APPELLATE PROCEDURE

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INTRODUCTION

This Article examines opinions, orders, and other developments in the area of state appellate procedure in Indiana during the most recent reporting period.[1] In Part I of the Article, rule amendments of interest to the appellate practitioner are examined. Part II contains a discussion of important published decisions issued during the reporting period. Lastly, in Part II, miscellaneous developments of possible interest are highlighted.

I. RULE AMENDMENTS

By order dated July 1, 2003, the Indiana Supreme Court made several changes to the rules governing appellate procedure in Indiana.[2] These changes, discussed below, went into effect January 1, 2004.[3]

A. Filing Date for Appellant's Case Summary in Interlocutory Appeals Clarified

As reported in last year's survey article, the Appellate Practice Section of the Indiana State Bar Association made two specific recommendations to the Supreme Court Committee on Rules of Practice and Procedure.[4] The committee and supreme court agreed to address one of them—a proposal to clarify the date for filing the appellant's case summary in discretionary interlocutory appeals. The appellant's case summary provides important information about the appeal to the appellate court and serves as the appearance form for the appellant.[5]

Appellate Rule 15(B), which governs the procedures for filing the appellant's case summary, is shown below in both its pre- and post-amendment form. New language is shown with underscoring and deleted language is shown as stricken:

> **B. Date due.** The Appellant's Case Summary shall be filed within thirty (30) days of the filing of the Notice of Appeal or, in the case of a Discretionary Interlocutory Appeal ~~an interlocutory appeal~~ under Rule 14(B)(2), the Appellant's Case Summary shall be filed at the time of the motion requesting permission to file the interlocutory appeal is filed in the Court of Appeals. ~~, at the same time as the filing of either the Notice~~

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1. This Article covers the time period from October 1, 2002 through September 30, 2003.
2. *See* Order Amending Rules of Appellate Procedure (Ind. July 1, 2003) (No. 94S00-0307-MS-290).
3. *Id.* at 4.
4. *See* Douglas E. Cressler, *Appellate Procedure*, 36 IND. L. REV. 935, 938-39 (2003).
5. *See* IND. APP. R. 15(C), 16(A).

~~of Appeal with the trial court clerk or the motion to the Court of Appeals requesting permission to file an interlocutory appeal.~~[6]

Discretionary interlocutory appeals involve trial court orders that are neither final judgments nor orders otherwise appealable as a matter of right pursuant to Appellate Rule 14(A). In order to appeal such orders, the appealing party must obtain the permission of both the trial court and the court of appeals.[7] Appellate Rule 15(B), as amended, now makes clear that an appellant's case summary shall be filed at the same time as the motion seeking permission of the appellate court to bring the discretionary interlocutory appeal.[8] In all other types of appeals, the appellant's case summary remains due within thirty days of the filing of the notice of appeal.

Appellate Rule 15(D)(4) was also amended to be consistent with the change to Appellate Rule 15(B) discussed above.[9] Specifically, that rule now states the notice of appeal need not be an attachment to the appellant's case summary in discretionary interlocutory appeals. This was just a common-sense amendment, since no notice of appeal is filed in a discretionary interlocutory appeal until after the court of appeals accepts jurisdiction,[10] but the appellant's case summary is due along with the motion seeking permission from the court of appeals to bring the appeal.[11]

B. Requirement of File-Marked Notice of Appeal Modified

On further recommendation from the rules committee, the supreme court also took action on a rule that has been troublesome for many appellate lawyers. Some explanation is helpful to understanding the concerns addressed in the amendment to Appellate Rule 9(A), which governs the procedures for filing the notice of appeal.

Appellate Rule 9(A)(1) requires the notice of appeal to be filed in the trial court and that copies be served on all parties of record and filed with the appellate court clerk. The appellate clerk has historically required that the copy filed with that office be file-marked with a filing date by the trial court. Although the rule did not actually state such a requirement, the appellate clerk imposed the requirement to ensure that the notice of appeal date on each case's chronological case summary was accurate. The problem arose from the interaction of this rule with Appellate Rule 24(B), which requires that documents must be served no later than the date they are filed. Applying Appellate Rule 24(B) together with the requirement imposed by the appellate clerk that it receive a file-marked copy of the notice of appeal resulted in appellants being obligated to obtain a file-marked notice of appeal from the trial court for same-day service on the appellate clerk.

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6. Order Amending Rules of Appellate Procedure, *supra* note 2, at 2.
7. *See* IND. APP. R. 14(B).
8. *See* IND. APP. R. 14(B)(2).
9. *See* Order Amending Rules of Appellate Procedure, *supra* note 2, at 2.
10. *See* IND. APP. R. 14(B)(3).
11. *See* IND. APP. R. 15(B) (as amended).

This requirement was viewed by some appellate attorneys as an unnecessary burden, especially if the attorney was litigating out-of-county.

Appellate Rule 9(A)(1), was amended as follows, again with additions shown underlined and deleted words being shown as stricken. Note that the term Clerk, when used alone and capitalized, refers to the appellate clerk.[12]

> *(1) Appeals from Final Judgments.* A party initiates an appeal by filing a Notice of Appeal with the trial court clerk within thirty (30) days after the entry of a Final Judgment. . . . ~~The~~ Copies of the Notice of Appeal, which need not be file stamped by the trial court clerk, shall be served on all parties of record in the trial court, ~~and filed with~~ the Clerk:, and ~~The Notice of Appeal shall also be served~~ upon the Attorney General in all Criminal Appeals and any appeals from a final judgment declaring a state statute unconstitutional in whole or part. (*See* Form # App. R. 9-1).[13]

As amended, the rule now expressly states that the copy of the notice of appeal served on the appellate clerk and counsel need not be file-marked by the trial court clerk.

The supreme court was not unmindful of the desirability of providing to the appellate clerk, at some point in time, a file-marked copy of the notice of appeal. The court thus amended Appellate Rule 15(D) in conjunction with the changes to Appellate Rules 15(B) and 9(A)(1). Appellate Rule 15(D) enumerates the attachments that must accompany the appellant's case summary. Subpart (4) identifies the notice of appeal as one of the required attachments. That provision was amended as follows:

> (4) A file-stamped copy of the Notice of Appeal, except in Discretionary Interlocutory Appeals;[14]

In summary, the amendment to Appellate Rule 9(A)(1) expressly removed any requirement that the notice of appeal originally served on the appellate clerk be file-marked. Instead, as the amendment to Appellate Rule 15(D)(4) now provides, the copy of the notice of appeal accompanying the appellant's case summary must be file-marked. The appellant's case summary is generally filed with the appellate clerk within thirty days of the service of the notice of appeal, thus allowing appellant thirty days within which to obtain a file-marked copy of the notice of appeal.[15]

Appellate Rule 9(E) was also amended simply to conform to the new language of Appellate Rules 9(A) and 15(B):

> **E. Payment of Filing Fee.** The appellant shall pay the Clerk the filing fee of $250. No filing fee is required in an appeal prosecuted in *forma pauperis* or on behalf of a governmental unit. The filing fee shall be paid

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12. *See* IND. APP. R. 2(D).
13. Order Amending Rules of Appellate Procedure, *supra* note 2, at 1.
14. Order Amending Rules of Appellate Procedure, *supra* note 2, at 2.
15. *See* IND. APP. R. 15(B).

to the Clerk when the Notice of Appeal is served on the Clerk ~~filed in the trial court. The filing fee shall be accompanied by a copy of the Notice of Appeal~~. . . .[16]

C. Emergency Stay Procedures Toughened Up

Also on the recommendation of the rules committee, the supreme court adopted significant changes to the rule governing requests for emergency stays in the court of appeals. The trial and appellate rules permit a party that has requested but been denied a stay of execution of a judgment in the trial court to petition the court of appeals for reconsideration of the stay issue.[17] Other than tendering a proposed order, the rules have never imposed any special requirements for obtaining an emergency stay from the court of appeals. However, the requirements for a motion seeking an emergency stay without notice to opposing counsel have been made more rigorous. The old and new versions of Appellate Rule 39(D) are shown below, with new language shown with underlining and deleted language shown as stricken:

D. ~~Proposed Orders for~~ Emergency Stays. If an emergency stay without notice is requested, the moving party shall submit:

(1) an affidavit setting forth specific facts clearly establishing that immediate and irreparable injury, loss, or damage will result to the moving party before all other parties can be heard in opposition;

(2) a certificate from the attorney for the moving party setting forth in detail the efforts, if any, which have been made to give notice to the other parties and the reasons supporting his claims that notice should not be required; and

(3) a proposed order setting forth the remedy being requested.[18]

In connection with the changes to Appellate Rule 39(D), the supreme court also made two additions to the list of documents that must accompany any motion for stay in the court of appeals, listed under Appellate Rule 39(C):

(4) an attorney certificate evidencing the date, time, place and method of service made upon all other parties; and
(5) an attorney certificate setting forth in detail why all other parties should not be heard prior to the granting of said stay.[19]

These amendments constitute a change from existing appellate practice and indicate that obtaining a stay on an ex parte basis will be more procedurally

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16. Order Amending Rules of Appellate Procedure, *supra* note 2, at 2.
17. *See* IND. TRIAL R. 62(D)(1); IND. APP. R. 39(B).
18. *See* Order Amending Rules of Appellate Procedure, *supra* note 2, at 3.
19. *Id.*

demanding than in the past.

D. Other

The only other change to the appellate rules that went into effect on January 1, 2004 was a new requirement that a proof of appointment be attached to the appellant's case summary in appeals being taken by counsel on behalf of an indigent person.[20]

II. DEVELOPMENTS IN THE CASE LAW

A. The Resilience of Orders from the Court of Appeals and Taboo Appeal Bonds

One of the most noteworthy opinions in the area of appellate procedure issued during the reporting period was *Marshall County Tax Awareness Committee v. Quivey*.[21] The decision included two holdings of significance to appellate practitioners.

The plaintiff-appellant committee in the Quivey appeal represented a group of property owners ("committee") opposed to the issuance of a public bond to finance school improvements in Marshall County. The defendant-appellees were the county auditor and Plymouth Community School Corporation ("school"), who were attempting to get the school bond issued. The county auditor determined that the committee had not accumulated enough valid signatures on a petition to defeat the issuance of the school bond.[22] A lawsuit ensued. The committee challenged the auditor's conclusion and sought to enjoin the issuance of the school bond.[23]

Because it was challenging the validity of the financing of a public improvement project, the committee was bringing what is known as a "public lawsuit."[24] Public lawsuits are governed in significant part by statute. If a plaintiff in a public lawsuit is unable to demonstrate a substantial issue to be tried, the trial court is authorized by statute to dismiss the suit unless the plaintiff is able to post a surety bond.[25] In this case, the trial court determined the plaintiff committee had not demonstrated a substantial issue to be tried and ordered it to post a $1 million bond or the case would be dismissed.[26]

The committee appealed the order. The school filed a motion asking the court of appeals to dismiss the appeal unless the committee posted an appeal bond. The court of appeals granted the motion and ordered the committee to post

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20. *Id.* at 2, 4.
21. 780 N.E.2d 380 (Ind. 2002), *reh'g denied.*
22. *Id.* at 382.
23. *Id.*
24. IND. CODE § 34-6-2-124 (2003).
25. *Id.* § 34-13-5-7.
26. *Marshall County Tax Awareness Comm.*, 780 N.E.2d at 383.

a $1 million appeal bond or the appeal would be dismissed.[27]

Before the court of appeals could take any additional action, the Indiana Supreme Court stepped in and assumed jurisdiction by granting the school's emergency motion to transfer jurisdiction prior to consideration by the court of appeals.[28] The matter was fully briefed by the parties and the court issued its opinion. On the merits, the court found that the trial court had erred in finding no substantial issue to be tried and in subsequently finding that a statutory bond was required. It reversed the judgment of the trial court and remanded for further proceedings.[29] The supreme court also declared two principles of procedural law that are significant.

First, it held that any orders issued by the court of appeals remain valid even after the supreme court has granted transfer and assumed jurisdiction over an appeal. The court stated:

> By rule, this Court's granting transfer has the effect of vacating the Court of Appeals' opinions. Ind. App. R. 58(A). However, the Rules of Appellate Procedure do not provide that the orders of the Court of Appeals are also vacated. When this Court assumes jurisdiction, it takes the case as it finds it, including any outstanding orders.[30]

This appears to be the first opinion to ever announce that procedural rule, although experienced appellate practitioners have probably understood jurisdictional transfers to operate in this manner. Suppose, for example, the court of appeals has issued a stay of execution of a judgment on motion of the appellant and then later issues its opinion. If the supreme court subsequently grants transfer of jurisdiction, the opinion of the court of appeals is vacated but not the order staying execution of the judgment. Under the Quivey holding, the stay of execution on the judgment, like any intermediate order of the court of appeals, remains in place unless separately overruled by the supreme court.

Applying this rule to the case at hand, the court determined that the order of the court of appeals requiring the committee to post an appeal bond was, under ordinary circumstances, viable. However, the court determined it would not dismiss the appeal because the court of appeals had erred in requiring the appellant to post an appeal bond.[31] Thus arises the second procedural holding of the case: the bringing of an appeal generally cannot be conditioned on the posting of a bond.[32]

Appellate Rule 18 expressly states, "No appeal bond shall be necessary to prosecute an appeal from any Final Judgment or appealable interlocutory order."[33] Moreover, as the opinion notes, article VII, section 6 of the Indiana Constitution

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27. *Id.* at 386.
28. *Id.* at 384 (citing IND. APP. R. 56(A)).
29. *Id.* at 386-87.
30. *Id.* at 386.
31. *Id.*
32. *Id.*
33. IND. APP. R. 18.

grants an absolute right to an appeal.[34] The supreme court concluded that simply because a statute authorizes a trial court to dismiss a case for failure to post a bond, that statute cannot serve as a basis for similarly dismissing an appeal.[35] If that were to be allowed, the difficulties of appealing an order from a trial court dismissing a public lawsuit following a determination of no substantial issue for trial would become almost insurmountable.

Of course, an appellant who fails to post a bond required by either the trial court or the court of appeals cannot prevent the appellee from executing on a money judgment. But the appellant's inability to post bond should not serve as an impediment to the bringing of an appeal.

The reader of *Quivey* is cautioned not to be confused by the fact that the word "bond" is used in three different contexts. First, there was the bond the school corporation wanted to issue to raise money for building improvements. Second, the opinion refers to the bond the plaintiff committee was statutorily required to post once the trial court determined there was no substantial issue for trial. Finally, there was the appeal bond the court of appeals erroneously required the appellant to post in order to bring the appeal.

B. Lessons Learned the Hard Way: Appeals Dismissed

In most instances when an appeal is dismissed, the court of appeals simply issues an order and no one but the parties is ever aware of the dismissal. But on five occasions during the reporting period, the court of appeals published opinions or orders dismissing appeals. While the grounds for the dismissals did not always involve completely new principles of law, the situations were novel and significant enough to warrant publication by the court of appeals. These published dispositions also provide noteworthy practical guidance for the appellate practitioner and are discussed below.

1. A Final Judgment Is "Entered" When File-Marked.—Appellate Rule 9(A) requires that a party institute an appeal by filing a notice of appeal within thirty days "after the entry of" a final judgment.[36] Failure to file the notice of appeal within thirty days results in the forfeiture of the right to appeal.[37] In *Estate of Hester v. Hester*,[38] the trial court signed a final judgment order on August 28, it was file-marked August 28, and it was shown on the chronological case summary as filed on August 28.[39]

The appellant filed a notice of appeal four days late, and appellee filed a motion to dismiss with the court of appeals. In response to the motion, the appellant argued that the judgment was not "entered" for purposes of Appellate Rule 9 until a deputy clerk physically "entered" it on the chronological case

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34. *Marshall County Tax Awareness Comm.*, 780 N.E.2d at 386.
35. *Id.*
36. IND. APP. R. 9(A).
37. *Id.*
38. 780 N.E.2d 848 (Ind. Ct. App. 2002), *trans. denied.*
39. *Id.* at 849.

summary by typing the entry.[40] The appellant submitted an affidavit from a clerk stating that she received the case file and typed the order onto the chronological case summary on September 3, although the entry reflected the signature date of August 28.[41] Following long-standing practice, the court of appeals was not persuaded. Appeal dismissed.

2. Fatal Failure to Recognize the Significance of the Magic Language.— There are many orders that may be of critical importance to the parties that are nevertheless not immediately appealable as either final judgments or interlocutory orders appealable as a matter of right under Appellate Rule 14(A).[42] In most instances, such orders can only be appealed using the two-step procedure identified in Appellate Rule 14(B).[43] That is, the party seeking to appeal must first get certification by the trial court in accordance with Appellate Rule 14(B)(1) and then must obtain permission from the court of appeals in accordance with Appellate Rule 14(B)(2).[44]

However, judgment orders entered pursuant to Trial Rules 54 (judgments) or 56 (summary judgments) as to less than all the issues or all the parties can be made immediately appealable without obtaining the permission of the court of appeals if the trial court uses the "magic language."[45] Trial Rules 54(B) and 56(C) contain similar provisions. Both provide that when the trial court expressly directs "entry of judgment" in writing and determines there is no "just reason for delay," the judgment is immediately appealable even though it is rendered on less than all the issues, claims, or parties.[46] Appellate Rule 2(H)(2) further implements these particular rules by defining "final judgment" to include partial judgments under Trial Rules 54(B) or 56(C) that include the language directing the entry of judgment and finding no just reason for delay.[47]

In *Peals v. County of Vigo*, the trial court entered a partial summary judgment as to the claims against only one of the three defendants.[48] However, the order stated, "The Court finds that there is no just reason for delay, and expressly directs entry of judgment as to all claims filed by plaintiff against the Board of Commissioners of Vigo County, only."[49] Six months later, after the claims against the other defendants were voluntarily dismissed, plaintiff sought to appeal the previously-entered partial summary judgment order and filed a notice of

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40. *Id.*

41. *Id.*

42. IND. APP. R. 14(A).

43. IND. APP. R. 14(B).

44. *Id.*

45. In *Ramco Industries, Inc. v. C & E Corp.*, 773 N.E.2d 284 (Ind. Ct. App. 2002), Judge Paul D. Mathias referred to the particular words by which an otherwise partial judgment can be made an appealable final judgment as the "magic language." *Id.* at 288. The phrase provides a useful shorthand.

46. IND. TRIAL R. 54(B), 56(C).

47. IND. APP. R. 2(H)(2).

48. 783 N.E.2d 781, 782-83 (Ind. Ct. App. 2003).

49. *Id.* at 783.

appeal for that purpose.[50]

The court of appeals noted the presence of the magic language in the partial summary judgment order entered months earlier that made it an immediately appealable final judgment.[51] The court further noted the requirement of Appellate Rule 9(A) that a notice of appeal be filed within thirty days of the entry of a final judgment or the right to appeal is forfeited.[52] The appellant's failure to recognize the significance of the language converting the otherwise interlocutory order into a final judgment was fatal. Appeal dismissed.

Peals illustrates a good practice pointer. The party successfully moving for partial summary judgment should strongly consider asking the trial court to include the magic language of finality in its granting order. If the trial court expressly directs "entry of judgment" in writing and determines there is no "just reason for delay," the non-moving party must file a notice of appeal within thirty days or the right to appeal the order would generally be considered lost.

3. The Court of Appeals Must Approve Any Appeal of a Denial of Summary Judgment.—Another appeal decided during the reporting period indirectly implicated Trial Rules 54(B) and 56(C) and is significantly informed by the preceding discussion. In *Anonymous Doctor A v. Sherrard*,[53] the trial court denied a motion for summary judgment on a statute of limitations defense.[54] The trial court stated its intent that the order be immediately appealable pursuant to Trial Rules 56(C) and 54(B) and also certified the order for interlocutory appeal in accordance with Appellate Rule 14.[55] The physician-defendant filed a notice of appeal and briefing went forward on the merits.

The court of appeals raised a jurisdictional issue *sua sponte*. First, the court noted (as discussed at some length in the preceding section) that Trial Rules 54(B) and 56(C) generally allow an otherwise interlocutory order entered under one of those rules to be made immediately appealable if the trial court expressly finds in writing that there is no just reason for delay and directs the entry of judgment as to less than all the issues, claims, or parties.[56] However, as the court noted, the *denial* of summary judgment is not any kind of entry of judgment.[57] To be immediately made appealable under Trial Rules 54(B) or 56(C), an order must dispose of at least one substantive claim.[58] Since an order denying summary judgment disposes of nothing, it cannot be made immediately appealable using the magic language of Trial Rule 56(C).

The court further noted that although the trial court had alternatively certified its order for interlocutory appeal pursuant to Appellate Rule 14(B)(1), the

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50. *Id.*
51. *Id.*
52. *Id.*
53. 783 N.E.2d 296 (Ind. Ct. App. 2003).
54. *Id.* at 297.
55. *Id.* at 298.
56. *Id.* at 299.
57. *Id.*
58. *Id.*

appellant had not sought permission from the court of appeals to bring an interlocutory appeal in accordance with Appellate Rule 14(B)(2).[59] Appeal dismissed.

As *Sherrard* illustrates, the denial of summary judgment is always interlocutory and can only be appealed by following the procedures for discretionary interlocutory appeals in Appellate Rule 14(B).

4. Denial of Summary Judgment, Again.—The same issue also arose in *Bueter v. Brinkman*.[60] Coincidentally, *Bueter* was also a medical malpractice case. As in *Sherrard*, the defendant physician filed a motion for summary judgment based on a statute of limitations defense that was denied.[61] The trial court certified the order for interlocutory appeal, but the court of appeals refused to accept the appeal, which was within its discretion.[62] The parties nevertheless proceeded forward with briefing as if the trial court's order was a final judgment. The court of appeals explained the jurisdictional defect, referring to the same general principles applied in *Sherrard*.[63] The court further noted that Appellate Rule 66 gives it the authority to accept jurisdiction over the appeal, despite the facts that: (1) the order from which appeal was sought was not a final judgment, and (2) the court had earlier declined to accept jurisdiction over the interlocutory appeal.[64] However, the court elected not to exercise that authority. Appeal dismissed.

5. Late Notice of Appeal Following a Remand in a Criminal Appeal.—One of the appeals dismissed by the court of appeals—*Hancock v. State*[65]—raises an interesting, if obscure, question about criminal appellate procedure. The question is so oblique that some background explanation is necessary to even frame it properly. The background analysis begins with developing an understanding of the procedural differences between a direct criminal appeal and a post-conviction appeal.

Appellate Rule 9(A) establishes a firm jurisdictional rule regarding appeals: "Unless the Notice of Appeal is timely filed, the right to appeal shall be forfeited except as provided by P.C.R. 2."[66] In other words, unless Post-Conviction Rule 2 applies, a late notice of appeal is fatal to all appeals. Post-Conviction Rule 2 establishes procedures wherein a person convicted of a crime can petition for leave to bring a late appeal, even when the person has failed to file a timely notice of appeal.[67]

Given the otherwise strict forfeiture provision of Appellate Rule 9, this is a powerful exception. By its own terms, Post-Conviction Rule 2 does not apply to

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59. *Id.*
60. 776 N.E.2d 910 (Ind. Ct. App. 2002).
61. *Id.* at 912.
62. *See* IND. APP. R. 14(B)(2).
63. 776 N.E.2d at 912-13.
64. *Id.* at 912.
65. 786 N.E.2d 1142 (Ind. Ct. App. 2003).
66. IND. APP. R. 9(A).
67. *See* IND. POST-CONVICTION R. 2, § 1.

civil appeals. Further, in *Howard v. State*[68] the Indiana Supreme Court held that the exceptions to the forfeiture rule found in Post-Conviction Rule 2 apply only to criminal direct appeals and not to all criminal appeals.[69] Therefore, the failure to timely file a notice of appeal from collateral criminal proceedings is fatal, and the appeal cannot be saved by the exception allowed by Post-Conviction Rule 2. Examples of such collateral proceedings would include the denial of a post-conviction relief petition,[70] the denial of a motion to correct erroneous sentence,[71] or the denial of a petition seeking habeas corpus relief.[72]

With that background, *Hancock* presents itself in greater focus. In an earlier proceeding, Joseph Hancock appealed his convictions and sentencing on charges of rape and criminal deviate conduct.[73] The court of appeals affirmed in whole, but the supreme court granted transfer of jurisdiction and affirmed in part and reversed in part. The case was remanded to the trial court for re-sentencing consistent with the opinion.[74]

After the trial court re-sentenced Hancock, he sought to appeal the new sentencing judgment. However, his notice of appeal was late and the court of appeals dismissed the appeal, issuing the opinion of interest to this discussion.[75]

Initially, the opinion indicated the appeal was dismissed solely because the appellant did not avail himself of the procedures for bringing a belated appeal under Post-Conviction Rule 2, as discussed above: "Hancock does not claim, nor does the record indicate that he filed a petition for permission to file a belated Notice of Appeal pursuant to Post-Conviction Rule 2. We therefore dismiss Hancock's attempted appeal as untimely."[76] This part of the opinion seems to indicate that Hancock could go back to the trial court and file a P.C.R. 2 § 1 petition, obtain leave to file a belated notice of appeal, file it, and then proceed with appellate review of his new sentence.

However, the court did not stop at that point. The court of appeals continued in the opinion as follows:

> See *Davis v. State*, 771 N.E.2d 647, 648-49 (Ind. 2002) (where defendant filed Notice of Appeal after the thirty-day deadline of App. Rule 9, and P-C. R. 2 did not apply, he forfeited his right to appeal, and Court of

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68. 653 N.E.2d 1389 (Ind. 1995).

69. *Id.* at 1390.

70. *Id.*

71. Davis v. State, 771 N.E.2d 647, 649 (Ind. 2002).

72. Montgomery v. State, Cause No. 45A03-0209-PC-319 (Order, Ind. Ct. App., Sept. 30, 2002) (appeal from the denial of a petition seeking habeas corpus relief dismissed due to untimely notice of appeal).

73. Hancock v. State, 768 N.E.2d 880 (Ind. 2002), *modifying and summarily aff'g in part*, 758 N.E.2d 995 (Ind. Ct. App. 2001), *trans. granted.*

74. *Id.*

75. *Id.*

76. *Id.* at 1143-44.

Appeals lacked subject matter jurisdiction).[77]

This concluding citation muddies the water by perhaps suggesting that Hancock has forfeited his right to appeal, as did the appellant in *Davis*. But *Davis* involved an appeal from the denial of a collateral attack on the underlying judgment, in the form of a motion to correct erroneous sentence.[78] By way of contrast, Hancock was appealing a re-sentencing on remand from his direct appeal. As the preceding discussion attempts to clarify, this distinction is important.

The opinion raises but does not answer a question about the rights of an appellant in a direct criminal appeal who receives appellate relief in the form of a remand for new sentencing. If the appellant then wishes to appeal the new sentence entered on remand, an issue arises as to whether the second appeal is a continuation of the initial direct appeal or is an appeal from a new collateral proceeding. If the former, the failure to file a timely notice of appeal would not be fatal and the appeal would be subject to the saving procedures of Post-Conviction Rule 2. If the latter, then the failure to file a timely notice of appeal would result in forfeiture. The supreme court has not spoken definitively of that question, but the better rule might be to treat the second appeal as just a continuation of the first and not as a collateral form of post-conviction proceeding.[79]

The appellant in *Hancock* did not try to re-docket his appeal using the procedures of Post-Conviction Rule 2, suggesting he may have read the opinion to foreclose that possibility.

C. Use of an Anders *Brief in a State Appeal Approved (Maybe)*

What happens if competent appellate counsel appointed to represent an indigent criminal defendant can find no good faith basis for taking an appeal? If the appeal is from the denial of post-conviction relief, Indiana's rules provide procedural guidance. Post-Conviction Rule 1 § 9 expressly permits appointed counsel to withdraw from a proceeding upon counsel's certification that there are no meritorious grounds for relief.[80] But the question becomes much more troubling in a direct appeal from a judgment of conviction or sentence.[81]

The counsel appointed to represent an indigent criminal defendant in a meritless direct appeal is pulled in opposite directions by the attorney's ethical

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77. *Id.* at 1144.

78. *See* Davis v. State, 771 N.E.2d 647 (Ind. 2002).

79. There are many instances in which second appeals have been taken following remand for new sentencing. *See, e.g.*, Shaw v. State, 771 N.E.2d 85 (Ind. Ct. App. 2002), following remand in Shaw v. State, No. 46A05-0001-CR-472, 756 N.E.2d 1101(Ind. Ct. App., Sept. 26, 2001); Ingle v. State, 766 N.E.2d 392 (Ind. Ct. App. 2002), following remand in Ingle v. State, 746 N.E.2d 927 (Ind. 2001). Nothing in these second appeals suggests they should be treated as a collateral or post-conviction proceedings.

80. IND. POST CONVICTION R. 1 § 9.

81. For a discussion of the difference between a criminal direct appeal and the appeal of a collateral criminal proceeding, see the preceding discussion of *Hancock*, *supra* Part II.B.5.

obligations. On one side stand the constitutional right to effective appellate counsel,[82] the constitutional right in Indiana to an appeal,[83] and the general obligation to vigorously advocate on behalf of one's client.[84] On the other stand the duty of candor to the tribunal[85] and the duty to avoid asserting frivolous claims or defenses.[86]

Although approaches vary, the federal courts and many state courts have adopted the use of an "Anders brief" to address the problems inherent in a meritless direct criminal appeal.[87] The term for the procedure is taken from *Anders v. California*,[88] a U.S. Supreme Court case decided in 1967. In that opinion, the high court held that when a conscientious examination of a case reveals no appealable issue that is not frivolous, the appellate lawyer can meet the requirements of substantive due process by advising the appellate court and requesting permission to withdraw from the case.[89] The request to withdraw must be accompanied by a brief referring to anything in the record that might arguably support the appeal and must be served upon the client. The appellate court will then decide if the appeal is wholly frivolous and if so, grant counsel's request to withdraw. If the appellate court finds any colorable issue, then the opportunity for assistance of appellate counsel must be afforded to the appellant.[90]

The Indiana Court of Appeals had previously refused to approve the use of the Anders brief in a direct appeal. In *Smith v. State*, a 1977 opinion, the appellate attorney followed the proper procedural steps stated in *Anders* and asked leave to withdraw.[91] However, the appellate court stated that counsel's reliance on *Anders* was "misplaced."[92] The court addressed the two issues that counsel had suggested might arguably support an appeal, independently reviewed the record, affirmed the underlying judgment, and denied the motion to withdraw.[93]

During this most recent reporting period, however, the court of appeals decided *Packer v. State*, a case in which the defendant sought to appeal judgments

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82. *See* Miller v. State, 702 N.E.2d 1053, 1058-59 (Ind. 1998) and cases cited therein.

83. IND. CONST. art. 7, § 6 (2003).

84. MODEL RULES OF PROF'L CONDUCT, PREAMBLE: A LAWYER'S RESPONSIBILITIES ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); MODEL RULE OF PROF'L CONDUCT R. 1.3, cmt. 1.

85. MODEL RULE OF PROF'L CONDUCT R. 3.3.

86. MODEL RULE OF PROF'L CONDUCT R. 3.1.

87. Martha C. Warner, *Anders in the Fifty States: Some Appellant's Equal Protection Is More Equal Than Others*, 23 FLA. ST. U. L. REV. 625, 653 (1996).

88. 386 U.S. 738 (1967).

89. *Id.* at 744.

90. *Id.*

91. 363 N.E.2d 1295, 1296-97 (Ind. Ct. App. 1977).

92. *Id.* at 1297 n.l; *see also* Hendrixson v. State, 316 N.E.2d 451 (Ind. Ct. App. 1974) (refusing to apply *Anders* procedures); Dixon v. State, 284 N.E.2d 102 (Ind. Ct. App. 1972).

93. *Smith*, 363 N.E.2d at 1297.

finding her in contempt of court and revoking her probation.[94] Packer's appointed public defender filed a brief stating that "appellate counsel . . . is unable to construct a non-frivolous argument" that the trial court committed any error in its judgments.[95] The argument sections of the brief essentially demonstrated that the trial court did not commit any error. Acting *sua sponte*, the court of appeals expressed its concern that "counsel has neither acted with dedication to the interests of Packer nor advocated with zeal on Packer's behalf."[96]

The court of appeals noted the ethical dilemma and, after balancing the competing considerations, approved the use of the *Anders* procedures in the Indiana state court system.[97]

The *Packer* opinion did not mention the earlier opinions that had declined to authorize the use of *Anders* briefs in Indiana nor the implications of Indiana's constitution that, unlike its federal counterpart, provides for an "absolute right to appeal."[98] However, these omissions from *Packer* are not particularly troubling. The procedures in *Anders* and those followed in the older Indiana cases that declined to approve the use of *Anders* briefs are similar in that they both favor some form of judicial review in all criminal direct appeals. Moreover, the continuing vitality of thirty-year-old opinions disapproving the *Anders* procedures might reasonably be questioned. Further, the constitutional right to an appeal cannot be so broad as to incorporate a right to bring a frivolous appeal.

Transfer of jurisdiction to the Indiana Supreme Court was not sought in *Packer*, so we do not know whether the *Anders* procedure endorsed by this panel of the court of appeals is the final word on this subject. But for the foreseeable future, *Packer* provides current law applicable in those situations in which appointed appellate counsel in a criminal appeal can find no issue to raise that is not frivolous.

D. Trial Court Failure to Create Transcript Discussed in Two Cases

In *Graddick v. Graddick*,[99] the court of appeals addressed the procedural implications of a court reporter failing to make a transcript of the evidence presented at a trial or hearing.

Graddick involved an appeal from a custody determination in a dissolution proceeding. The trial court did not make a record of the evidentiary hearing and the appellant asserted on appeal, among other arguments, that the judgment should be reversed for that reason.[100] The court of appeals declined to do so, citing the general rule that the appellant bears the burden of presenting a record

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94. 777 N.E.2d 733, 735 (Ind. Ct. App. 2002).
95. *Id.* at 736.
96. *Id.* at 737.
97. *Id.*
98. IND. CONST. art. 7, § 6 (2003).
99. 779 N.E.2d 1209, 1210-11 (Ind. Ct. App. 2002).
100. *Id.*

that is complete with respect to the issues raised on appeal. The judgment of the trial court was affirmed.[101]

The court of appeals noted that Appellate Rule 31 explains the procedure for assembling a record when no transcript is available, and stated further that compliance with that rule sustains the appellant's burden of presenting a complete record.[102] In general, Appellate Rule 31 provides that when no or only part of a transcript is available, a verified statement of the evidence may be prepared from the "best available sources" for approval by the trial court.[103] Although the appellant complained that her trial counsel could not recollect the hearing, the appellate court held that the appellant herself could have availed herself of the Appellate Rule 31 procedures based on her own recollection.[104] Although not pointed out by the court of appeals, Appellate Rule 33 also provides a procedural mechanism for creating a record when the parties can agree the issues are capable of resolution without reference to a transcript.[105]

Although the court of appeals refused to find reversible error in the trial court's failure to make a record, the appellate court nevertheless chastised the trial court for conducting a proceeding without recording it. Calling the failure to do so a "folly," the court of appeals stressed the need to record all proceedings or to obtain consent from the parties to waive recording.[106]

In an unrelated case, the court of appeals voiced its concern about unrecorded proceedings in even stronger terms. After noting the inability of the trial court to produce tapes of portions of the trial transcript, the appellate court in *Smith v. State* noted, "Although the missing transcripts played no role in the outcome of this case, we cannot tolerate any failure, however small, to perform such a fundamental element of the judicial process, as such failure tarnishes public confidence in the process and, ultimately, in the judiciary itself."[107]

E. Procedural Pitfalls in Summary Judgment Cases Involving Agency-Principal Relationships Among the Defendants

Kreighbaum v. First National Bank & Trust serves as a reminder to plaintiffs of the care that must be taken to preserve appellate rights when, for example, summary judgment is entered as to less than all the defendants but the liability of the defendants is predicated on agency principles.[108]

The plaintiff in *Kreighbaum* sued a bank, the seller of real estate purchased by the plaintiff, and five agents and loan officers of the bank.[109] The real estate

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101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. IND. APP. R. 31.
106. IND. APP. R. 33.
107. 792 N.E.2d 940, 946 n.4 (Ind. Ct. App. 2003).
108. 776 N.E.2d 413 (Ind. Ct. App. 2002).
109. *Id.* at 416.

seller and one of the bank's agents declared bankruptcy and the proceeding was stayed as to those defendants.[110] The trial court granted summary judgment to the bank and one of its loan officers. The remaining three agents and officers of the bank did not join in the motions for summary judgment, but it was undisputed that their liability was predicated on the bank's liability through agency-principal doctrines.[111] The plaintiff did not file a notice of appeal within thirty days from the entry of the summary judgment order.[112] The trial court proceedings then become muddled,[113] but the matter ended up in the court of appeals.

A judgment order that disposes of all claims as to all parties is a final judgment, and a notice of appeal must be filed within thirty days after entry of the judgment in order to preserve the right to appeal.[114] The two entities that had been granted summary judgment argued on appeal that the trial court's entry of summary judgment was a final judgment and that the appeal should be dismissed because the plaintiff did not file a timely notice of appeal. The plaintiff replied that the judgment was not final because it did not dispose of the claims of the three remaining defendants.

In arguing for dismissal, the appellees asserted that for all practical purposes, the order did dispose of all claims as to all parties because the liability of the three remaining defendants was predicated solely on the bank's liability. Since the bank was granted summary judgment, argued the appellees, that judgment should be considered final as to the non-moving defendants as well.[115]

The court of appeals agreed that had each of the defendants in the case filed motions for summary judgment, "the trial court would have been required to grant them."[116] However, because the other defendants did not file their own motions for summary judgment and the trial court did not expressly enter judgment on their behalf as it could have pursuant to Trial Rule 56(B), the summary judgment order was not, standing alone, an appealable final judgment.[117]

Although the plaintiff-appellant in *Kreighbaum* survived to appeal the summary judgment order on the merits, the opinion should be read as a cautionary tale for cases involving "partial" summary judgment orders in favor of a principal where the liability of the all the other defendants is predicated on their agency with the principal. There are alternative ways in which such an order could be made clearly final and appealable, even when not every defendant moved for summary judgment. For example, Trial Rule 56(B) permits the trial court to grant judgment in favor of other parties even where they did not move

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110. *Id.*
111. *Id.* at 417-18.
112. *Id.* at 416.
113. *Id.* at 418 n.3.
114. *See* IND. APP. R. 2(H)(1), 9(A).
115. *Kreighbaum*, 776 N.E.2d at 417.
116. *Id.* at 418.
117. *Id.*

for summary judgment.[118] A trial court might well take advantage of that authority and grant judgment to non-moving agency defendants at the same time it grants summary judgment to the principal. Further, the trial court's order could contain the language of finality of Trial Rules 54(B) or 56(C).[119] In any of the examples given, the summary judgment order would be considered a final judgment for purposes of establishing (or losing) appeal rights.

As a final advisory note on this topic, the next panel of the court of appeals faced with a similar situation may not be as forgiving as the *Kreighbaum* panel. In the next procedurally similar appeal, the assigned panel may well conclude that a summary judgment order as to the principal is a final judgment if the only defendants remaining in the case are agents whose liability is solely based on that of the principal. That panel might simply disagree with *Kreighbaum* or find it distinguishable based on the "confusion in the trial court" and "baffl[ing]" procedural orders issued after the summary judgment order was entered in the *Kreighbaum* case.[120]

The thorough appellate lawyer takes special care when dealing with judgment orders of any kind to make sure that the all the possible implications for appeal purposes are fully understood. Care is especially warranted when agency-principal relationships exist among the defendants.

F. Order Directing Consummation of Settlement Agreement Generally Not a Final Judgment

Georgos v. Jackson[121] was a tort case in which the trial court ordered mediation. A mediation conference took place in which the plaintiff, Jackson, appeared by counsel but not in person.[122] A settlement agreement was reached at the conference and was signed by counsel. However, Jackson later attempted to repudiate the agreement.[123]

The defendant filed a motion seeking enforcement of the settlement agreement, which the trial court granted. After no activity for five months, Jackson filed a motion for relief from the trial court's order on various grounds.[124] The trial court granted the motion, the case went to trial, and the jury ultimately awarded Jackson a verdict in an amount over five times greater than the settlement agreement would have provided.[125] Defendants appealed.

One of the defendant's claims was that the order granting the motion seeking enforcement of the settlement agreement was a final judgment.[126] Since Jackson

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118. IND TRIAL R. 56(B).
119. *See supra* notes 44-51 in Part II.B.2.
120. 776 N.E.2d at 417 n.2 & 418 n.3.
121. 790 N.E.2d 448 (Ind. 2003).
122. *Id.* at 450.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 451.

did not file a notice of appeal within thirty days of the judgment, argued the defendants, the judgment became the law of the case and the trial court lacked jurisdiction to overrule it.[127]

The court of appeals accepted this contention. It reversed the jury verdict and reinstated the settlement agreement on the ground that the order granting relief from the earlier order to enforce the settlement agreement was void.[128]

The supreme court granted transfer of jurisdiction, thus vacating the opinion of the court of appeals.[129] The high court also reversed the jury verdict and reinstated the settlement agreement, but on a different ground from that advanced by the court of appeals. The supreme court determined that the trial court's order overruling its earlier granting of the motion to enforce the settlement agreement was not void, but was simply erroneous.[130]

In so doing, the court necessarily determined that the order granting the motion to enforce the settlement agreement was itself not a final judgment. The court determined that it was not a final judgment because it did not dispose of all the issues as to all the parties.[131] The court noted that the trial court's order directed Jackson to "take all measures necessary to consummate the settlement . . . within 30 days."[132] The court noted, "This did not dismiss the case, and left open what would happen if, as in fact turned out to be the case, Jackson did not comply with the directive to consummate the agreement."[133]

It might be unwise to read more into *Georgos* than is actually there. Although the supreme court concluded that this particular order to enforce a settlement agreement was not a final appealable judgment, it relied, at least in part, on the specific language of the order. A different order to enforce a settlement agreement, entered under different circumstances and with different language, might well dispose of all the claims as to all the parties and thus be a final judgment for appeal purposes.

G. An Order Worth Tracking—Stay Tuned

For the appellate practitioner, one of the more significant developments of the reporting period may turn out to be a two-word order issued by the Indiana Supreme Court on August 14, 2003: "transfer granted."[134] The order vacated the

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127. *See* IND. APP. R. 9(A) (providing that failure to file a notice of appeal within thirty days of a final judgment forfeits the right to an appeal).

128. Georgos v. Jackson, 762 N.E.2d 202, 207 (Ind. Ct. App. 2002), *vacated.*

129. *See* Georgos v. Jackson, 790 N.E.2d 448 (Ind. 2001).

130. The court concluded that attorney attendance at a mediation conference under the Rules for Alternative Dispute Resolution and execution of a settlement agreement is sufficient to bind the client who fails to attend the conference without excuse. *Id.* at 455.

131. *Id.* at 451.

132. *Id.* at 452.

133. *Id.*

134. Bojrab v. Bojrab, Cause No. 02S03-0308-CV-365 (Order, Ind.).

opinion of the court of appeals issued in *Bojrab v. Bojrab*.[135]

A key appellate procedural issue in the case is whether the failure to bring an appeal from an interlocutory order appealable as a matter of right waives the right to appeal the order later after final judgment has been entered.

In *Bojrab*, the trial court entered a preliminary order directing the husband in a dissolution proceeding to, among other things, pay temporary maintenance to the wife.[136] The husband did not immediately appeal. Later, after a final dissolution decree was entered, wife commenced an appeal. On cross-appeal, the husband challenged the maintenance order.

Because the interlocutory order was "for the payment of money," it was immediately appealable as a matter of right pursuant to Appellate Rule 14(A)(1).[137] However, as noted, the husband did not immediately appeal the order, but sought appellate review later after the entry of the final dissolution decree.

Because his appeal rights arose when the interlocutory order for maintenance was issued, the court of appeals held that husband had waived the right to appeal the order by not exercising that right.[138] It therefore declined to address the husband's claim of error.[139] While there is support for that proposition in other opinions of the court of appeals, there is also some supreme court authority that suggests the contrary.[140]

By granting transfer in *Bojrab*, the supreme court has the opportunity to give a final and definitive answer to the question of waiver in interlocutory orders that qualify as appealable of right pursuant to Appellate Rule 14(A). The outcome may be foreshadowed by another opinion of the supreme court issued during the reporting period, *Georgos v. Jackson*, discussed in greater detail above.[141] In *Georgos*, the court addressed whether an order directing the parties to consummate a settlement agreement, without more, is a final judgment for appeal purposes. In concluding that it is not, the court also stated the following in dicta:

> Even though the trial court's [ruling compelling the enforcement of a settlement agreement] was an interlocutory order, it was arguably appealable as a matter of right under Appellate Rule 14(A)(2) because it required the execution of a document. However, there is no requirement

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135. 786 N.E.2d 713 (Ind. Ct. App. 2003), *vacated*.

136. *Id.* at 720.

137. *Id.* at 721.

138. *Id.*

139. *Id.*

140. *Compare* Crowley v. Crowley, 708 N.E.2d 42 (Ind. Ct. App. 1999), *and* Burbach v. Burbach, 651 N.E.2d 1158 (Ind. Ct. App. 1995) (holding the right to take appeal of interlocutory available as a matter of right waived if not immediately exercised), *with* Trojnar v. Trojnar, 698 N.E.2d 301 (Ind. 1998), *and* Wayne Township v. Parkview Mem'l Hosp., 580 N.E.2d 958 (Ind. 1991) (recognizing no waiver of appeal rights in failing to immediately appeal interlocutory order to pay money).

141. 790 N.E.2d 448 (Ind. 2003). *See supra* notes 128-33 accompanying Part II.F.

> that an interlocutory appeal be taken, and Jackson may elect to wait until the end of the litigation to raise the issue on appeal from a final judgment.[142]

The opinion of the supreme court in *Bojrab* will be issued some time after this Article will have been submitted for publication.

III. Miscellaneous Developments

A. Data from the Indiana Supreme Court

As the rule amendments and opinions cited herein demonstrate, the Indiana Supreme Court was again this year a major player in the area of appellate procedure.

The court also accepted a certified question from the United States Court of Appeals for the Third Circuit, the first time the court has been asked to accept a question from a federal appeals court other than the Seventh Circuit.[143]

The court conducted fifty-eight oral arguments during its fiscal year ending June 30, 2003, while disposing of 1097 cases that required a vote from each of the justices. One-hundred-ninety-eight of those dispositions were by majority opinion.[144]

The court's commitment to developing the civil law in Indiana is demonstrated by comparing the number of civil and criminal transfer petitions disposed of and the number of opinions issued. During fiscal 2003, the court disposed of 498 petitions seeking transfer of jurisdiction in criminal cases and 327 petitions in civil cases.[145] However, during that same reporting period, the court issued thirty-two opinions in criminal transfer cases and fifty-two opinions in civil transfer cases.[146] The disposition and opinion numbers do not correlate exactly; some of the opinions issued were accepted in a prior fiscal year and opinions will not be issued in some of the accepted cases until a future fiscal period. However, these numbers suggest that the court granted transfer of jurisdiction in roughly six percent of the criminal cases, compared with sixteen percent of the civil cases presented to it.

B. Data from the Indiana Court of Appeals

During calendar 2003, the Indiana Court of Appeals received more appeal filings than at any other time in Indiana history.[147] The state's intermediate

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142. *Georgos*, 790 N.E.2d at 452.

143. *See* Simon v. United States, 794 N.E.2d 1087 (Ind. 2003).

144. *See* Indiana Supreme Court Annual Report July 1, 2002 – June 30, 2003, at 30 and other figures available at the Division of Supreme Court Administration, 313 Statehouse, 200 W. Washington St., Indianapolis, Indiana (2003).

145. *Id.* at 30.

146. *Id.* at 31.

147. Abigail Johnson, *Appeals Court Sees a Record Caseload*, Ind. Law. 1 (Vol. 14, No. 03,

appellate court nevertheless continued its remarkable record of efficiency. The court disposed of 2242 cases during that time period.[148] Once fully briefed, the average age of a case in the chambers of a judge was only 1.2 months.[149]

The court reversed the judgment of the trial court in about 36% of the civil appeals and in about 14% of the criminal appeals.[150] Around 29% of the opinions of the court were published.[151]

The court of appeals hears oral arguments in only about less than 3% of its cases,[152] so an order setting a case for argument from that court suggests the judges on the assigned panel have some questions on their minds.

Of the 2468 motions seeking various extensions of time, the court of appeals denied only 22.[153]

The court of appeals received 290 motions asking for acceptance of a discretionary interlocutory appeal and it granted 119 of those motions.[154]

C. And Still Counting . . .

One day during the reporting period, a delivery person from the State Public Defender agency arrived in the clerk's office with one of the many blue briefs filed each year by that agency. Without fanfare, the brief was filed-marked and the messenger returned to other appointed duties. However, that brief represented a significant milestone—it was the 3000th appellant's brief filed in which Susan K. Carpenter was listed as one of the counsel for the appellant.[155]

On October 12, 1981, Susan Carpenter was first appointed by then Chief Justice Richard Givan to serve as the State Public Defender in Indiana. She had been out of law school for only five years. Ms. Carpenter has been reappointed to that position every four years thereafter.[156] For over twenty-two years, she has directed the agency responsible for representing indigent persons incarcerated in Indiana, primarily in post-conviction proceedings and appeals therefrom.[157] Though there may have been attorneys general who have filed more briefs as the appellee, it would seem beyond question that Ms. Carpenter has represented more appellants than any attorney in Indiana history. Her record number of filings grows further out of reach to future lawyers each week.

Dec. 31,2003 – January 13, 2004).

148. *See* INDIANA COURT OF APPEALS, 2003 ANNUAL REPORT 1 (2004).

149. *Id.*

150. *Id.*

151. *Id.* at 4.

152. *Id.* at 1 (59 oral arguments conducted in connection with 2242 appeals).

153. *Id.* at 12.

154. *Id.*

155. According to records on file with the State Public Defender, One North Capitol, Suite 800, Indianapolis, Indiana.

156. *See* IND. CODE § 33-1-7-1 (2003).

157. *See id.* § 33-1-7-2.

CONCLUSION

Finding a theme uniting the rule amendments and opinions issued during the reporting period is difficult. The changes in the appellate rules adopted this past year address fairly minor points of procedure. The published opinions of the period provide helpful guidance, but generally dealt with unusual factual circumstances. However, one of the most serious recurring problems for appellate practitioners was determining whether a judgment order was final and appealable. Many of the opinions discussed in this Article touch on that question.

But if there is a specific message for the appellate lawyer that emerges from this reporting period, it might be that the procedures for taking an appeal in Indiana have advanced to the point where the appellate courts can simply address some of the finer points of procedure, freeing our appellate judges to focus on the difficult substantive issues with which they are daily confronted.