁹ In his appellee’s brief,

278. 721 N.E.2d 316 (Ind. Ct. App. 1999), *trans. denied*, 735 N.E.2d 232 (Ind. 2000).

279. *See id.* at 317.

280. *See id.*

281. *See id.*

282. *Id.* (citing IND. CODE § 13-7-11-2(d) (1999)).

283. *Id.* at 319.

284. 726 N.E.2d 285 (Ind. 2000).

285. *See* IND. TRIAL RULE 53.3(A).

286. *Cavinder Elevators, Inc.*, 726 N.E.2d at 286.

287. *See id.*

288. *See id.* at 287.

289. *See id.*

“the plaintiff sought review on the merits of the issues [raised], . . . including the grant of summary judgment and the claim of newly discovered evidence.”²⁹⁰

The court of appeals held that the trial court’s belated ruling granting the motion to correct error and setting aside the summary judgment was a nullity.²⁹¹ The court of appeals then addressed the merits of the plaintiff’s claim of newly discovered evidence, raised on cross-appeal, and concluded that no error occurred when the plaintiff’s motion to correct error based on newly discovered evidence was deemed denied.²⁹²

The supreme court granted transfer, and the three-member majority first addressed the propriety of the defendant’s appeal.²⁹³ The court noted that Trial Rule 59(F) “makes appealable any order ‘modif[ying] or setting aside’ a final judgment,” and that former Appellate Rule 4(A) provided “that a ruling or order by the trial court granting or denying relief on a motion to correct error is an appealable final order.”²⁹⁴ The court then rejected the notion that the “deemed denied” language in Trial Rule 53.3(A) precludes a timely appeal under Trial Rule 59(F) and former Appellate Rule 4(A).²⁹⁵ The court continued:

Accordingly, we hold that the belated grant of the motion to correct error in this case is not necessarily a nullity but rather is voidable and subject to enforcement of the “deemed denied” provision of Trial Rule 53.3(A) in the event the party opposing the motion to correct error promptly appeals. Had the defendant failed to promptly appeal this belated grant, such failure would constitute waiver and would have precluded a subsequent appellate claim that the motion to correct error was deemed denied under Trial Rule 53.3(A).²⁹⁶

Thus, the defendant was procedurally correct in appealing the belatedly granted motion to correct error.

The court then turned to the plaintiff’s procedural options. The court held that the party filing the motion to correct error may seek appellate review on the merits of the “deemed denied” motion.²⁹⁷ The moving party preserves its right to appeal when it properly files a well-founded motion to correct error and timely files a praecipe when the trial court has failed to act within the Rule 53.3(A) period, even if he thereafter receives an order from the court granting the relief requested.²⁹⁸ If the opposing party appeals the belated order granting relief, the moving party may reassert the issues raised in the “deemed denied” motion to

290. *Id.*

291. *See id.*

292. *See id.*

293. *See id.*

294. *Id.*

295. *Id.* at 287-88.

296. *Id.* at 288.

297. *See id.*

298. *See id.*

correct error in its appellee's brief.²⁹⁹

The court concluded as follows:

Summarizing our conclusions regarding the “deemed denied” problem, we reiterate that the belated grant of the plaintiff’s motion to correct error in this case was not a nullity but rather was voidable subject to the defendant’s timely appeal under Trial Rule 59(F) and [former] Appellate Rule 4(A). If the defendant had failed to promptly appeal the belated grant of such a motion, however, this failure would have waived and thus precluded subsequent appellate review of whether the trial court’s ruling violated Trial Rule 53.3(A). Because the defendant promptly appealed from the belated grant of the motion to correct error, and because the plaintiff timely commenced his appeal from the Rule 53.3(A) deemed denial of his motion to correct error, the defendant’s appeal should be considered, as should the plaintiff’s issues raised as cross-errors under Trial Rule 59(G). However, if the plaintiff, as the party filing the motion to correct error, had failed to commence a timely appeal following the deemed denial pursuant to Trial Rule 53.3(A), such failure would have waived the claims and precluded the plaintiff from raising them as cross-errors on appeal.³⁰⁰

The court then reversed the entry of summary judgment for defendant and remanded to the trial court.³⁰¹

Q. When Is a Motion to Correct Error Not a Prerequisite to Appeal?

The Indiana Supreme Court rendered a short but significant opinion interpreting Trial Rule 59 during the survey period. As a prerequisite to perfecting an appeal, Trial Rule 59(A)(2) requires that a motion to correct error be filed if the party is claiming that “a jury verdict is excessive or inadequate.”³⁰² The appellant in *Tipmont Rural Electric Membership Corp. v. Fischer*³⁰³ argued on appeal that a jury verdict entered in the underlying proceeding was *outside the*

299. *See id.*

300. *Id.* at 289. The dissent would hold that the trial court’s belated granting of the motion to correct error was a nullity, that the defendant could not appeal from a nullity, that the plaintiff’s failure to perfect his earlier initiated appeal resulted in forfeiture of his appeal, and that the court therefore lacked jurisdiction over the attempted appeals. *See id.* at 290-92 (Sullivan, J., dissenting).

301. *See id.* at 290.

302. IND. TRIAL RULE 59(A). A motion to correct error is also a mandatory prerequisite to an appeal if a party seeks to address “[n]ewly discovered material evidence, including alleged jury misconduct, capable of production within thirty (30) days of final judgment and which, with reasonable diligence, could not have been discovered and produced at trial.” T.R. 59(A)(1). “All other issues and grounds for appeal appropriately preserved during trial may be initially addressed in the appellate brief.” T.R. 59(A).

303. 716 N.E.2d 357 (Ind. 1999).

scope of the evidence.³⁰⁴ The court of appeals held that the issue regarding whether the damages were outside the scope of the evidence had been waived because Tipmont had not filed a motion to correct error challenging the alleged excessiveness of the verdict.³⁰⁵

The supreme court granted transfer to clarify a point of appellate procedural law.³⁰⁶ The court held that when Trial Rule 59(a)(2) speaks of a jury verdict being "inadequate or excessive," the rule is referring to the common-law doctrines of additur and remittitur.³⁰⁷ Additur is a trial court order, or the procedure by which the order is entered, used to increase a damage award, usually with the defendant's consent, in lieu of granting a new trial because of patently inadequate damages.³⁰⁸ Similarly, remittitur is a trial court order, or the procedure by which the order is entered, used to reduce or propose to reduce a patently excessive portion of a damage award to avoid relitigation.³⁰⁹

The court distinguished those concepts from the case at hand, where the appellant presented the "more ordinary question about the sufficiency of the evidence supporting the verdict."³¹⁰ The court held that when the alleged error is that the damage award is outside the scope of the evidence, it may be presented to the appellate court without the need for filing a motion to correct error.³¹¹

The court of appeals also rendered an opinion applying Trial Rule 59 during the survey period. In *Marsh v. Dixon*,³¹² the plaintiff brought a products liability claim in which he had to overcome a release of liability he had signed.³¹³ The trial court entered summary judgment for the defendants, and then the plaintiff filed a "non-mandatory" motion to correct error.³¹⁴ Trial Rule 59(A) states that the filing of a motion to correct error is a prerequisite to an appeal only when a party raises issues relating to newly discovered evidence or a claim that a jury verdict is excessive or inadequate.³¹⁵ In this instance, the plaintiff's motion to correct error raised only two issues: (1) whether the evidence created a genuine issue of material fact so as to preclude the entry of summary judgment, and, (2)

304. *See id.* at 358.

305. *See* Tipmont Rural Elec. Membership Corp. v. Fischer, 697 N.E.2d 83, 89 (Ind. Ct. App. 1998), *aff'd*, 716 N.E.2d 357 (Ind. 1999). Despite the finding of waiver, the court of appeals nevertheless addressed the issue on the merits, finding that the verdict was within the scope of the evidence. *See id.* at 89-90.

306. *See Fischer*, 716 N.E.2d at 357.

307. *Id.* at 358.

308. *See* BLACK'S LAW DICTIONARY 39 (7th ed. 1999).

309. *See id.* at 1298.

310. *Fischer*, 716 N.E.2d at 358.

311. *See id.* The court summarily affirmed the opinion of the court of appeals in all other respects. *See id.* (citing IND. APP. R. 11(B)(3) (repealed Jan. 1, 2001)).

312. 707 N.E.2d 998 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 302 (Ind. 1999).

313. *See id.* at 999.

314. *See id.*

315. *See* IND. TRIAL RULE 59(A)(1) and (2).

the viability of a products liability claim on the facts presented.³¹⁶

The motion was denied and an appeal was taken. On appeal, in addition to the two issues raised in the motion to correct error, the appellant raised a third issue—the validity of the release.³¹⁷ The appellee argued that because the third issue was not included in the motion to correct error, it was waived.³¹⁸ Relying on the plain language of Trial Rule 59, the court of appeals found no waiver and addressed all the issues on the merits.³¹⁹ As the appellate court noted, the rule states that issues other than those required to be raised in a motion to correct error may be “initially addressed in the appellate brief” so long as they were “appropriately preserved during the trial.”³²⁰

R. Statutory Motion to Correct Erroneous Sentence Is a PCR Petition

*Waters v. State*³²¹ provides important procedural guidance in the area of successive criminal post-conviction relief proceedings. In addition to the direct appeal afforded to those convicted of crimes, Indiana also permits such persons to collaterally attack their convictions through a petition seeking post-conviction relief (PCR).³²² A convicted person has the right to file one PCR in the court where the conviction took place.³²³ However, effective January 1, 1994, a convicted person who already sought post-conviction relief once cannot file another PCR without obtaining leave from the appellate court of appropriate jurisdiction.³²⁴

The Indiana General Assembly has also separately authorized a statutory proceeding whereby a convicted criminal can file in the court of conviction a motion asking that an allegedly “erroneous sentence” be corrected.³²⁵ Generally, such a motion might be appropriate where the sentence imposed is erroneous on its face, such as a sentence that is in excess of that authorized by statute.³²⁶

Alex Waters had been convicted of various drug-related offenses and his convictions had been affirmed on appeal. He sought and was denied post-conviction relief, a decision that was also affirmed on appeal. As provided in the PCR rules noted above, Waters then sought leave of the court of appeals to file

316. See *Marsh*, 707 N.E.2d at 1000.

317. See *id.*

318. See *id.*

319. See *id.*

320. *Id.* (quoting IND. TRIAL RULE 59(A)(1) and (2)).

321. 703 N.E.2d 688 (Ind. Ct. App. 1998).

322. See INDIANA POST-CONVICTION RULE 1 § 2.

323. See *id.*

324. See *id.* All PCR appeals and petitions seeking leave to file a successive PCR are filed with the court of appeals except where a sentence of death has been imposed. See APPELLATE RULE 4(A)(1)(a), 5(A).

325. IND. CODE § 35-38-1-15 (1999).

326. See, e.g., *Lockhart v. State*, 671 N.E.2d 893, 904-05 (Ind. Ct. App. 1996).

a successive PCR, which was denied.³²⁷

Undaunted, Waters then filed a motion in the trial court requesting that his allegedly erroneous sentence be corrected. The trial court addressed the motion on the merits, but denied it.³²⁸ On appeal of that denial, the court of appeals remanded with instruction to dismiss, rather than deny, the motion.³²⁹ The court of appeals noted that a motion to correct an erroneous sentence is, in effect, just another form of a request for post-conviction relief.³³⁰ Accordingly, a convicted person who has already sought and been denied post-conviction relief once must seek leave of the appellate court before being allowed to file a motion to correct erroneous sentence.³³¹ In Waters' particular circumstance, he had already unsuccessfully sought leave to file a successive PCR.³³² Therefore, the trial court was without jurisdiction to do anything but dismiss his motion.³³³

S. Recovering Appellate Attorney Fees

Under Indiana law, the trial court in a dissolution proceeding "may order a party to pay a reasonable amount" of the other party's legal fees.³³⁴ A 1985 opinion of the court of appeals, *Hudson v. Hudson*,³³⁵ held that the trial court lacked jurisdiction to enter an award for attorney fees after the record of proceedings had been filed.³³⁶ The court in *Hudson* reasoned, in essence, that a trial court is divested of jurisdiction once an appeal is perfected.³³⁷ It therefore reversed the trial court order entered after the record of proceedings had been filed that awarded attorney fees in a dissolution proceeding.³³⁸

At least two subsequent opinions of the court of appeals have declined to follow *Hudson*.³³⁹ During the survey period, a third opinion in disagreement with

327. See *Waters v. State*, 703 N.E.2d 688 (Ind. Ct. App. 1998).

328. See *id.*

329. See *id.*

330. See *id.* at 689 (citing *State ex rel. Gordon v. Vanderburgh Circuit Court*, 616 N.E.2d 8 (Ind. 1993)).

331. See *id.*

332. See *id.* at 688.

333. See *id.* at 689.

334. IND. CODE § 31-15-10-1 (1999).

335. 484 N.E.2d 579 (Ind. Ct. App. 1985).

336. See *id.* at 583.

337. See *id.*

338. See *id.* We note that the attorney fee statute cited in *Hudson*, Indiana Code section 31-1-11.5-16, was a predecessor to the current statute, Indiana Code section 31-15-10-1.

339. See *Wagner v. Wagner*, 491 N.E.2d 549, 555 (Ind. Ct. App. 1986) ("Because the award of appellate attorney's fees is separate and distinct from the issues on appeal, the perfection of the appeal does not deprive the trial court of jurisdiction to make such an award."); *Scheetz v. Scheetz*, 509 N.E.2d 840, 848-49 (Ind. Ct. App. 1987) (declining to follow *Hudson* and finding *Wagner* "more convincing").

Hudson was issued. In *Pierce v. Pierce*,³⁴⁰ the court of appeals stated what now appears to be the prevailing view. “[T]he trial court retains jurisdiction even after perfection of an appeal to make an award of appellate attorney fees and in what amount.”³⁴¹ Although the Indiana Supreme Court was presented with the opportunity to address the conflict between the more recent cases and *Hudson*, it declined to do so in the *Pierce* case.³⁴²

The court of appeals also considered what effect a release of judgment had on a pending request for appellate attorney fees. In *RJH of Florida, Inc. v. Summit Account & Computer Services, Inc.*,³⁴³ the plaintiff obtained a judgment of approximately \$95,000 in the trial court, which included \$10,000 in attorney fees awarded pursuant to former Indiana Code section 34-4-30-1.³⁴⁴ After the court of appeals affirmed on appeal, the plaintiff filed a petition in the trial court seeking appellate attorney fees and costs.³⁴⁵ Before the trial court ruled on the petition, the plaintiff filed a release of judgment, apparently based on the defendant’s payment of the underlying judgment.³⁴⁶ The defendant then argued that the release of judgment terminated the litigation, foreclosing the plaintiff’s right to the requested appellate attorney fees.³⁴⁷ The trial court agreed, but the court of appeals reversed.³⁴⁸

The court of appeals first noted that the release of judgment was not a result of any agreement between the parties, but was filed pursuant to Trial Rule 67(B), which refers to statements of “total or partial satisfaction.”³⁴⁹ The court concluded that when a statement of satisfaction applies to only part of a judgment, further proceedings with respect to unsatisfied claims are not barred.³⁵⁰

The release of judgment was ambiguous because it did not expressly state whether it was in full or only partial satisfaction of plaintiff’s claims.³⁵¹ The court of appeals therefore turned to the circumstances surrounding the release of judgment to determine the plaintiff’s intent.³⁵² The court concluded that since the plaintiff had diligently pursued its request for appellate attorney fees, it was

340. 702 N.E.2d 765, 769 (Ind. Ct. App. 1998), *trans. denied*, 726 N.E.2d 300 (Ind. 1999) (unpublished table decision).

341. *Id.* (citing *Wagner*, 491 N.E.2d at 555).

342. *See Pierce*, 726 N.E.2d at 300.

343. 725 N.E.2d 972 (Ind. Ct. App. 2000).

344. *See id.* at 973. The statute, now recodified at Indiana Code section 34-24-3-1, permits persons who suffer a pecuniary loss as a result of certain criminal violations to recover, among other things, a reasonable attorney fee.

345. *See id.*

346. *See id.*

347. *See id.*

348. *See id.*

349. *Id.* at 974 (quoting IND. TRIAL RULE 67(B)).

350. *Id.*

351. *See id.*

352. *See id.*

unlikely that it intended to release this claim in the release of judgment.³⁵³ Rather, the release was limited to the initial award and was filed so the plaintiff could obtain the award, which could not be affected by the pending appellate-fee petition, from the trial court clerk.³⁵⁴ Thus, the release did not bar recovery of appellate attorney fees.³⁵⁵

T. Attorney Held Personally Responsible for Payment of Court Reporter Fees

The court of appeals' opinion in *Boesch v. Marilyn M. Jones & Associates*³⁵⁶ should be welcomed news to court reporters. In this case, court reporter Jones provided reporting services at a deposition at the request of attorney Boesch. Jones sent her initial bill and subsequent requests for payment to Boesch, who forwarded them to his client. The client had agreed to pay the expenses of the litigation. Ultimately, the client paid neither Boesch nor Jones. When Boesch refused to pay Jones for her reporting services, she brought suit.³⁵⁷ The trial court entered judgment in her favor and Boesch appealed.³⁵⁸

The court of appeals affirmed.³⁵⁹ It rejected Boesch's argument that he was merely an agent for the client, and that the agent should not be held liable for expenses incurred by the principal.³⁶⁰ In a case of first impression in Indiana, the court of appeals held that absent a disclaimer of responsibility of which the court reporter is aware, the attorney who requests court reporting services is responsible for paying for them.³⁶¹ Although the case involved reporting services provided in connection with a deposition, the same rule would seem to apply as between trial court reporters and appellate practitioners.

U. How to Write an Unpersuasive Brief

The Indiana Supreme Court took umbrage with an attack on the integrity of the court of appeals in *Michigan Mutual Insurance Co. v. Sports, Inc.*³⁶² After the court of appeals issued its opinion, the appellant petitioned for transfer to the supreme court. In its brief in support of transfer, the appellant asserted that the opinion of the court of appeals was "so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that

353. *See id.*

354. *See id.* at 975.

355. *See id.* at 974-75.

356. 712 N.E.2d 1061 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 313 (Ind. 1999).

357. *See id.* at 1062.

358. *See id.*

359. *See id.* at 1063.

360. *See id.*

361. *See id.*

362. 706 N.E.2d 555 (Ind. 1999) (per curiam). The opinion of the court of appeals is reported at 698 N.E.2d 834 (Ind. Ct. App. 1998).

conclusion (regardless of whether the facts or the law supported its decision).”³⁶³ The supreme court denied transfer, but issued a *per curiam* opinion chastising counsel for the statement and striking the brief.³⁶⁴

During the survey period, a few other attorneys similarly lost their professional bearings in petitions for rehearing following the issuance of court of appeals’ opinions. In one instance, the court of appeals had to caution counsel that it was not persuasive to refer to its opinion as “incomprehensible.”³⁶⁵ The court of appeals was likewise not impressed with having its opinion referred to as a “bad lawyer joke.”³⁶⁶

The judicial system in general was asserted to be an “unwitting accomplice” to the “evil purpose” of another party by the appellant in *Pitman v. Pitman*.³⁶⁷ The court of appeals was not convinced and struck various passages from the appellant’s brief.³⁶⁸

Unpersuasive argumentation style was not limited to unwise salvos aimed at the judiciary. In one opinion issued during the survey period, the court of appeals was required to point out to the appellee that its “hyperbolic barbs” aimed at opposing counsel were, to put it lightly, uninformative.³⁶⁹ After citing various examples of the appellee’s “petulant grouching,” the court reminded counsel: “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.”³⁷⁰ The court of appeals was similarly unimpressed with the lack of collegiality and “name-calling” directed at opposing counsel by the appellee in another case published during the reporting period.³⁷¹ The court stated that the comments of counsel added “no merit” to the arguments and demonstrated “a lack of professionalism.”³⁷²

363. *Mutual Ins.*, 706 N.E.2d at 555 (quoting Appellant’s brief).

364. *See id.* (“As a scurrilous and intemperate attack on the integrity of the Court of Appeals, this sentence is unacceptable, and the Brief in Support of Appellant’s Petition to Transfer is hereby stricken.”).

365. *Bloomington Hosp. v. Stofko*, 709 N.E.2d 1078, 1079 n.1 (Ind. Ct. App. 1999).

366. *B & L Appliances & Servs., Inc. v. McFerran*, 712 N.E.2d 1033, 1037 (Ind. Ct. App. 1999).

367. 717 N.E.2d 627, 634 (Ind. Ct. App. 1999) (quoting Appellant’s brief).

368. *See id.* at 634.

369. *See County Line Towing, Inc. v. Cincinnati Ins. Co.*, 714 N.E.2d 285, 290-91 (Ind. Ct. App. 1999) (quoting *Amax Coal Co. v. Adams*, 597 N.E.2d 350, 352 (Ind. Ct. App. 1992), *trans. denied*, 735 N.E.2d 219 (Ind. 2000)).

370. *Id.*

371. *Mid-Continent Paper Converters, Inc. v. Brady, Ware & Schoenfeld, Inc.*, 715 N.E.2d 906, 911 n.5 (Ind. Ct. App. 1999).

372. *Id.*

V. Other Potential Briefing Pitfalls

While the case law is replete with admonitions about briefs that are defective or that vary from the rules in some significant manner, a few cases from the survey period merit mentioning. Care should always be taken when stating the facts pertinent to an appeal. In a few cases, counsel were chastised for argumentative statements of the facts.³⁷³ In at least two cases, counsel were admonished for misrepresenting or creating false impressions about the facts of record.³⁷⁴

In *Hotmix & Bituminous Equipment Inc. v. Hardrock Equipment Corp.*,³⁷⁵ the appellant contended that a case on which the trial court had relied was wrongly decided.³⁷⁶ In support, the appellant only quoted from “Indiana Practice, Rules of Procedure Annotated,” by Professor William F. Harvey.³⁷⁷ This was insufficient development of the argument for the court of appeals, which held that the appellant waived review of this issue.³⁷⁸ Thus it appears that for at least some members of the court of appeals, more than quotation of supporting scholarly opinion is necessary to avoid waiver of an argument on appeal.

Although appellate courts generally appreciate brevity, counsel should not take the maxim “less is more” to an extreme. In one civil case, the appellant’s statement of facts consisted of two sentences.³⁷⁹ The court of appeals counseled that

[b]riefs should be prepared so that each judge, considering the brief alone and independent of the record, can intelligently consider and decide each issue presented. The brief must be prepared so that all questions can be determined from an examination of the brief alone because there is only one record to be shared among all the judges.³⁸⁰

In another case, the appellees chose not to brief an issue raised by the appellants because appellees believed that the court did not need to address the issue to resolve the case.³⁸¹ The court responded:

373. See, e.g., *Pitman v. Pitman*, 717 N.E.2d 627, 630 n.1 (Ind. Ct. App. 1999); *Wright v. Elston*, 701 N.E.2d 1227, 1230 (Ind. Ct. App. 1998).

374. See, e.g., *Halbe v. Weinberg*, 717 N.E.2d 876, 880 n.7 (Ind. 1999); *Adams v. State*, 726 N.E.2d 390, 392 n.3 (Ind. Ct. App. 2000), *reh’g denied, modified*, No. 45D01-9204-CT-452, 2000 Ind. LEXIS 2, at *1 (Ind. Jan., 7, 2000), *trans. granted*, (Order Nov. 3, 2000), *opinion pending*. The opinion of the court of appeals in *Adams* has been vacated and has no precedential value, but the admonition of counsel is nevertheless noteworthy.

375. 719 N.E.2d 824 (Ind. Ct. App. 1999).

376. See *id.* at 828-29.

377. See *id.* at 829 n.3.

378. See *id.*

379. See *Ling v. Stillwell*, 732 N.E.2d 1270, 1272 n.2 (Ind. Ct. App. 2000), *trans. denied*, No. 49A02-0002-CV-119, 2001 Ind. LEXIS (Ind. Jan. 17, 2001).

380. *Id.* (quoting *Paulson v. Centier Bank*, 704 N.E.2d 482, 486 n.2 (Ind. Ct. App. 1998)).

381. See *Turner v. City of Evansville*, 729 N.E.2d 149 (Ind. Ct. App. 2000), *vacated*, 740

We appreciate the [appellees'] attempts at brevity; however, we are in the best position to determine what issues need to be discussed in order to resolve a given case. . . . Should we decide that an issue to which the appellee has not responded is necessary for resolution of a case, the failure to respond would lessen the appellant's burden of showing error.³⁸²

In yet another case, the court of appeals deemed some arguments waived when the only support the appellant offered was attempted incorporation by reference of materials filed in the trial court.³⁸³

Finally, in three criminal appeals coming before the Indiana Supreme Court during the survey period, the court was so dissatisfied with the quality of the briefing of appointed appellate counsel that it issued orders directing that the appeal be rebriefed by a different attorney.³⁸⁴

W. Appellate Attorney Shortcomings Warranted Disciplinary Action

In two cases, formal disciplinary action for the mishandling of an appeal was warranted. In *In re McCord*,³⁸⁵ the Indiana Supreme Court suspended the respondent from the practice of law for not less than sixty days based on his mishandling of an appeal he took to the Seventh Circuit.³⁸⁶ His deficiencies included: failing to become admitted to practice before the Seventh Circuit; filing an appellant's brief that was late and contained irregularities; failing to correct these irregularities in his first two attempts; and making substantive changes in the brief on his third attempt to correct the brief (in violation of applicable rules and admonishments in the court's deficiency notices) resulting in the court striking the brief and dismissing the appeal.³⁸⁷ The court held that the respondent had violated several provisions of the Rules of Professional Conduct, principally Professional Conduct Rule 1.1, which requires that a lawyer provide competent representation to clients.³⁸⁸

N.E.2d 860 (Ind. 2001).

382. *Id.* at 156 n.2.

383. *See* Bigler v. State, 732 N.E.2d 191, 196-97 (Ind. Ct. App. 2000), *trans. denied*, No. 84A05-9904-PC-192, 2000 Ind. LEXIS 907, at *1 (Ind. Sept. 14, 2000).

384. *See* Perez v. State, No. 12S00-9910-CR-663, order (Ind. Apr. 28, 2000), *appeal pending*; Bishop v. State, No. 49S00-9910-CR-621, order (Ind. Apr. 6, 2000), *redocketed to court of proper jurisdiction as* Cause No. 49A02-0004-CR-223 (conviction and sentence ultimately affirmed); Price v. State, No. 49S00-9802-CR-84, order (Ind. Oct. 19, 1998) (conviction and sentence ultimately affirmed). For a more complete discussion of mandated rebriefing, see Douglas E. Cressler, *Mandated Rebriefing: A Judicial Mechanism for Enforcing Quality Control in Criminal Appeals*, RES GESTAE, July 2000, at 20.

385. 722 N.E.2d 820 (Ind. 2000).

386. *See id.* at 824.

387. *See id.* at 822-23.

388. *See id.* at 824.

In *In re Thonert*,³⁸⁹ the Indiana Supreme Court gave a public reprimand and admonishment to an attorney for failure to disclose controlling authority to an appellate tribunal (which was known to him and not disclosed by opposing counsel), and for failure to advise his client of the adverse authority.³⁹⁰ For a fee of \$5000, the attorney agreed to represent a client who had pled guilty to operating a motor vehicle while intoxicated.³⁹¹ On appeal, the attorney argued that the client should be allowed to withdraw his guilty plea.³⁹² The attorney advised the client of a 1989 court of appeals decision that was favorable to the client's position, but did not disclose to the client or to the court of appeals a 1995 supreme court opinion that was unfavorable.³⁹³ Moreover, the attorney had to have known about the supreme court case because he represented the losing party in that case.³⁹⁴

The supreme court found that the attorney's failure to disclose controlling adverse authority to the court of appeals violated Professional Conduct Rule 3.3(a)(3).³⁹⁵ The court found that the attorney's conduct also violated Professional Conduct Rule 1.4(b), which requires a lawyer to explain a matter to the extent necessary to permit a client to make informed decisions regarding representation.³⁹⁶ The attorney here had "effectively divested his client of the opportunity to assess intelligently the legal environment in which his case would be argued and to make informed decisions regarding whether to go forward with it."³⁹⁷

X. Praise for Appellate Attorney Excellence

While the appellate courts occasionally pointed out appellate shortcomings, the courts also expressed public praise for appellate excellence. In several opinions handed down during the survey period, the appellate courts paused to note excellent legal work on appeal.³⁹⁸ The court was more specific in its praise

389. 733 N.E.2d 932 (Ind. 2000).

390. *See id.* at 934.

391. *See id.* at 933.

392. *See id.*

393. *See id.*

394. *See id.* at 933-43.

395. *See id.* at 934.

396. *See id.*

397. *Id.*

398. *See, e.g.,* *Coffer v. Arndt*, 732 N.E.2d 815, 818 n.1 (Ind. Ct. App. 2000), *reh'g denied*, No. 49A02-9910-CV-720, 2000 Ind. App. LEXIS 1773, at *1 (Ind. Ct. App. Oct. 2, 2000); *Clemens v. Wishard Mem'l Hosp.*, 727 N.E.2d 1084, 1085 n.3 (Ind. Ct. App. 2000), *trans. denied*, No. 93A02-9910-EX-714, 2000 Ind., LEXIS 1039, at *1 (Ind. Oct. 18, 2000); *Brickner v. Brickner*, 723 N.E.2d 468, 469 n.1 (Ind. Ct. App. 2000), *trans. denied*, 735 N.E.2d 235 (unpublished table decision); *Franklin v. Benock*, 722 N.E.2d 874, 876 n.1 (Ind. Ct. App. 2000), *trans. denied*, No. 42A04-9902-CV-83, 2000 Ind. LEXIS 832, at *1 (Ind. Aug. 15, 2000); *Gallant Ins. Co. v. Wilkerson*, 720 N.E.2d 1223, 1225 n.2 (Ind. Ct. App. 1999); *Owens Corning Fiberglas Corp. v.*

in *Moore v. State*,³⁹⁹ noting that at oral argument, appellant's counsel "was clearly passionate about his client and the issues presented," and expressing appreciation for "his candor during argument, never intending to mislead the court in any way and stating that he would not answer if he was not positive about certain facts or law."⁴⁰⁰ In other cases, the court commended counsel for the "intelligent strategic decision" of "winnowing out weaker arguments on appeal and focusing on" stronger issues,⁴⁰¹ and expressed appreciation for an appellee's candor in conceding an issue the appellant had raised.⁴⁰²

Y. *Miscellanies of Note*

The longest opinion issued during the survey period was *Community Care Centers, Inc. v. FSSA*,⁴⁰³ weighing in at a hefty 21,536 words. The court of appeals' opinion in *State v. Friedel*⁴⁰⁴ is remarkable in that thirty-seven percent of the total word-count in the opinion consists of footnotes. Without giving any credit to Euclid (circa 300 B.C.), the court of appeals in *Gronceski v. Long Beach Board of Zoning Appeals*⁴⁰⁵ judicially determined how to calculate the area of a circle given only its perimeter length.⁴⁰⁶ Finally, of interest to sports fans is *Wright v. Spinks*,⁴⁰⁷ wherein the court of appeals took judicial notice that a "mulligan" is a replacement golf shot.⁴⁰⁸

While the court of appeals generally "uses extreme restraint" in awarding attorney fees under former Appellate Rule 15(G) (now Appellate Rule 66(E)),⁴⁰⁹ appellants in two back-to-back cases advanced arguments so lacking in merit that the same court of appeals panel awarded appellate attorney fees to the appellees, with one award imposed *sua sponte*.⁴¹⁰

The two-year survey period also included examples of infrequently used

Cobb, 714 N.E.2d 295, 297 n.1 (Ind. Ct. App. 1999), *trans. granted, vacated by* 735 N.E.2d 219 (Ind. 2000).

399. 723 N.E.2d 442 (Ind. Ct. App. 2000).

400. *Id.* at 444 n.2.

401. *Rouster v. State*, 705 N.E.2d 999, 1004 n.2 (Ind. 1999), *cert. denied*, *Williams v. Indiana*, 120 S. Ct. 1970 (2000).

402. *See Cole v. Lantis Corp.*, 714 N.E.2d 194, 197 n.2 (Ind. Ct. App. 1999).

403. 716 N.E.2d 519 (Ind. Ct. App. 1999), *trans. denied sub nom. Comty. Care Ctrs., Inc. v. Tioga Pines Living Ctr.*, 735 N.E.2d 229 (Ind. 2000) (unpublished table decision).

404. 714 N.E.2d 1231 (Ind. Ct. App. 1999).

405. 721 N.E.2d 359 (Ind. Ct. App. 1999).

406. *See id.* at 364 n.11.

407. 722 N.E.2d 1278 (Ind. Ct. App.), *trans. denied*, 735 N.E.2d 239 (Ind. 2000).

408. *Id.* at 1279-80.

409. *Scott v. Randle*, 697 N.E.2d 60, 69-70 (Ind. Ct. App. 1998).

410. *See Geico Ins. Co. v. Rowell*, 705 N.E.2d 476, 483 (Ind. Ct. App. 1999), *reh'g denied*, No. 45A03-9806-CV-253, 1999 Ind. App. LEXIS 2381 (Ind. Ct. App. Feb. 18, 1999); *Garza v. Lorch*, 705 N.E.2d 468, 475 (Ind. Ct. App. 1998).

supreme court authority, including two direct civil appeals,⁴¹¹ four grants of transfer because of the emergency nature of the proceedings,⁴¹² and three denials of transfer after transfer had already been granted, thus resuscitating court of appeals' opinions that had been vacated.⁴¹³

Finally, it may not be a matter of common knowledge but the voting of the members of the Indiana Supreme Court on petitions to transfer is a matter of public record easily accessible to practitioners. For the past three years, West Publishing has published tables semiannually in the advance sheets and bound volumes of the *Northeastern Reporter* that record the voting on every transfer decision made during the reporting period.⁴¹⁴

CONCLUSION

As noted at the beginning of this Article, this survey period was one of the most eventful from the standpoint of appellate practice. January 1, 2001, marked the effective date of both a new set of Rules of Appellate Procedure and a rule amendment implementing a constitutional change in supreme court jurisdiction. The revised rules promise to clarify, modernize, and streamline appellate practice, as soon as practitioners and others involved in the process master the new system. The jurisdictional change will greatly increase the supreme court's control over its docket, giving it more discretion to address issues that might otherwise have been crowded out by its former mandatory criminal direct review jurisdiction.

The jurisdictional shift will only slightly increase the workload of the court of appeals, but general growth trends point toward a potential need to begin consideration of the addition of a new panel to the court of appeals.

Rule and jurisdictional changes were not the only significant developments during the survey period. Several opinions issued during the time frame covered

411. See *Van Dusen v. Stotts*, 712 N.E.2d 491 (Ind. 1999); *Baldwin v. Reagan*, 715 N.E.2d 332 (Ind. 1999) (Pursuant to former Appellate Rule 4(A)(8), now Indiana Appellate Rule 4(A)(1)(b), civil appeals wherein a state or federal statute is declared unconstitutional are taken directly to the Indiana Supreme Court).

412. *State v. Costa*, 732 N.E.2d 1224 (Ind. 2000); *Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151 (Ind. 1999); *Ind. Bell Tel. Co. v. Ind. Util. Regulatory Comm'n*, 715 N.E.2d 351 (Ind. 1999); *GTE Corp. v. Ind. Util. Regulatory Comm'n*, 715 N.E.2d 360 (Ind. 1999) (granting transfer in all four cases before an opinion had even been issued by the court of appeals on petitions demonstrating that the appeals involved questions of law of great public importance that should be determined quickly).

413. *Weida v. Dowden*, 726 N.E.2d 307 (Ind. 1999), *revitalizing* 664 N.E.2d 742 (Ind. Ct. App. 1996); *State v. Linck*, 716 N.E.2d 892 (Ind. 1999), *revitalizing* 708 N.E.2d 60 (Ind. Ct. App. 1999); *Jordan v. Read*, 712 N.E.2d 967 (Ind. 1999), *revitalizing* 677 N.E.2d 640 (Ind. Ct. App. 1997) (unpublished memorandum decision).

414. See, e.g., 741 N.E.2d 1247 (Table); 735 N.E.2d 219 (Table); 726 N.E.2d 297 (Table); 714 N.E.2d 163 (Table); 706 N.E.2d 165 (Table); 698 N.E.2d 1182 (Table); 690 N.E.2d 1178 (Table); 683 N.E.2d 578 (Table).

herein, including two by the U.S. Supreme Court, decided important issues relating to appellate procedure in Indiana.

The next few years should prove interesting for appellate lawyers as the courts and practitioners come to grips with an entirely new set of rules and the Indiana Supreme Court becomes a more significant player in the civil arena. A new era in appellate practice is upon us.