1992 Developments in Indiana Appellate Procedure: Of Timely Praecipes, Interlocutory Appeals, and Civility

George T. Patton, Jr.*

During 1992, the changes in Indiana appellate procedure largely came from opinions of the appellate courts. Amendments to the appellate rules during 1992 were mainly ministerial, adding no new major rules or procedures. The appellate courts' unpublished orders, like the published opinions, further provide insight into trends in Indiana appellate procedure.

In addition to being aware of the changes, lawyers and judges should contemplate how to further improve and refine Indiana's appellate procedures to increase quality and efficiency. In this spirit, this Article offers proposals to refine the state's appellate procedures. The limitations of appellate procedures generally come to light from the bench's and bar's day-to-day application of the rules to the case at hand. Many problems and answers that are difficult to discover in the abstract are easier to resolve and locate in the concrete.

The first section of this Article covers recent decisions on the timely initiation of an appeal by filing the praecipe. Section II discusses new opinions and rules on interlocutory appeals. Section III discusses recent Indiana Supreme Court opinions affecting appellate procedure. Section IV surveys the recent changes in the appellate rules. The final part of the Article reviews recent orders and opinions on civility between lawyers in the appellate context.

I. A Timely Praecipe to Initiate the Appeal

Although the appellate process has many jurisdictional hurdles—timely filing a record of proceedings, a motion to dismiss, a petition for extension of time, or a brief—the single most important appellate deadline is the timely filing of a praecipe to initiate the appeal. In all criminal appeals after January 1, 1993, the party initiating the appeal is required to serve a copy of the praecipe on the Attorney General,[1]

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* Associate, Bose, McKinney & Evans, Indianapolis. Adjunct Assistant Professor of Appellate Advocacy, Indiana University School of Law—Bloomington. A.B., 1984, Wabash College; J.D., 1987, Indiana University School of Law-Bloomington. I thank Ronald E. Elberger, Stephen E. Arthur, and Debra L. Burns of Bose McKinney & Evans, and Chief Justice Randall T. Shepard of the Indiana Supreme Court for reviewing a draft of this Article.

1. Ind. App. R. 2(A).

who is the representative of the state in all criminal appeals.[2] Although the procedures initiating a civil appeal did not change, a number of decisions during 1992 demonstrate potential problems of initiating an appeal when a motion to correct error is used.

A. Timely Motions to Correct Error

Since 1989, a motion to correct error is only required as a prerequisite to initiation of an appeal in two instances.[3] First, a motion to correct error is a prerequisite for appeal when counsel seeks to introduce newly discovered material evidence that could not have been discovered or produced at trial.[4] Second, a motion to correct error is a prerequisite for appeal to support a claim that a jury verdict is excessive or inadequate.[5] When counsel chooses to file a motion to correct error, the motion must be timely or the appeal will be forfeited. Even if a praecipe is filed within thirty days of the trial court's ruling on the motion to correct, the appeal will be dismissed if the motion to correct error is not timely.[6]

In one appeal dismissed during 1992, the trial court entered an appealable final order with the language: "There is no just reason for delay and a Declaratory Judgment should be entered at this time."[7] The time for filing either a motion to correct error or a praecipe began on the date the trial court entered its final order.[8] The party against whom the judgment was rendered curiously moved the trial court to enter a final judgment almost a month later.[9] The trial court granted the motion, and the party then filed a motion to correct error.[10] Following a hearing on the motion to correct error, the trial court denied the motion.[11] The

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2. IND. APP. R. 2(B).

3. *See* Karl L. Mulvaney, *Fundamental Changes in Indiana Appellate Procedure or, What Happened to the Motion to Correct Error?*, 32 RES GESTAE 472 (1989).

4. IND. TRIAL R. 59(A)(1).

5. IND. TRIAL R. 59(A)(2).

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

7. *Id.* at 927; *see* IND. TRIAL R. 56(C):

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

See also IND. TRIAL R. 54(B): "A judgment as to one or more but fewer than all of the claims or parties is final when the court in writing expressly directs entry of judgment, and an appeal may be taken upon this or other issues resolved by the judgment."

8. *Vellucci*, 596 N.E.2d at 928.

9. *Id.* at 927.

10. *Id.*

11. *Id.*

party finally filed its praecipe a month after the trial court denied the motion to correct error. The praecipe was untimely because the motion to correct error was untimely, resulting in dismissal of the appeal by the court of appeals.

When counsel is unsure whether a praecipe should be filed, a praecipe should be filed within thirty days of the questionable ruling even if a motion to correct error is used. In Indiana, the premature filing of a praecipe before the ruling on a motion to correct error constitutes sufficient compliance and is not a fatal defect.[12] In the federal system, however, the filing of a notice of appeal prior to a ruling on a timely motion under Federal Rule of Civil Procedure 50, 52(b), or 59 is void.[13]

Interestingly, the appellee moved to dismiss the appeal prior to briefing the case on the merits.[14] The court of appeals initially denied the motion. After full briefing on the merits, the court of appeals reconsidered and held "that we do not have jurisdiction to entertain . . . [the] appeal."[15] The law of the case doctrine did not prohibit the appellate court from reconsidering its ruling on a motion raised again in the same appeal.

B. Motions to Correct Error Deemed Denied

In addition to timely filing a motion to correct error, appellate practitioners should beware of the automatic denial of a motion to correct error by rule and the corresponding duty to file a praecipe within thirty days of the date the motion is deemed denied. The rule provides:

> In the event a court fails for forty-five (45) days to set a Motion to Correct Error for hearing, or fails to rule on a Motion to Correct Error within thirty (30) days after it was heard or forty-five (45) days after it was filed, if no hearing is required, the pending Motion to Correct Error shall be deemed denied. Any appeal shall be initiated by filing the praecipe under Appellate Rule 2(A) within thirty (30) days after the Motion to Correct Error is deemed denied.[16]

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12. Haverstick v. Banat, 331 N.E.2d 791 (Ind. Ct. App. 1975); *see* 4A KENNETH M. STROUD, INDIANA PRACTICE: APPELLATE PROCEDURE § 6.1, p. 9 (Supp. 1992) ("The premature filing of a praecipe is a procedural irregularity which does not adversely affect the substantial rights of any party or defeat appellate jurisdiction.").

13. FED. R. APP. P. 4(a)(4); *but see* 137 F.R.D. 417, 437-46 (1991) (The Advisory Committee on Appellate Rules has proposed a change to replace the current rule with one which states that an appeal filed before disposition of a motion to amend the judgment shall be held in abeyance and activate when the district judge acts on the motion.).

14. *Vellucci*, 596 N.E.2d at 927.

15. *Id.*

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

If a judge does not rule on the motion to correct error within the prescribed time limit, the motion is deemed denied by operation of law.[17] This "lazy judge" rule is self-activating when the requisite number of days has lapsed.[18]

The self-activating portion of the rule can be a trap for the unwary appellate counsel. In *Jackson v. Paris*, a party timely filed a motion to correct error after the trial court entered judgment and a hearing commenced on May 17, 1991, and concluded on May 22, 1991.[19] The trial court did not rule on the motion to correct error until August 27, 1991.[20] The party filed a praecipe on September 23, 1991.[21]

The court of appeals held that because "the praecipe was not timely filed in accordance with our rules of procedure, we lack jurisdiction and must dismiss the appeal."[22] By operation of the rule, the motion to correct error was deemed denied thirty days after the hearing concluded. Because the party failed to file the praecipe within thirty days after the motion to correct error was deemed denied, the praecipe was not timely.

C. A Proposal: Initiating a Cross-Appeal

In Indiana, a praecipe serves two purposes. It informs the clerk of the trial court what is to be included in the record of proceeding that will be filed with the appellate court, and it serves as notice to all parties of record that an appeal has been commenced. Although the rules are clear regarding a single-party appeal, they are ambiguous when parties cross-appeal.[23]

Indiana appellate rules should expressly address initiating cross-appeals. In the federal system if a timely notice of appeal is filed by a party, any other party may file a notice of appeal within fourteen days after the date on which the first notice of appeal was filed or within the time otherwise prescribed, whichever period last expires.[24] In Indiana,

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17. Jackson v. Paris, 598 N.E.2d 1106, 1107 (Ind. Ct. App. 1992).
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 1107-08.
23. The only reference in the rules refers to briefing requirements for cross-appeals:
> (D) BRIEFS IN CASES INVOLVING CROSS-APPEALS. If a cross-appeal is filed, the plaintiff in the court below shall be deemed the appellant for the purpose of this rule, unless the parties otherwise agree or the court otherwise orders. The brief of the appellee shall contain the issues and argument involved in his appeal as well as the answer to the brief of appellant.

IND. APP. R. 8.3(D).
24. FED. R. APP. P. 4(a)(3).

once one party files a praecipe requesting the entire record of proceedings, the other party is not given additional time to consider a cross-appeal.

The Indiana Rules of Appellate Procedure also do not contemplate a reply brief for a cross-appellant, providing only for an appellant's brief, an appellee's brief, and a reply brief.[25] Four briefs, rather than the three, should be permitted in cross-appeals in the following order:

	Color of Cover	Page Limitation
Appellant's Brief	Blue	50 pages
Appellee's and Cross-Appellant's Brief	Red	50 pages
Appellant's Reply and Cross-Appellee's Brief	Yellow	50 pages
Cross-Appellant's Reply	Gray	25 pages[26]

Although this table suggests only twenty-five pages for the final reply brief, the current Indiana appellate rules permit up to fifty pages for reply briefs in all appeals, except appeals from the Indiana Tax Court.[27] Twenty-five pages of reply should be sufficient for almost all appeals. If the page limitation causes a hardship, a party could petition the appellate court for leave to file a brief in excess of the page limitation.[28]

In cross-appeals, the second praecipe need only indicate to the trial court clerk the additional items that should be included in the record of proceedings. The second praecipe would counter-designate in addition to the initial designation of the first praecipe. Counter-designation would also be helpful to the appellee in defending a trial court's judgment even in the absence of a cross-appeal. The appellee should have an opportunity to include pleadings and testimony in the record that supports the trial court's judgment even if the praecipe does not call for such pleadings or testimony. The federal appellate systems permits such counter-designation.[29] Indiana should follow the federal approach with respect to initiating a cross-appeal, briefing in cross-appeals, and counter-designating portions of the record.

II. Interlocutory Appeals

The most important change with respect to interlocutory appeals is a new deadline for permissive interlocutory appeals pursuant to Indiana

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25. Ind. App. R. 8.3; *see also* Ind. App. R. 8.3(D) ("The brief of appellee shall contain the issues and argument involved in his [cross] appeal as well as the answer to the brief of appellant.").

26. 7th Cir. R. 28(g)(1).

27. *Compare* Ind. App. R. 8.2(A)(4) *with* Ind. App. R. 18(E)(2).

28. Ind. App. R. 8.2(A)(4).

29. Fed. R. App. P. 10(b)(3).

Appellate Rule 4(B)(6). Effective January 1, 1993, a party wishing to pursue such an interlocutory appeal must petition the court of appeals to accept the interlocutory appeal within thirty days of the trial court's certification: "the petition for the Court of Appeals to entertain jurisdiction must be filed within thirty (30) days of *certification of the question* by the trial court . . . ."[30]

Previously, the rules did not provide a time limit to petition the court of appeals for permission to take an interlocutory appeal after the trial court had certified the issue.[31] During the last two years, the appellate procedures for permissive interlocutory appeals pursuant to Indiana Appellate Rule 4(B)(6) have been substantially clarified: (1) after a trial court certifies a question, the party has thirty days to petition the court of appeals to entertain jurisdiction, (2) the party must then file a praecipe no later than ten days *after* the court of appeals grants the petition and accepts the interlocutory appeal, and (3) the party shall file the record of proceedings no later than thirty days after the praecipe is filed.[32]

A. Trial Court Certification of the Question

The use of the phrase "certification of the question" in the amendment to Indiana Appellate Rule 2(A) raises an interesting corollary issue regarding a petition to accept jurisdiction of an interlocutory appeal. During 1992, the court of appeals dismissed a petition to accept an interlocutory appeal because the trial court certified a question for interlocutory appeal.[33] The trial court had denied a motion to suppress evidence discovered as a result of a roadblock, but later certified for interlocutory appeal the denial of the motion to suppress with the following order:

> Now certifies that the following issue shall be considered for interlocutory appeal:
> Whether the roadblock at issue in the case at Bar complied with holding of *State v. Garcia* (1986) Ind., 500 N.E.2d 158.
> The Court further finds that this Order involves a substantial question of law and the early determination of which will promote a more orderly disposition of this case.[34]

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30. IND. APP. R. 2(A) (emphasis added).

31. Bayless v. Bayless, 580 N.E.2d 962, 965 n.3 (Ind. Ct. App. 1991); George T. Patton, Jr., *Recent Developments in Indiana Appellate Procedure: Reforming the Procedural Path to the Indiana Supreme Court*, 25 IND. L. REV. 1105, 1108 (1992).

32. IND. APP. R. 2(A); IND. APP. R. 2(B).

33. Dingman v. State, 602 N.E.2d 184 (Ind. Ct. App. 1992).

34. *Id.* at 185.

The defendant petitioned the court of appeals to accept the interlocutory appeal pursuant to Indiana Appellate Rule 4(B)(6). The State opposed the petition.[35]

By a two-to-one vote, the court of appeals denied the petition. The majority stated, "The rule makes no provision for the certification of questions to this Court by a state trial court."[36] In dissent, Judge Staton wrote that the majority had interpreted Indiana Appellate Rule 4(B)(6) too narrowly: "Regardless of the form—ruling on a motion to suppress or an order of the court—it is implicit that this Court has discretion to accept such appeals."[37] He further noted that as of July 2, 1991, a federal district court in Indiana could certify a question of law to the Indiana Supreme Court: "It appears highly unlikely that the shackles shorn from the federal trial courts would be left in place on the Indiana trial courts."[38]

During 1992, the Indiana Supreme Court accepted and ruled upon the first certified question from a federal district court sitting in Indiana.[39] The Indiana Supreme Court's acceptance of the case generated numerous *amicus curiae*—Indiana State AFL-CIO, International Union, UAW, and the Indiana Trial Lawyers Association. In response to the certified question, the Indiana Supreme Court unanimously held that Indiana law will permit a cause of action by an injured employee against a worker's compensation insurance carrier for injuries proximately caused by the insurance carrier's tortious conduct such as gross negligence, intentional infliction of emotional distress, and constructive fraud.[40] The exclusive remedy provision of the Indiana Worker's Compensation Act did not preclude the action.[41]

B. Limits on Interlocutory Appeals of Right

In addition to prohibiting certified questions, the appellate courts limited interlocutory appeals as a matter of right under Indiana Appellate Rule 4(B)(1).[42] The rule permits an interlocutory appeal as of right "[f]or the payment of money or to compel the execution of any instrument of writing, or the delivery or assignment of any securities, evidence of

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35. *Id.*

36. *Id.*

37. *Id.* at 186 (Staton, J., dissenting).

38. Dingman v. State, 602 N.E.2d 184, 187 (Ind. Ct. App. 1992) (Staton, J., dissenting); *see also* IND. APP. R. 15(O).

39. Stump v. Commercial Union, 601 N.E.2d 327 (Ind. 1992).

40. *Id.* at 334.

41. *Id.* (citing IND. CODE § 22-3-2-6 (1988)).

42. State v. Hogan, 582 N.E.2d 824 (Ind. 1991); Cua v. Morrison, 600 N.E.2d 951 (Ind. Ct. App. 1992).

debt, documents or things in action . . . ."[43] The matters that are appealable as of right under the rule involve trial court orders which carry financial and legal consequences akin to those more typically found in final judgment: payment of money, issuance of a debt, and delivery of securities.[44]

The Indiana Supreme Court held that Indiana Appellate Rule 4(B)(1) is not designed to create an appeal as of right from every order to produce documents during discovery.[45] To appeal a trial court's order requiring the production of documents, a party must use the discretionary appeal procedures under Indiana Appellate Rule 4(B)(6). Thus, the party must obtain the trial court's certification and have the court of appeals accept the interlocutory appeal. The interlocutory appeal is discretionary with the trial court and the appellate court.

A more difficult question arose before the court of appeals. A trial court had ordered a plaintiff to execute a medical release form and a letter authorizing plaintiff's physicians to confer *ex parte* with defense counsel.[46] Following supreme court precedent, the court of appeals held, "[w]hile [plaintiff] does not have a *right* to appeal the trial court's order compelling her to execute the release under A.R. 4(B)(1), she could have asked the trial court to certify the discovery order for an interlocutory appeal pursuant to A.R. 4(B)(6)."[47] In a concurrence, Judge Sullivan noted that the order involved in the appeal was for more than the production of information; rather, the order required the execution of a document that constituted a surrender of the patient-physician privilege.[48] He further stated that the surrender occurred in a setting that did not permit plaintiff's counsel to be present.[49] Nonetheless, Judge Sullivan did not dissent to the dismissal of the appeal because the supreme court had entered an order dismissing an interlocutory appeal on the same facts. Judge Sullivan closed, "[W]e are bound by the Supreme Court's order in *Lytle [v. Miller]* even though it may appear that the better course would be for the Court to modify the Appellate Rule."[50]

As an aside, the supreme court's order in *Lytle v. Miller*[51] arose from an unpublished opinion of the court of appeals. The majority

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43. IND. APP. R. 4(B)(1).
44. *Hogan*, 582 N.E.2d at 825.
45. *Id.* (citing Greyhound Lines, Inc. v. Vanover, 311 N.E.2d 632 (Ind. Ct. App. 1974)).
46. *Cua*, 600 N.E.2d at 951.
47. *Id.* at 954.
48. *Id.* at 955 (Sullivan, J., concurring).
49. *Id.*
50. *Id.*
51. 583 N.E.2d 802 (Ind. Ct. App. 1991) (table).

opinion noted the supreme court's order in *Lytle*, but did not cite the court of appeals opinion because "memorandum decisions shall not . . . be regarded as precedent nor cited before any court . . . ."[52] Judge Sullivan argued that this prohibition did not relate to an unpublished decision or order from the supreme court or any court other than the court of appeals.[53]

C. A Proposal: Limit Interlocutory Appeals of Partial Summary Judgments

In Indiana, a summary judgment upon less than all the issues involved in a claim, or with respect to less than all the claims or parties, shall be interlocutory unless the court in writing expressly determines that there is no just reason for delay and in writing expressly directs entry of judgment as to less than all the issues, claims, or parties.[54] In the federal system, a district court does not have such an option.[55] Appeals of partial summary judgment relating to liability but not damages should not be appealable merely because a trial court finds no just reason for delay and in writing expressly directs the entry of judgment. Appeals of partial summary judgment should only be permitted as a permissive interlocutory appeal under Indiana Appellate Rule 4(B)(6), just as such appeals are permissive interlocutory appeals in the federal system.[56]

Although the Indiana Trial Rule 56(C) should be amended to delete appealability from partial summary judgments, Indiana Trial Rule 54(B) should be retained to allow a trial court to make final a judgment when there are multiple claims or multiple parties. If a trial court enters summary judgment finally disposing of the action as against one party in an action involving multiple parties, the trial court would still have the option to make that judgment final pursuant to Indiana Trial Rule 54(B). Alternatively, if a trial court enters summary judgment finally disposing of an entire claim in a multiple claim action, the trial court would still have the power to make the judgment final pursuant to Indiana Trial Rule 54(B). Deleting the similar provision from Indiana Trial Rule 56(C) would only affect cases in which the trial court has entered partial summary on liability but has not determined damages for the claim.

The general rule has long favored postponing appeal until final judgment has been rendered, because it promotes judicial economy by

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52. *Id.* at 954 n.2 (quoting IND. APP. R. 15(A)(3)).
53. *Id.* at 954 n.3.
54. IND. TRIAL R. 56(C).
55. FED. R. CIV. P. 56(c).
56. 28 U.S.C. § 1292(b) (1988).

avoiding the time and expense attendant to piecemeal litigation.[57] A partial summary judgment on liability without a determination on damages is not "final," such as the entry of judgment in the favor of one party when multiple parties are involved or judgment on one entire claim when multiple claims are involved. One court of appeals decision implies that a trial court's findings under Indiana Trial Rule 56(C) without a certification under Indiana Appellate Rule 4(B)(6) could not be appealed:

> The Court rendered summary judgment on less than all the issues in the complaint. Summary judgment on less than all the issues in a claim is interlocutory unless the court determines otherwise and certifies the judgment for appeal. Indiana Rules of Procedure, Trial Rule 56(C); Appellate Rule 4(B)(6). The trial court has done neither.[58]

This reasoning is consistent with the federal rule for partial summary judgments: "[A] grant of partial summary judgment limited to the issue of . . . liability . . . [is] interlocutory . . . and where assessment of damages or awarding of other relief remains to be resolved have never been considered 'final' within the meaning of 28 U.S.C. § 1291."[59]

III. The Indiana Supreme Court and Appellate Procedure

The Indiana Supreme Court further limited direct appeals to it by removing its exclusive jurisdiction over appeals from the denial of release in habeas corpus cases arising out of a criminal extradition or a mental health proceeding.[60] In 1992, the supreme court also handed down two particularly noteworthy decisions affecting Indiana appellate procedure. One decision was the highly publicized appeal brought by a former heavyweight boxing champion, and the other, although less publicized, considered "important questions about the authority of Indiana courts to permit pauper appeals in civil cases."[61]

A. The Interesting Procedures in Mr. Tyson's Request for Bond Pending His Criminal Appeal

In *Tyson v. State*,[62] a jury found Michael Tyson guilty of rape and two counts of criminal deviate conduct.[63] The trial court sentenced Tyson

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57. INB Nat'l Bank v. 1st Source Bank, 567 N.E.2d 1200, 1202 (Ind. Ct. App. 1991) (entry of partial summary judgment on liability with trial remaining on damages not appealable without certification under Ind. App. R. 4(B)(6) by both trial court and appellate court).

58. Pekin Ins. Co. v. Charlie Rowe Chevrolet, Inc., 556 N.E.2d 1367, 1369 (Ind. Ct. App. 1990).

59. Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 744 (1976).

60. Ind. App. R. 4(A)(9) (deleted effective Jan. 1, 1993).

61. Campbell v. Criterion Group, 605 N.E.2d 150, 151 (Ind. 1992).

62. 593 N.E.2d 175 (Ind. 1992).

63. *Id.* at 176.

to an executed sentence of six years, and he sought bail from the trial court pending appeal.[64] The trial court denied bail, and Tyson petitioned the court of appeals for bail pending appeal.[65] After oral argument, the court of appeals denied the petition without offering a written opinion.[66]

Mr. Tyson's lawyers then filed a petition in the supreme court in which they attempted to invoke the court's jurisdiction by alternative means: through a writ in aid of appellate jurisdiction or through transfer.[67] The supreme court first found that whether Mr. Tyson received bail pending his appeal did not involve the court's appellate jurisdiction over the merits of the appeal. Accordingly, a writ in aid of appellate jurisdiction was inappropriate.[68]

The supreme court proceeded to discuss transfer. Writing for a unanimous court, Chief Justice Shepard stated: "Transfer as described in [Indiana Appellate] Rule 11 is simply an administrative term this Court has attached to the process of retaining control over this Court's declaration of law function."[69] Chief Justice Shepard pointed out that the court had previously recognized that a petition to transfer may be granted despite the fact that the appeal does not specifically fit within Indiana Appellate Rule 11:

> [W]here the statute or rules of this Court fail to provide for a review of the decision of the Appellate Court, which decision could be reviewed under the old common law writ of certiorari, the Supreme Court of this state may consider a petition to transfer as a writ of certiorari at common law. In such a case this Court need not be limited to the items or grounds specified in the rule or in the statute. The action of this Court is based upon *its inherent constitutional duty to act as the final and ultimate authority in stating what the law in this state is.*[70]

The court noted that although it had chosen to adopt rules of appellate procedure that generally limit actions that can be brought before the state's court of last resort, the court could still choose to speak on an issue for which the appellate rules do not specifically provide.[71]

The supreme court had chosen to assume jurisdiction in the case to write on the procedures for reviewing bail decisions pending appeal to

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64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 179-80.
69. *Id.* at 180 (footnote omitted).
70. *Id.* at 180 n.12 (quoting Troue v. Marker, 252 N.E.2d 800, 803 (Ind. 1969)) (emphasis in original).
71. *Id.* at 181.

give guidance to the lower courts. The supreme court, however, did not review the merits of the court of appeals' bail decision. The denial of the bond was not "so clearly in error that we should exercise our inherent authority to overrule it."[72] The supreme court then returned the case to the court of appeals.

B. Pauper Appeals in Civil Cases

In *Campbell v. Criterion Group*,[73] the supreme court granted transfer to consider an important question about the authority of Indiana courts to permit pauper appeals in civil cases and the method by which such appeals may be brought.[74] The trial court had denied a motion to proceed on appeal as a poor person. The court of appeals subsequently granted the petition to proceed on appeal *in forma pauperis* and also held that an indigent civil appellant was entitled to a record of proceedings prepared without cost to the indigent.[75] On transfer, the supreme court considered two questions: (1) whether the trial court properly denied the motion to proceed on appeal as a poor person; and (2) if allowed to proceed *in forma pauperis*, whether the indigent is entitled to have the record of proceeding, or a portion thereof, prepared at public expense.

The supreme court agreed with the court of appeals that the trial court abused its discretion in denying the motion to proceed on appeal as a poor person, incorporating the court of appeals' "excellent history of the right to appeal and Indiana's accommodation of indigents."[76] The supreme court thoroughly analyzed the applicable statutes, the common law powers of court, and the constitutional and procedural authority to provide for indigent civil appeals.[77] The opinion contains a rich historical overview going back to Roman times, early acts of the British Parliament, and the beginning of the nation and state.

While the supreme court agreed with the court of appeals on reversing the trial court's denial of the motion to proceed on appeal as a poor person, the supreme court disagreed with the intermediate appellate court's decision that the indigent civil appellant is entitled to a record of proceedings prepared without cost to the indigent.[78] The supreme court stated:

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72. *Id.* at 181.
73. 605 N.E.2d 150 (Ind. 1992).
74. *Id.* at 151.
75. Campbell v. Criterion Group, 588 N.E.2d 511 (Ind. Ct. App. 1992), *incorporated in part and vacated in part*, 605 N.E.2d 150 (Ind. 1992).
76. *Campbell*, 605 N.E.2d at 150.
77. *Id.* at 152-58.
78. *Id.* at 160.

> We think our appellate rules afford a narrowly tailored solution. Appellate Rule 7.2(A)(3)(c) provides a mechanism for presenting a record to an appellate court in the event that "no report of all or part of the evidence or proceedings at the hearing or trial was or is being made, or if a transcript is unavailable." In such cases, a party may prepare a statement of the evidence of proceedings from the best available means, including his recollection. The trial court has the duty to approve and settle such statements and once it has done so, it becomes a part of the record. . . . [T]his mechanism should also be made available to indigent appellants seeking to perfect their appeals.[79]

The court added that agreed statements, as provided in Indiana Appellate Rule 7.3, may also be an acceptable alternative.[80] The supreme court determined that these alternatives strike the proper balance between the obligation to protect the procedural entitlements of indigent parties and the legitimate fiscal needs of the counties. The supreme court allowed the party to appeal *in forma pauperis*, but held that the party failed to demonstrate that the appeal could not have been perfected through the preparation of a statement of the evidence.[81]

C. A Proposal: Different Deadlines to Petition for Rehearing in Court of Appeals and to Transfer to Supreme Court

Beginning in 1988, a party no longer had to petition the court of appeals to rehear a cause in order to file a petition to transfer.[82] Today, the time deadline for filing a petition for rehearing with the court of appeals and a petition for transfer to the supreme court is twenty days.[83] Although it was appropriate to have the same deadline when petitions for rehearing were mandatory, having the same deadline when petitions for rehearing are optional can deprive the court of appeals from considering a petition for rehearing on the merits.

For example, in a recent appeal both parties were dissatisfied with the opinion of the court of appeals and one party filed a petition for

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79. *Id.* at 160 (citations omitted).
80. *Id.* at 160-61.
81. *Id.* at 161.
82. IND. APP. R. 11(B). The 1988 amendment provided:

> Provided further, the party seeking transfer shall have the right at his option, without first filing a petition for rehearing in the Court of Appeals and having it denied, to petition the Supreme Court directly within twenty (20) days from the date of the rendition of the decision in the Court of Appeals to transfer the cause to the Supreme Court for review.

83. IND. APP. R. 11(B).

rehearing and another party filed a petition for transfer on the same day. In denying the petition for rehearing, the court of appeals determined that "effective at the time of the filing of [the] Petition to Transfer, this court became divested of jurisdiction and therefore, lacks the authority to address the merits of appellants' Petition for Rehearing."[84] The court of appeals did allow the party twenty days to petition the supreme court for relief. The appellant subsequently filed a petition to transfer, arguing that the court of appeals' denial of rehearing on jurisdictional grounds was erroneous.[85] Specifically, the appellant maintained that the ruling contradicted the internal process the supreme court had previously employed.

Rather than having the same time frame, the better approach would be to have a longer time period to petition for transfer than to petition for rehearing and toll the time for filing a petition to transfer while the court of appeals considers the matter on rehearing. In the federal system, the time for filing a petition for writ of certiorari to the United States Supreme Court is tolled if a timely petition for rehearing has been filed.[86] The time deadline should be lengthened for filing a petition to transfer and shortened for a petition for rehearing. The supreme court should not be reviewing the decision of the court of appeals until it is final, rehearing and all.

IV. Ministerial Developments in Indiana Appellate Rules

Although there were few changes in the Indiana Rules of Appellate Procedures, the ones that were made make the appellate process more convenient for the practitioner. Any party during the pendency of an appeal may request that service of orders and opinions in a case be made by electronic facsimile transmission.[87] The filing fees set forth by statute were incorporated into the appellate rules.[88] Marginal notes are no longer required on the clerk's portion of the record of proceedings.[89]

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84. Indiana Carpenters Cent. & Western Ind. Pension Fund v. Seaboard Sur. Co., No. 49A02-9111-CV-510 (Ind. Ct. App. March 9, 1993).

85. Appellant's Brief in Support of Petition to Transfer, Carpenters Cent. & Western Ind. Pension Fund v. Seaboard Sur. Co., (No. 49 A02-9111-CV-510) (Ind. March 29, 1993).

86. United States Supreme Court Rule 13.4 provides:

> [I]f a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment.

87. Ind. App. R. 12(F).

88. Ind. App. R. 3(A); Ind. Original Action R. 3(J).

89. Ind. App. R. 7.2(A)(2).

A. Service Via Facsimile Transmission

An entire new subsection was added to the appellate rules on filing and service. The new subsection became effective on April 27, 1992 and reads:

> (F) Optional Service by Clerk. Any party during the pendency of an appeal may request that service of orders and opinions in that case be made by Electronic Facsimile Transmission (FAX). The request must be written, signed by the attorney or party making the request, and provide the telephone number at which such service shall be made. In those instances where service is made by FAX, the Clerk will retain as a record of service the machine generated transmission log. When service is made by FAX, duplicate service will not be made. The Clerk of the Court, without notice, may decline or discontinue FAX service in the event electronic transmission is not possible.[90]

This new service should help lawyers by providing quicker notice of court action. Because a petition for rehearing and a petition for transfer is due twenty days from "rendition of the decision," this will provide the practitioner the full period to respond.[91]

B. Filing Fees in Rule

The filing fee in the appellate court is set at $250 by statute.[92] The appellate rules were amended to track the statutory fee, thus alleviating counsel's need to dig into the statute to discover the filing fee:

> Upon the filing of the record of proceeding, the appellant shall pay a filing fee of two hundred fifty ($250) dollars. The fee is not applicable in cases prosecuted as a pauper cause or on behalf of a governmental unit.[93]

In promulgating this amendment, the supreme court noted that the amendment did not concern a new filing fee because the $250 filing fee had been in effect for several years.

C. Marginal Notes in Transcript

Marginal notes are no longer required on the Clerk's portion of the record of proceedings.[94] Marginal notes still are required on the transcript of evidence. The rule provides:

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90. Ind. App. R. 12(F).
91. Ind. App. R. 11(A), (B).
92. Ind. Code § 33-15-5-2 (1988).
93. Ind. App. R. 3(A).
94. Ind. App. R. 7.2(A)(2) ("Notations need not be made in the margins on the pages of the Clerk's portion of the record.").

> Notations shall be made on the margin of each page of the transcript of the evidence indicating all motions and the ruling thereon; the exhibits, if any; the instructions given and refused; all rulings of the court; and where the evidence is set out by deposition or otherwise, the name of each witness, and whether the examination is direct, cross, or redirect.[95]

During 1992, the court of appeals summarily affirmed an appeal when an appellant failed to comply with the rule of appellate procedure mandating marginal notations on the transcript.[96]

The appellee in the case first moved to dismiss the appeal for failing to include marginal notations. The court of appeals denied the motion but ordered the appellant to make appropriate marginal notations as required by the rule within fifteen days. Even after this grace period, the court of appeals found that preparation of the record fell demonstrably short of compliance with the appellate rules and the court's order:

> The record in the instant case consists of three volumes containing 483 pages. Following our . . . Order, there remain in the record well in excess of 150 instances in which [the appellant] failed to comply with our Order and the appellate rules relative to the identification of the witness being examined. In addition, [the appellant] also failed in 36 instances to comply with the Order, and App. R. 7.2(A)(3)(a), relative to identification and admission of exhibits.[97]

The court of appeals noted that the marginal notations were enacted for the purpose of aiding the appellate court in the expeditious and efficient consideration of appeals. Marginal notes were "indispensable aids" in the process of searching the record.[98]

D. A Proposal: Require Court Reporter to Put Marginal Notations on Transcript

In some counties, the court reporters will put marginal notations on the transcript of evidence.[99] The appellate rules should place the duty not on counsel to put marginal notations on the transcripts, but rather

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95. IND. APP. R. 7.2(A)(3)(a).

96. Summers v. Summers, 591 N.E.2d 152 (Ind. Ct. App. 1992).

97. *Id.* at 153.

98. *Id.* at 154 (quoting Hickey v. Hickey's Estate, 136 N.E.2d 722, 724 (Ind. Ct. App. 1956)).

99. For example, in St. Joseph county the court reporters put marginal notations on the transcript while they are transcribing the evidence.

on court reporters while they are transcribing the evidence. Such additional typing will not be much of an added burden and will greatly facilitate preparation of the record of proceedings for filing with the appellate court clerk.

V. Civility on Appeal

Within the last five months of 1992, the supreme court has stricken two briefs. The Indiana Supreme Court's first order, entered *sua sponte*, speaks for itself:

> The Petition filed by counsel . . . contains disrespectful, scandalous, and impertinent allegations aimed at the Indiana Court of Appeals. Such pleadings are subject to being stricken from the record. *Barnard v. Kruzan* (1942), 221 Ind. 208, 46 N.E.2d 238.
>
> Accordingly, the Court now strikes the Petition to Transfer from the record of this case. The Court will consider a Petition to Transfer on behalf of appellant . . . if a proper petition is filed on or before August 21, 1992.[100]

The supreme court allowed fifteen days to file a proper petition. In the second order, the Indiana Supreme Court acted in response to a motion to strike and this time did not give a second chance:

> The Court, being duly advised, finds that the Appellant's Brief in Opposition to Petition to Transfer contains unwarranted personal attacks upon the integrity of counsel for the Appellee, and that it unfairly and improperly characterizes the arguments of the Appellee as attempts to deceive the Court. Accordingly, the Appellant's Brief in Opposition to Petition to Transfer is ordered stricken.[101]

Disrespectful, scandalous and impertinent attacks on the court of appeals, personal *ad hominem* attacks on the integrity of counsel, and unfair characterization of opposing arguments in an attempt to deceive a court have no place in the Indiana appellate system.

The most pointed lecture on civility came from the court of appeals. That court's own words provide a persuasive discussion of the effectiveness of such arguments:

> We must first discuss the quality of briefing by counsel in this appeal. Throughout the parties' briefs, they have launched

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100. Deitsch v. Linderman, No. 49A02-9105-CV-219 (Ind. Aug. 6, 1992).

101. Cap Gemini Am., Inc. v. Judd, No. 29A02-9010-CV-620 (Ind. December 29, 1992).

> rhetorical broadsides at each other which have nothing to do with the issues in this appeal. Counsels' comments concern their opposite numbers' intellectual skills, motivations, and supposed violations of the rules of common courtesy. Because similar irrelevant discourse is appearing with ever-increasing frequency in appellate briefs, we find it necessary to discuss the easily-answered question of whether haranguing condemnations of opposing counsel for supposed slights and off-record conduct unrelated to the issues at hand is appropriate fare for appellate briefs.
>
> At the outset, we point to the obvious: the judiciary, in fact and of necessity, has absolutely no interest in internecine battles over social etiquette or the unprofessional personality clashes which frequently occur among opposing counsel these days. Irrelevant commentary thereon during the course of judicial proceedings does nothing but waste valuable judicial time. On appeal, it generates a voluminous number of useless briefing pages which have nothing to do with the issues presented, as in this appeal.
>
> Further, appellate counsel should realize, such petulant grousing has a deleterious effect on the appropriate commentary in such a brief. Material of this nature is akin to static in a radio broadcast. It tends to blot out legitimate argument.
>
> On a darker note, if such commentary in appellate briefs is actually directed to opposing counsel for the purpose of sticking hyperbolic barbs into his or her opposing numbers' psyche, the offending practitioner is clearly violating the intent and purpose of the appellate rules. In sum, we condemn the practice, and firmly request the elimination of such surplusage from future appellate briefs.[102]

The appellate court should continue to upbraid counsel for uncivil conduct toward a court, opposing counsel or an opposing party. The purpose of the appellate process is to resolve disputes, not create personal disputes through the resolution of the issues. This Article will end with a proposal on civility: be respectful of the courts and counsel.

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