

44 Ind. L. Rev. 1033

**Indiana Law Review**

2011

Survey

IV. Appellate Procedure

DEVELOPMENTS IN INDIANA APPELLATE PROCEDURE: RULE AMENDMENTS,  
REMARKABLE CASE LAW, AND COURT GUIDANCE FOR APPELLATE PRACTITIONERSBryan H. Babb<sup>a1</sup> Curtis T. Jones<sup>a2</sup>

Copyright (c) 2011 Trustees of Indiana University; Bryan H. Babb, Curtis T. Jones

**Introduction**

In 2000, the Indiana Rules of Appellate Procedure (“Appellate Rules”) were adopted. The Indiana Supreme Court, the Indiana Court of Appeals, and the Indiana Tax Court (collectively, the “appellate courts”) are collectively responsible for applying, interpreting, and updating the Appellate Rules through appellate decisions and amendment orders. This article tracks the developments in Indiana appellate procedure between October 1, 2009 and September 30, 2010 by summarizing amendments to the Appellate Rules, as well as examining and synthesizing court opinions affecting appellate procedure to provide guidance to practitioners in order to improve their appellate practice.

**I. Rule Amendments**

The supreme court issued its Appellate Rule amendments on September 21, 2010.<sup>1</sup> The court substantively amended [Appellate Rules 8, 9, 14, 14.1, 15, 16, 18, 22, 30, 35, 39, 41, 45, 49, 50, 62, and 63](#).<sup>2</sup> These amendments took effect on January 1, 2011 and may be categorized as temporal amendments, technological amendments, procedural amendments, and form amendments.

**A. Temporal Amendments-Amendments Made to the Calculation and Measurement of Days**

Many of the Appellate Rules' amendments aim to eliminate the ambiguity that existed in calculating the number of days an appellate practitioner had to file a notice or motion with the appellate courts. Problems arose in situations where a court order was decided, dated, and entered on different days. [Appellate Rules 8, 9, 14, 14.1, and 62](#) now use the date entered or noted on the chronological case \*1034 summary (CCS) as the starting day for purposes of counting days.<sup>3</sup>

[Appellate Rule 8](#) addresses the time at which the appellate court acquires jurisdiction.<sup>4</sup> Previously, the rule stated that jurisdiction was acquired on the date the notice of completion of clerk's record was issued by the trial clerk.<sup>5</sup> Now, the rule specifically provides that jurisdiction is granted on the date that the notice of completion of clerk's record is noted in the CCS.<sup>6</sup> This modification clears up any confusion that could result from the notice being issued, delivered, and dated on different days.

[Appellate Rule 9](#) utilizes the CCS for purposes of determining when the notice of appeal is first due to the trial court clerk.<sup>7</sup> The notice must be filed “with the trial court clerk within thirty (30) days after the entry of a Final Judgment is noted in the Chronological Case Summary.”<sup>8</sup> The same language applies to appeals of rulings on motions to correct error.<sup>9</sup>

Additionally, the rule governing interlocutory appeals-[Appellate Rule 14](#)-received an update consistent with the changes to [Appellate Rules 8 and 9](#).<sup>10</sup> Regarding interlocutory appeals of right, notices of appeal are due to the trial court clerk “within thirty (30) days after the notation of the interlocutory order in the Chronological Case Summary.”<sup>11</sup> [Appellate Rule 14\(B\)](#)

(1), which governs the trial court's certification of a discretionary interlocutory appeal, and [Appellate Rule 14\(B\)\(2\)](#), which addresses the court of appeals's acceptance of jurisdiction over the appeal, contain the same language changes.<sup>12</sup> The same requirements have also been added to [Appellate Rule 14\(C\)](#), which governs appeals of class certification orders.<sup>13</sup> Regarding expedited appeals for children's placement and/or services, [Appellate Rule 14.1](#) now refers to the CCS for calculating the filing due dates for the notice of expedited appeal and the notice of completion of the transcript and the record.<sup>14</sup>

Several rules regarding the filing of the appellant's brief also received slight updates in the amended rules order. [Appellate Rule 45](#) addresses the time for filing briefs and now states that the appellant's brief must be filed:

no later than thirty (30) days after: (a) the date the trial court clerk or [a]dministrative [a]gency serves its notice of completion of [c]lerk's [r]ecord on the parties pursuant to [Appellate Rule 10\(C\)](#) if the notice \*1035 reports that the [t]ranscript is complete or that no [t]ranscript has been requested; or (b) in all other cases, the date the trial court clerk or [a]dministrative [a]gency serves its notice of completion of the [t]ranscript on the parties pursuant to [Appellate Rule 10\(D\)](#).<sup>15</sup>

The rule also expressly excludes the additional three-day extension for service of the appellant's brief by mail or third-party commercial carrier under [Appellate Rule 25\(C\)](#).<sup>16</sup>

The amendment to [Appellate Rule 63](#) regarding the review of tax court decisions relates to the counting of days, but it does not utilize the CCS language used in previous rule changes.<sup>17</sup> [Appellate Rule 63\(C\)](#) formerly stated that a notice of intent to petition for review must be filed with the clerk no later than thirty days after the final judgment or final disposition.<sup>18</sup> It was amended to clarify that the petition must be filed thirty days from "the date of entry in the court's docket" of the final judgment or disposition"<sup>19</sup> A similar addition was made to [Appellate Rule 63\(E\)](#) regarding the filing of the actual petition for review.<sup>20</sup>

### **B. Technological Amendments-Adjustments to the Technology Allowed in Storing and Transmitting Information**

With the ever-changing nature of technology comes the necessity of revision to court practices and procedures. Previously, the Appellate Rules contained references to such antiquated storage solutions as CD-ROMs and floppy disks.<sup>21</sup> The newest rule amendments help to modernize the appellate courts.

[Appellate Rule 16](#) sets out the requirements for filing an appearance form with the court, which is necessary in order to participate in an appeal.<sup>22</sup> [Appellate Rule 16\(B\)](#) contains the requirements for an appropriate appearance form and was amended to remove the language requiring the appearing attorney to state a preference of receiving orders and opinions via fax.<sup>23</sup> This update comes on the heels of the previous year's amendment to [Appellate Rule 26](#), requiring all represented parties to receive court orders by e-mail and eliminating the use of fax.<sup>24</sup> Unrepresented parties are still able to request court orders via fax.<sup>25</sup> The \*1036 same elimination concerning receipt of orders and opinions via fax was made to the section addressing amicus curiae appearance forms.<sup>26</sup>

The procedure for preparing an electronic transcript was updated in the amendments made to [Appellate Rule 30](#).<sup>27</sup> Prior to this year, the Appellate Rules called for the preparation of electronic transcripts to be contained within disks, CD-ROMs, and zip drives.<sup>28</sup> The rule now simply states that transcripts may be kept in "electronic data storage devices," appearing to incorporate all modern methods of electronic data storage and transportation.<sup>29</sup> The court also updated Appendix B to the Appellate Rules to include the approved media for electronic storage, including "USB flash memory drives, compact discs (CDs), and digital versatile discs (DVDs) specifically formatted to store electronic data in a FAT or FAT-32 file system."<sup>30</sup> The method of submission for electronic transcripts no longer calls for delivery in a "clear, sturdy case" but now only requires an envelope bearing the trial court case number and the designated marking of "Transcript."<sup>31</sup>

### **C. Procedural Amendments-Administrative Amendments to Procedural Rules**

Many of the Appellate Rules were amended to clarify or make changes to certain administrative aspects of the appellate process. Whether they introduce new inclusions to appellate forms or update the requirements for filing motions, there are several amendments worth noting.

[Appellate Rule 15](#) addresses the appellant's case summary.<sup>32</sup> Section C contains the information that must be included in the appellant's case summary, and several additions were made to this list of requirements, including the “[d]ate [m]otion to [c]orrect [e]rror [was] denied or deemed denied, if used,” and “[w]hether [the] case was heard by a judicial officer other than a judge and, if so, whether [the] trial judge approved the proposed judgment or order.”<sup>33</sup> The form to be used in accordance with [Appellate Rule 15](#) was also updated and is described below.

[Appellate Rule 18](#), the rule pertaining to appeal bonds, was expanded to **\*1037** include all forms of security.<sup>34</sup> The enforcement of a final judgment is directed to be stayed in the event an appeal is made and a bond is given in place of the judgment.<sup>35</sup> Previously, the Appellate Rules only allowed for bonds or irrevocable letters of credit to satisfy this requirement.<sup>36</sup> The amendment to [Appellate Rule 18](#) now allows for all “other form[s] of security approved by a trial court or [a]dministrative [a]gency.”<sup>37</sup>

[Appellate Rule 39](#) provides the procedure for filing a motion to stay with the appellate court.<sup>38</sup> The rule states that a motion for stay pending appeal cannot be filed with the appellate court unless the motion was filed and denied by a trial court or administrative agency.<sup>39</sup> This is the rule unless a situation exists in compliance with the updated [Rule 39\(C\)](#), which provides that a motion to stay pending appeal in the appellate court should contain:

certified or verified copies of the following: (1) the judgment or order to be stayed; (2) the order denying the motion for stay or a verified showing that (a) the trial court or [a]dministrative [a]gency has failed to rule on the motion within a reasonable time . . . or (b) extraordinary circumstances exist which excuse the filing of a motion to stay in the trial court or [a]dministrative [a]gency altogether.<sup>40</sup>

A new section was also added to [Appellate Rule 41](#) pertaining to materials that may be submitted by amicus curiae.<sup>41</sup> The new rule explicitly states that amicus curiae may not file appendices or addendums to the brief that contain documents not already in the appellate record unless granted leave to do so first.<sup>42</sup>

[Appellate Rule 49](#), which addresses the requirements for filing an appendix with a brief, received new language pertaining to a situation where an appeal is dismissed before a party has an opportunity to file an appendix.<sup>43</sup> In such circumstances, “an [a]ppendix may be filed contemporaneously with the [p]etition for [r]ehearing or [t]ransfer and the [b]riefs in [r]esponse.”<sup>44</sup>

Another rule governing appendices, [Appellate Rule 50](#), received a substantial update pertaining to the contents of each appendix.<sup>45</sup> In multiple sections, any reference to the inclusion of portions of the transcript were eliminated, and the rule now precludes the use of duplicate materials already contained in the same or other appendices, unless the inclusion is necessary for completeness or **\*1038** context.<sup>46</sup>

#### **D. Form Amendments-Updating the Forms to Be Used with the Amended Rules**

The form to be used in accordance with [Appellate Rule 9-Form App. 9-1](#), which shows the proper format for a notice of appeal, received additional language to be used under the certificate of service heading.<sup>47</sup> The form specifically provides that the clerk of the Indiana Supreme Court, Indiana Court of Appeals and tax court must be served a copy of the notice of appeal from the trial court.<sup>48</sup>

Also, in accordance with the amendments to [Appellate Rule 15](#), [Appellate form 15-1](#), which provides the format for the appellant's case summary, received several new directives applying the new language set out in [Rule 15](#) above.<sup>49</sup>

## II. Case Law Interpreting the Appellate Rules

The Indiana Court of Appeals issues the majority of case law interpreting the Appellate Rules. The large volume of cases heard by the court of appeals gives the court more opportunities to address appellate procedure than the Indiana Supreme Court or Indiana Tax Court.

### A. Acceptance of Interlocutory Appeal

1. Court May Reconsider an Interlocutory Issue That Was Previously Denied Review.-In *Murray v. City of Lawrenceburg*,<sup>50</sup> Murray, an alleged landowner, filed suit against the City of Lawrenceburg (“the City”) after the city subleased a disputed parcel of land to a developer in order to build a casino.<sup>51</sup> The owner of the land was unknown for more than fifty years prior to the conveyance by the City, and Murray did not bring the action until eight years after the conveyance.<sup>52</sup> Initially, the City moved for judgment on the pleadings pursuant to *Indiana Trial Rule 12(C)*, arguing that the only cause of action available to Murray “was inverse condemnation which was barred by the six year statute of limitations for injury to real property.”<sup>53</sup> The trial court denied the City's motion and certified its order for interlocutory appeal, but the court of appeals declined to accept jurisdiction over the appeal.<sup>54</sup> Subsequently, the trial court denied Murray's demand for a jury trial but granted his request to certify that ruling for an \*1039 interlocutory appeal.<sup>55</sup> The City cross-appealed, “again seeking appellate review of the trial court's denial of their motion for judgment on the pleadings based on the statute of limitations.”<sup>56</sup>

The court of appeals accepted Murray's interlocutory appeal from the trial court's denial of his jury trial demand and also reconsidered the City's cross-appeal regarding its motion for judgment on the pleadings.<sup>57</sup> In addressing the concern of granting a “second bite at the apple,” the court stated, “the earlier decision by the motions panel of this court to decline interlocutory jurisdiction is not binding on us. We may reconsider rulings by the motions panel of this court because we may reconsider any of our decisions while an appeal remains in fieri.”<sup>58</sup> The Indiana Supreme Court noted with approval that

the [c]ourt of [a]ppeals acknowledged that in a discretionary interlocutory appeal it normally considers only issues raised by the trial court's order that is the subject of the appeal. The [c]ourt of [a]ppeals noted, however, that the issue presented by defendants' cross-appeal had previously been certified by the trial court for interlocutory appeal. Moreover, the [c]ourt of [a]ppeals found precedent for reconsideration of a motion to accept an interlocutory appeal, and held that it may reconsider any ruling while an appeal is pending.<sup>59</sup>

Ultimately, the supreme court held that inverse condemnation was the only remedy available to Murray and that the six-year statute of limitations was appropriate to apply, barring Murray from pursuing his claims.<sup>60</sup> Hence, even though an interlocutory appeal was initially denied, a later appeal of a different issue could reopen a previous order certified by the trial court for interlocutory review, especially when a determination of the previous order “may be dispositive of the case and moot the jury issue.”<sup>61</sup>

2. Voluntary Dismissal of One Count Does Not Necessarily Affect the Ability to Appeal Earlier Summary Judgment Rulings on the Only Remaining Counts.-In *Keck v. Walker*,<sup>62</sup> the Indiana Court of Appeals discussed a scenario in which an issue requiring an interlocutory appeal was later considered a final and appealable order. In *Keck*, the children of a beneficiary (the “Children”) brought suit against a testator's personal representative, who was asserting an interest in their mother's share of a will.<sup>63</sup> The Children charged two counts in \*1040 the complaint: first, that based on statements made by the testator, the wills and codicils in probate were superseded by a subsequent will; and second, that the inclusion of the Children's mother in the will, coupled with statements made by the testator, indicated that the intent of the testator was to give the Children their mother's share.<sup>64</sup> The trial court granted partial summary judgment in favor of the estate, deciding that the bequest to the Children's mother had lapsed, thus eliminating the second count of the complaint.<sup>65</sup> The Children subsequently filed a motion

to correct error, which was denied by the trial court, and they requested a certification of that denial for interlocutory appeal.<sup>66</sup> The court of appeals initially accepted interlocutory jurisdiction, but later handed down a memorandum decision finding the notice of appeal to be untimely.<sup>67</sup>

In its explanation, the court reasoned that because the trial court's order granting partial summary judgment was not dispositive of the entire case and only dismissed one count, a motion to correct error was improper, and the motion should be classified as a motion to reconsider.<sup>68</sup> Going further, the court explained that a motion to reconsider does not extend the amount of time permitted to make any other filings, pursuant to [Indiana Trial Rule 53.4\(A\)](#).<sup>69</sup> Accordingly, the court noted that the Children should have filed their motion for certification of interlocutory appeal within thirty days of the trial court's summary judgment order.<sup>70</sup>

On remand, the Children voluntarily dismissed their first count, leaving only the second count, which had been dismissed by summary judgment.<sup>71</sup> The Children argued that their voluntary dismissal of count one had the effect of “retroactively” transforming “the earlier order granting partial summary judgment into a final order,” which the court of appeals stated was “absurd.”<sup>72</sup> Nonetheless, the court noted that the trial court's order approving the dismissal of count one was a final judgment from which the Children timely filed a notice of appeal.<sup>73</sup> In sum, the Children's failure to timely seek an interlocutory appeal of the partial summary judgment order in favor of the estate did not bar them from challenging the trial court's summary judgment order following final judgment.<sup>74</sup>

#### **\*1041 B. Courts May Address the Timeliness of an Appeal Sua Sponte**

The court addressed the allocation of attorneys' fees as the product of discovery sanctions in *Johnson v. Estate of Brazill*.<sup>75</sup> *Johnson* involved an attorney who committed certain abuses while engaging in the process of discovery and was ordered to pay the attorneys' fees of several parties in opposition to his client.<sup>76</sup> The disciplinary actions were addressed separately in orders dated September 22, 2008 and October 20, 2008.<sup>77</sup> The attorney filed a motion to reconsider the orders, which was denied by the trial court.<sup>78</sup> After the attorney failed to pay back the fees as ordered, the owed parties sought to obtain the money through proceedings supplemental.<sup>79</sup> The trial court ordered payment by an order dated December 30, 2008.<sup>80</sup> The attorney subsequently appealed that order on January 22, 2009.<sup>81</sup>

In consideration of the appeal, the court of appeals stated, “Although neither party presents the timeliness of . . . [the attorney's] appeal as an issue, the timeliness of an appeal is a jurisdictional matter which we should raise sua sponte if the parties do not.”<sup>82</sup> The court then held that the attorney failed to file a timely appeal for each of the separate discovery sanctions.<sup>83</sup> The court's reasoning rested upon the fact that the December order from which the attorney initiated the appeal was not the first instance where the trial court ordered him to pay the fees.<sup>84</sup>

Citing *State v. Kuespert*,<sup>85</sup> the court noted that “an order requiring one party to pay attorney fees to another party as a discovery sanction is appealable as of right because it forces the party to pay money.”<sup>86</sup> The sanctions delivered in September and October constituted a separate interlocutory order that was appealable under [Indiana Appellate Rule 14\(A\)\(1\)](#).<sup>87</sup> The attorney had thirty days from the issuing of those orders to file an interlocutory appeal, and because he failed to do so, he waived the right to an appeal of those sanctions.<sup>88</sup>

The court stated that the December order did not act to delay the time period **\*1042** within which the attorney had to appeal, because then a party ordered to pay money could repeatedly move the court to reconsider or clarify its original order, and if the trial court then modified that order in a way that did not affect the moving party's obligations under the original order, that party could then appeal from the trial court's order denying the motion to reconsider.<sup>89</sup>

The court held that such a procedure “could allow a party to potentially delay compliance with the trial court's order, which is precisely what [Trial Rule 53.4](#) is designed to prevent.”<sup>90</sup> In sum, the court chose not to ignore “the jurisdictional issue of timeliness” where the party attempted to appeal an order of an earlier interlocutory order requiring payment of money.<sup>91</sup>

### C. Issue Not Ripe for Appellate Review

In *Indiana Department of Environmental Management v. NJK Farms, Inc.*,<sup>92</sup> the Indiana Department of Environmental Management (IDEM) brought an interlocutory appeal regarding a trial court order finding it in breach of a settlement agreement with NJK.<sup>93</sup> Among the issues raised by IDEM was whether the trial court had subject matter jurisdiction when the settlement agreement at issue was required to be filed with and approved by a regulatory agency.<sup>94</sup> NJK first submitted an application for a landfill in November 1991, and on February 12, 2008, IDEM deemed it complete.<sup>95</sup> In 2008, the Indiana General Assembly passed a law requiring new applications to include county ordinance approval for the facility.<sup>96</sup> NJK ignored IDEM's request to submit a new application in accordance with the new law and filed a civil lawsuit in Marion County against IDEM, alleging that the state agency breached a prior settlement agreement.<sup>97</sup> The trial court found that it had “exclusive jurisdiction” and that the new statute did not apply to Fountain County.<sup>98</sup> The court of appeals accepted jurisdiction over the interlocutory appeal pursuant to [Appellate Rule 14\(B\)](#).<sup>99</sup>

The court of appeals held that because IDEM's actions were state agency actions, “the [Administrative Orders and Procedures Act] provides the exclusive \*1043 means to review IDEM's actions.”<sup>100</sup> The court of appeals noted that [Appellate Rule 14\(B\)](#) provides that “[a]n appeal may be taken from other interlocutory orders if the trial court certifies its order and the [c]ourt of [a]ppeals accepts jurisdiction over the appeal.”<sup>101</sup> However, the court also noted that interlocutory appeals are taken from interlocutory orders, and [Appellate Rule 14\(B\)](#) does not permit certification of particular issues.<sup>102</sup> Hence, since the trial court did not have subject matter jurisdiction to consider NJK's allegations, the court of appeals did not have jurisdiction to hear the appeal. NJK Farms serves as a reminder that subject matter jurisdiction cannot be waived and the lack thereof will end an appeal.

Additionally, in *NJK Farms*, the court of appeals reminded practitioners that “a statement of facts that is rife with argument . . . is inappropriate in that part of an appellate brief.”<sup>103</sup> The court stated, “A statement of facts should be a concise narrative of the facts stated in accordance with the standard of review appropriate to the judgment or order being appealed, and it should not be argumentative.”<sup>104</sup>

### D. Cross-Petition for Rehearing Allowed in Response Brief

In *U.S. Bank, N.A. v. Integrity Land Title Corp.*,<sup>105</sup> the court of appeals held against U.S. Bank regarding an agent's liability in tort and against Integrity regarding a breach of contract claim.<sup>106</sup> U.S. Bank timely filed a petition for rehearing, asking the court to reconsider its ruling on the tort liability issue only.<sup>107</sup> In response to the petition for rehearing, Integrity addressed the tort liability issue and then asked the court to also reconsider its ruling on the breach of contract issue.<sup>108</sup> U.S. Bank filed a motion to strike the section of Integrity's response that discussed the breach of contract issue stating it was “untimely, in that it should have been raised in a separate petition for rehearing instead of in response to U.S. Bank's petition for rehearing.”<sup>109</sup>

The court of appeals noted that [Indiana Appellate Rule 54\(D\)](#) “prohibits the filing of a reply brief on rehearing,” but did not grant U.S. Bank's motion to \*1044 strike.<sup>110</sup> Instead, the court held that although “U.S. Bank's contentions are well taken,” it would reconsider its previous ruling regarding the breach of contract claim in “the interests of justice and judicial economy.”<sup>111</sup> Relying on the court's “inherent power,” the court held that “justice and judicial economy would be ill served if we were to turn a blind eye to Integrity's argument, the correctness of which is apparent on the face of the record.”<sup>112</sup> Ultimately, the court of appeals reversed its earlier opinion regarding the breach of contract claim, which had been decided adversely to Integrity.<sup>113</sup>

In dissent, Judge May argued that allowing Integrity to raise an argument in a brief in response to a petition for rehearing (that Integrity could not otherwise timely raise) was “unfair because it effectively deprive[d] U.S. Bank of an opportunity to respond to the contract argument.”<sup>114</sup> Judge May argued that Integrity’s brief in response to U.S. Bank’s petition for rehearing went outside the confines of [Indiana Appellate Rule 46\(B\)\(2\)](#).<sup>115</sup> Moreover, Judge May pointed out that because U.S. Bank sought rehearing on one particular point only, as opposed to a “general” petition, the court’s original opinion should “be modified as to that point only.”<sup>116</sup>

The Indiana Supreme Court granted transfer in U.S. Bank, and pursuant to [Indiana Appellate Rule 58\(A\)](#), it “summarily affirm[ed] the decision of the [Indiana] Court of Appeals” as to its holding on rehearing in favor of Integrity regarding the breach of contract issue.<sup>117</sup> In doing so, the Indiana Supreme Court chose not to comment on the procedural arguments raised in Judge May’s dissent. An appellate advocate should be aware of the procedural details of U.S. Bank and associated risk when purporting to seek rehearing on limited issues only that were determined unfavorably.

### E. Indiana Recognizes the Prison Mailbox Rule

In an opinion authored by Chief Justice Shepard, the supreme court recognized and adopted Indiana’s use of what is referred to as the prison mailbox rule.<sup>118</sup> In *Dowell v. State*, the court described the rule as follows: “a pro se \*1045 incarcerated litigant who delivers a notice of appeal to prison officials for mailing on or before its due date accomplishes a timely filing.”<sup>119</sup> The adoption of the rule comes from “recognizing the unique position of pro se prisoners.”<sup>120</sup> The prisoner in *Dowell* attempted to file a motion to correct error with the post-conviction court via the prison mailing system.<sup>121</sup> He delivered his motion to the Wabash Valley Correctional Facility mail system on the final day to file the motions, but the package did not arrive at the post-conviction court until two days later.<sup>122</sup> The post-conviction court denied the prisoner’s motion, and the prisoner appealed.<sup>123</sup>

The State asked that the prisoner’s appeal be dismissed because his motion to correct error was not timely filed.<sup>124</sup> In addressing the issue of his timeliness, the Indiana Supreme Court noted that “[l]ike the Federal Rules of Appellate Procedure at the time of the *Houston* decision, the Indiana Rules of Appellate Procedure do not provide for the prison mailbox rule.”<sup>125</sup> In *Dowell*, the Indiana Supreme Court made explicit that the prison mailbox rule applies in Indiana.<sup>126</sup> The court noted, “After *Houston v. Lack*, the Federal Rules of Appellate Procedure were amended to recognize the prison mailbox rule and to reflect the limits on its application,” presumably to combat potential abuse.<sup>127</sup>

### F. Supreme Court Outlines Briefing Process for [Indiana Appellate Rule 64](#) Certified Questions

Pursuant to [Indiana Appellate Rule 64](#), the Indiana Supreme Court accepted certified questions from the United States Court of Appeals for the Seventh Circuit in *George v. National Collegiate Athletic Ass’n*.<sup>128</sup> In the published order accepting the certified questions, the court set out the procedure for the submission of supplemental briefs addressing each question.<sup>129</sup> The requirements for the briefs are similar to those contained in the Appellate Rules. The appellants may only submit one brief between them, entitled “Supplemental Brief of [Appellant or Appellee],” must conform to the requirements set forth in \*1046 [Appellate Rules 43, 44, and 46](#), and it should be under 2000 words with an attached word count certificate.<sup>130</sup> No appendices or briefs in response are to be filed, as all responses to opposing parties’ briefs will be stated at oral argument.<sup>131</sup> Counsel for each party must file an appearance pursuant to [Appellate Rule 16\(C\)](#), provide a valid e-mail address with which to receive court orders, and comply with Indiana Admission & Discipline Rule 3, section 2 regarding temporary admission to practice law in Indiana.<sup>132</sup> Only those attorneys who have filed appearances and are licensed to practice law in Indiana may appear on the briefs, participate in oral argument, or receive any distributions from the clerk.<sup>133</sup> All filings are to be made with the clerk of the Indiana Supreme Court and should be served upon all counselors of record, with joint filings signed by each party.<sup>134</sup>

Extensions will only be granted in extreme circumstances, and failure to comply with the rules for temporary admission does not constitute a reason for extension.<sup>135</sup>

### G. Court of Appeals Further Addresses Attorneys' Fees Awarded as a Result of Frivolous Appeal

[Appellate Rule 66\(E\)](#) provides, “The [c]ourt may assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the [c]ourt's discretion and may include attorneys' fees.”<sup>136</sup> The standard for the award of attorneys' fees is high and difficult to meet. Several cases heard by the court of appeals in the last year helped to develop the threshold used in Indiana.

In *Gertz v. Estes*,<sup>137</sup> two homeowners were involved in a neighbor dispute over the harassing actions committed by one of the parties.<sup>138</sup> The accused neighbor (the “homeowner”) had applied for and received a permit for a seven-foot tall fence, but instead erected a fence standing eight feet tall and spanning 720 feet.<sup>139</sup> The fence was emblazoned with the large phrases of “NO CLIMBING” and “NO TRESSPASSING” and contained “thousands of protruding nails.”<sup>140</sup> The homeowner also installed a public address system, used to shout insulting remarks at the neighbor, and positioned surveillance cameras around the house to view the adjoining neighbors' property.<sup>141</sup> The neighbor sued \*1047 the homeowner, alleging that the fence constituted a “spite fence” under [Indiana Code section 32-26-10-1](#) to -2,<sup>142</sup> and alleging the public address system and cameras were a nuisance.<sup>143</sup> The trial court found the fence to be in violation of the statute and the homeowner's conduct to be a nuisance.<sup>144</sup> After receiving an order to remove the fence, the homeowner only removed the top foot of the fence and continued the harassing behavior.<sup>145</sup> The neighbor filed a petition to show cause, and the trial court found that the fence continued to be a nuisance before the offending neighbor appealed.<sup>146</sup>

On appeal, the neighbor alleged that the homeowner's appeal was pursued in bad faith and was of a frivolous nature, and he sought attorneys' fees pursuant to [Appellate Rule 66\(E\)](#).<sup>147</sup> While the conduct of the homeowner did constitute harassment, and the homeowner's brief failed to fully comply with the Appellate Rules, the court held that the appellee “failed to show that they are entitled to the extraordinary remedy of modification of the trial court's judgment.”<sup>148</sup> The court acknowledged that the homeowner's brief failed to fully comply with the Appellate Rules but stated that because the arguments were not “utterly devoid of all plausibility” or “written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court,” an award for fees was not proper.<sup>149</sup> Though this standard is high, the court has awarded appellate fees in certain cases.

In *Poulard v. LaPorte County Election Board*,<sup>150</sup> the winner of a local election tirelessly petitioned the court system for remedy against the local election board when he believed his opponent, who lost the election, was not a resident of \*1048 the town for which he was running.<sup>151</sup> Despite numerous rulings against him, Poulard continued to appeal the court's decisions.<sup>152</sup> The Indiana Court of Appeals, anxious to put an end to Poulard's litigious actions, used strong language in reminding him that [Appellate Rule 66\(E\)](#) should only be awarded in rare situations, stating:

While we are cognizant of the chilling effect that an award of appellate damages can have on litigants, this case is an example of when a chilling effect is necessary to put an end to the matter. Poulard has maintained this cause of action in a manner calculated to require the needless expenditure of time and resources by the Election Board, the trial court, and this [c]ourt.<sup>153</sup>

Hence, in certain circumstances, attorneys' fees incurred during an appeal will be awarded pursuant to [Appellate Rule 66\(E\)](#) as the result of malicious conduct.<sup>154</sup>

### III. Court Guidance for Appellate Practitioners

The court of appeals offers that in Indiana, “[w]e ask for two basic things from appellate practitioners in this state: compliance with the Indiana Rules of Appellate Procedure and adherence to fundamental standards of professionalism.”<sup>155</sup> A strict understanding of the Appellate Rules can go a long way in ensuring an appellate practitioner's good standing with the Indiana appellate courts. Similarly, conducting oneself in a professional manner at all times will also make the life of an appellate lawyer easier. But not only the outward appearance is paramount to the practice of law. The briefs and filings made by an attorney are a direct reflection of that individual's standards and practices and are not overlooked by the courts.

### A. Know the Importance of Accurate and Specific Citations

Appellate Rule 46(A)(8)(a) provides that any argument made in the appellant's brief “must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the [a]ppendix or parts of the [r]ecord on [a]ppeal relied on, in accordance with Rule 22.”<sup>156</sup> The requirement for accurate citations is important for reasons beyond adding credible support to an argument. \*1049 As the court pointed out in *Vandenburgh v. Vandenburgh*,<sup>157</sup> once a judicial body is forced to locate the supporting material for an argument and assume its utility, the court takes on the role of an advocate and no longer acts as an adjudicator.<sup>158</sup> An argument that is not supported by the proper citation is thus waived for appellate review.<sup>159</sup>

### B. Arguments May Be Waived if Not Properly Expressed in Briefs

In *Chapo v. Jefferson County Plan Commission*,<sup>160</sup> Jefferson County (“the County”) filed a 2004 notice of zoning violation against Chapo, alleging that she had built a residence on her property without obtaining the proper building permit.<sup>161</sup> The County waited until almost three years had passed to file a verified complaint for permanent injunction against Chapo for building the residence.<sup>162</sup> Days later, Chapo filed her response and indicated that she had not built the residence described in the County's complaint.<sup>163</sup> After several weeks had passed, the County acknowledged that the property described in the complaint listed the wrong address and that it intended to file an amended complaint giving the correct address of the property in violation.<sup>164</sup> The County failed to file the amended complaint, and after more than a year, Chapo moved to dismiss the complaint for failure to prosecute pursuant to Indiana Trial Rule 41(E).<sup>165</sup> Chapo's motion was granted with prejudice, and Chapo thereafter filed a motion for costs and fees associated with defending the dismissed action.<sup>166</sup> The trial court declined to grant Chapo's motion for fees, and after a motion to correct error was denied, she appealed.<sup>167</sup>

In *Chapo*, the court of appeals noted that in the County's “summary of the argument” section of its brief, it argued that the award of fees would be punitive in nature, and as a governmental entity, it should be immune from such judgments.<sup>168</sup> The County failed, however, to provide reference to authority in \*1050 support of this argument, and thus, the court waived its application.<sup>169</sup> The court stated, “Because Jefferson County fails to make a cogent argument, supported by citations to authorities and statutes, we find its contention waived.”<sup>170</sup> If a party plans to utilize an argument on appeal, it should express the argument not only in the statement of the argument section, but also in the body of the brief, complete with supporting authority and citations to avoid the court deeming the argument waived.

### C. Review Appellate Rules Prior to Filing in Order to Prevent Reminders from Appellate Courts

As discussed in last year's appellate survey article, the appellate courts have little tolerance for briefs filed that do not comply with the procedures set forth in the Appellate Rules.<sup>171</sup> In several decisions during this reporting period, the court of appeals further reminded attorneys of their duty to comply with these rules. One notable example comes from *Kentucky National Insurance Co. v. Empire Fire & Marine Insurance Co.*,<sup>172</sup> in which the appellant failed to include a statement of issues or a statement of case within its brief and similarly left out the section detailing the standard of review.<sup>173</sup> The court reminded appellant's counsel of his “professional obligation” to comply with Appellate Rules 46(A)(3), 46(A)(5), and 46(A)(8)(b).<sup>174</sup>

Later, in response to counsel's failure to include a designation of evidence in a motion for summary judgment, the court recalled the Indiana Supreme Court's decision in *Filip v. Block*,<sup>175</sup> saying:

Here, Kentucky National's motion for summary judgment did not "recite where the designation of evidence is to be found in the accompanying papers." Nor did Kentucky National's memorandum in support of its motion recite where the designation of evidence is to be found. We remind Kentucky National's counsel that the Indiana Supreme Court has held that "the courts and opposing parties should not be required to flip from one document to another to identify the evidence a party claims is relevant to its motion. Rather, the entire designation must be in a single \*1051 place, whether as a separate document or appendix or as a part of a motion or other filing."<sup>176</sup>

Appellate practitioners must adhere to the Appellate Rules governing the contents of motions, briefs, and appendices prior to filing such motions in order to avoid an unwelcome reminder by the appellate court. The rules can be found in Titles VI, VII, and VIII of the Indiana Rules of Appellate Procedure.

#### **IV. Indiana Supreme Court**

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

In total, during the 2010 fiscal year,<sup>177</sup> the supreme court disposed of 920 cases and issued 169 majority opinions and published dispositive orders.<sup>178</sup> The case makeup was much different than that of the previous fiscal year. Last year, approximately 52% of the cases heard were criminal; thirty percent were civil cases; 11% were attorney discipline cases; 3% were original actions; and fewer than 1% were tax or judicial discipline cases.<sup>179</sup> There was a large jump in attorney discipline cases this term, making up 42% of the majority opinions and published dispositive orders.<sup>180</sup> Approximately 26% of this year's opinions were criminal cases; 25% were civil; about 2% were original actions; 1% were certified questions; and the final percentage came from judicial discipline, Indiana Board of Law Examiners, mandate of funds, and other cases.<sup>181</sup> The court heard oral argument in seventy-five cases; with thirty-five coming from criminal cases, thirty-eight coming from civil cases, and two from certified questions.<sup>182</sup>

##### **B. The Indiana Supreme Court Welcomes a New Justice**

In September of 2010, Justice Theodore R. Boehm retired from the Indiana Supreme Court, leaving open the seat he had occupied since his appointment in 1996 by then-Governor Evan Bayh.<sup>183</sup> His retirement marked "the first change in the [c]ourt's membership in almost eleven years, by far the longest record of such continuity in Indiana history."<sup>184</sup> Justice Boehm authored more opinions \*1052 than any of his colleagues during his time on the bench, and his contributions to the Indiana judicial system are greatly appreciated.<sup>185</sup>

On October 18, 2010, Justice Steven David was appointed by Governor Mitch Daniels to replace Justice Boehm and become the 106th justice of the Indiana Supreme Court.<sup>186</sup> Justice David's career prior to his supreme court appointment included time spent as corporate counsel, a privately practicing attorney, and a military lawyer before serving as a Boone County circuit court judge.<sup>187</sup> Justice David graduated magna cum laude from Murray State University before earning his law degree from Indiana University School of Law-Indianapolis.<sup>188</sup> While serving as a judge in Boone County, he presided over more than sixty jury trials in criminal, civil, and military matters; he has also testified before the Indiana General Assembly and the United States Congress on juvenile law and national security issues.<sup>189</sup>

#### **Conclusion**

This year marked another opportunity for the Indiana appellate courts to continue shaping the rules and practices of appellate procedure in our jurisdiction. In the decade since the redrafting of the Appellate Rules, the courts' appellate decisions and ordered amendments have enhanced the efficiency and benefit of our judicial system for the citizens, bench, and bar of Indiana.

## Footnotes

- a1 Partner, Bose McKinney & Evans LLP. B.S., 1989, United States Military Academy; M.S.B.A., 1994, Boston University; J.D., cum laude, 1999, Indiana University Maurer School of Law; Law Clerk to Justice Frank Sullivan, Jr. of the Indiana Supreme Court (1999-2000).
- a2 Associate, Bose McKinney & Evans LLP; B.S., summa cum laude, 2000, Western Michigan University; J.D., magna cum laude, 2004, Law Clerk to Justice Theodore R. Boehm, Indiana Supreme Court (2004-06); Co-author of civil case law updates for Res Gestae.  
The authors greatly appreciate the research and drafting assistance provided by Philip R. Davis, third-year law student at Thomas M. Cooley Law School.
- 1 See Order Amending Indiana Rules of Appellate Procedure, No. 94S00-1003-MS-128 (Ind. Sept. 21, 2010), available at <http://www.in.gov/judiciary/orders/rule-amendments/2010/appellate-0921.pdf> [hereinafter Sept. 21, 2010 Appellate Rules Order].
- 2 Id. at 1.
- 3 Id. at 1-5, 17.
- 4 Ind. App. R. 8.
- 5 See Sept. 21, 2010 Appellate Rules Order, supra note 1, at 1.
- 6 Ind. App. R. 8.
- 7 Ind. App. R. 9(A)(1).
- 8 Id.
- 9 Id.
- 10 See Sept. 21, 2010 Appellate Rules Order, supra note 1, at 2-3.
- 11 Ind. App. R. 14(A).
- 12 Ind. App. R. 14(B)(1)-(2).
- 13 Ind. App. R. 14(C)(1)-(2).
- 14 Ind. App. R. 14.1(B)-(C).
- 15 Ind. App. R. 45(B)(1).
- 16 Id. Note that Ind. App. R. 24(C)(3) provides that “[a]ll papers will be deemed served when they are . . . deposited with any third-party commercial carrier for delivery within three (3) calendar days, cost prepaid, properly addressed.”
- 17 See Ind. App. R. 63.
- 18 See Sept. 21, 2010 Appellate Rules Order, supra note 1, at 17.
- 19 Ind. App. R. 63(C)(1)-(2).
- 20 Ind. App. R. 63(E); see also Sept. 21, 2010 Appellate Rules Order, supra note 1, at 18.
- 21 See Sept. 21, 2010 Appellate Rules Order, supra note 1, at 10.

- 22 Ind. App. R. 16.
- 23 See Sept. 21, 2010 Appellate Rules Order, *supra* note 1, at 7.
- 24 See Order Amending Indiana Rules of Appellate Procedure, No. 94S00-0901-MS-4 (Ind. Oct. 2, 2009), available at <http://www.in.gov/judiciary/orders/rule-amendments/2009index.html> (follow “Order Amending Indiana Rules of Appellate Procedure” PDF link); see also Bryan H. Babb et al., [Developments in Indiana Appellate Procedure: Rule Amendments, Remarkable Case Law, and Guidance for Appellate Practitioners](#), 43 Ind. L. Rev. 579, 581 (2010).
- 25 Ind. App. R. 26(B).
- 26 Ind. App. R. 16(D).
- 27 See Sept. 21, 2010 Appellate Rules Order, *supra* note 1, at 10.
- 28 See *id.*
- 29 Ind. App. R. 30(A)(5).
- 30 Ind. App. R. app. B.
- 31 See Sept. 21, 2010 Appellate Rules Order, *supra* note 1, at 11.
- 32 Ind. App. R. 15.
- 33 Ind. App. R. 15(C)(2).
- 34 See Sept. 21, 2010 Appellate Rules Order, *supra* note 1, at 8.
- 35 *Id.*
- 36 See *id.*
- 37 Ind. App. R. 18.
- 38 Ind. App. R. 39.
- 39 Ind. App. R. 39(B).
- 40 Ind. App. R. 39(C)(1)-(2) (emphasis added).
- 41 See Sept. 21, 2010 Appellate Rules Order, *supra* note 1, at 13.
- 42 Ind. App. R. 41(E).
- 43 See Sept. 21, 2010 Appellate Rules Order, *supra* note 1, at 14.
- 44 Ind. App. R. 49(A).
- 45 See Sept. 21, 2010 Appellate Rules Order, *supra* note 1, at 15-16.
- 46 *Id.*; Ind. App. R. 50(A)-(B), (D)-(F).
- 47 Sept. 21, 2010 Appellate Rules Order, *supra* note 1, at 18-19.
- 48 *Id.* at 19.

- 49 Id. at 20-22.
- 50 925 N.E.2d 728 (Ind. 2010).
- 51 Id. at 729-30.
- 52 Id. at 730.
- 53 Id.
- 54 Id.
- 55 Id.
- 56 Id.
- 57 See *Murray v. City of Lawrenceburg*, 903 N.E.2d 93, 97 (Ind. Ct. App. 2009), trans. granted, opinion vacated, 925 N.E.2d 728 (Ind. 2010).
- 58 Id. at 99 (citing *Miller v. Hague Ins. Agency, Inc.*, 871 N.E.2d 406, 407 (Ind. Ct. App. 2007)).
- 59 *Murray*, 925 N.E.2d at 730 (internal citations omitted).
- 60 Id. at 733-34.
- 61 Id. at 730-31.
- 62 922 N.E.2d 94 (Ind. Ct. App. 2010).
- 63 Id. at 97.
- 64 Id.
- 65 Id.
- 66 Id.
- 67 Id. at 97-98.
- 68 Id. at 98.
- 69 Id. (noting that a motion to reconsider does not “extend the time for any further required or permitted action, motion, or proceedings”).
- 70 Id.
- 71 Id.
- 72 Id. at 99.
- 73 Id.
- 74 Id.
- 75 917 N.E.2d 1235 (Ind. Ct. App. 2009).
- 76 Id. at 1237-38.

- 77 Id.
- 78 Id.
- 79 Id. at 1238.
- 80 Id.
- 81 Id.
- 82 Id. at 1239 (citing [Young v. Estate of Sweeney](#), 808 N.E.2d 1217, 1219 (Ind. Ct. App. 2004)).
- 83 Id. at 1239-40.
- 84 Id. at 1240.
- 85 425 N.E.2d 229, 232 (Ind. Ct. App. 1981).
- 86 [Johnson](#), 917 N.E.2d at 1239.
- 87 Id. at 1240 (providing circumstances where an interlocutory order will be taken as a matter of right).
- 88 Id. at 1241.
- 89 Id.
- 90 Id. (citing [Stephens v. Irvin](#), 734 N.E.2d 1133, 1134 (Ind. Ct. App. 2000)).
- 91 Id. at 1242.
- 92 921 N.E.2d 834 (Ind. Ct. App.), trans. denied, 940 N.E.2d 818 (Ind. 2010).
- 93 Id. at 835.
- 94 Id. at 840.
- 95 Id. at 836, 839.
- 96 Id. at 839 (referencing [Ind. Code § 13-20-2-10 \(2010\)](#)).
- 97 Id. at 840.
- 98 Id.
- 99 Id. The court of appeals noted that NJK initially filed a motion to transfer to the Indiana Supreme Court pursuant to [Appellate Rule 56\(A\)](#), but that motion was denied. Id. at 840 n.5.
- 100 Id. at 845.
- 101 Id. at 841.
- 102 Id.
- 103 Id. at 836 n.2 (citing [Cnty. Line Towing, Inc. v. Cincinnati Ins. Co.](#), 714 N.E.2d 285, 289-90 (Ind. Ct. App. 1999)).
- 104 Id. (citing [Ind. App. R. 46\(A\)\(6\)](#)).

- 105 [907 N.E.2d 616 \(Ind. Ct. App.\)](#), vacated in part on reh'g, [914 N.E.2d 320 \(Ind. Ct. App. 2009\)](#), trans. granted, opinion vacated, [929 N.E.2d 742 \(Ind. 2010\)](#).
- 106 *Id.* at 623.
- 107 [U.S. Bank, N.A. v. Integrity Land Title Corp.](#), [914 N.E.2d 320, 322 \(Ind. Ct. App. 2009\)](#), trans. granted, opinion vacated, [929 N.E.2d 742 \(Ind. 2010\)](#).
- 108 *Id.* at 323.
- 109 *Id.* (citing [Ind. App. R. 54\(B\)](#) (providing that “[a] [p]etition for [r]ehearing shall be filed no later than thirty (30) days after the decision”).
- 110 *Id.*
- 111 *Id.* The court noted that “Integrity could renew its claim in a petition to transfer before the Indiana Supreme Court.” *Id.* at 323 n.3.
- 112 *Id.* at 323 (citing [Bridgestone Ams. Holding, Inc. v. Mayberry](#), [854 N.E.2d 355, 360 n.4 \(Ind. Ct. App. 2006\)](#); [Ind. App. R. 66\(C\)\(10\)](#) (“[A]ppellate courts may grant ‘appropriate relief’ ‘with respect to some or all of the parties or issues, in whole or in part.’”)).
- 113 *Id.*
- 114 *Id.* at 324 (May, J., dissenting) (noting that [Ind. App. R. 54\(D\)](#) “explicitly prohibits reply briefs on rehearing”).
- 115 *Id.* (noting that [Ind. App. R. 46\(B\)\(2\)](#) mandates that an appellee's argument “address the contentions raised in the appellant's argument”).
- 116 *Id.* (quoting [Griffin v. State](#), [763 N.E.2d 450, 451 \(Ind. 2002\)](#)).
- 117 [U.S. Bank, N.A. v. Integrity Land Title Corp.](#), [929 N.E.2d 742, 745 \(Ind. 2010\)](#).
- 118 See [Dowell v. State](#), [922 N.E.2d 605 \(Ind. 2010\)](#).
- 119 *Id.* at 607 (citing [Houston v. Lack](#), [487 U.S. 266 \(1988\)](#)).
- 120 *Id.* at 606.
- 121 *Id.*
- 122 *Id.*
- 123 *Id.*
- 124 *Id.*
- 125 *Id.* at 607 (referencing [Houston v. Lack](#), [487 U.S. 266 \(1988\)](#), wherein the United States Supreme Court held that a pro se incarcerated litigant who delivers a notice of appeal to prison officials for mailing on or before its due date accomplishes a timely filing).
- 126 *Id.*
- 127 *Id.* at 607 n.1. This footnote seems to be an invitation to similarly amend Indiana's Rules of Appellate Procedure.
- 128 [623 F.3d 1135 \(7th Cir. 2010\)](#), certified question accepted, [No. 94S00-1010-CQ-544, 2010 WL 4361443 \(Ind. Oct. 29, 2010\)](#).
- 129 [George](#), [2010 WL 4361443](#), at \*1-2.
- 130 *Id.* at \*1.

131 *Id.*

132 *Id.*

133 *Id.*

134 *Id.* at \*2.

135 *Id.*

136 *Ind. App. R. 66(E).*

137 922 N.E.2d 135 (*Ind. Ct. App. 2010*).

138 *Id.* at 136.

139 *Id.*

140 *Id.* (quoting *Gertz v. Estes*, 879 N.E.2d 617, 621 (*Ind. Ct. App. 2008*)).

141 *Id.*

142 *Ind. Code § 32-26-10-1 to -2* (2011) provides that a fence erected higher than six feet for the malicious “purpose of annoying the owners or occupants of adjoining property[] is considered a nuisance,” and the injured party may seek damages, abatement, or other preventative remedies.

143 *Gertz*, 922 N.E.2d at 136.

144 *Id.* at 136-37.

145 *Id.* at 137.

146 *Id.* at 137-38.

147 *Id.* at 138.

148 *Id.*; see also *Indianapolis City Market Corp. v. MAV, Inc.*, 915 N.E.2d 1013, 1026 (*Ind. Ct. App. 2009*) (denying an award of appellate attorneys' fees where the appellee argued that the City Market failed to appeal the declaratory judgment within thirty days).

149 *Gertz*, 922 N.E.2d at 138-39. The court cited *Potter v. Houston*, 847 N.E.2d 241, 249 (*Ind. Ct. App. 2006*), which noted that there are two forms of bad faith claims relating to appellate attorneys' fees: those that are substantive and those that are procedural. Substantive claims show that the “appellant's contentions and arguments are utterly devoid of all plausibility,” while procedural bad faith claims occur[] when a party flagrantly disregards the form and content requirements of the rules of appellate procedure, omits and misstates relevant facts appearing in the record, and files briefs written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court.

*Id.*

150 922 N.E.2d 734 (*Ind. Ct. App. 2010*).

151 *Id.* at 736.

152 *Id.*

153 *Id.* at 738.

- 154 Appellate fees may also be available under statute. See [Wells Fargo Ins., Inc. v. Land](#), 932 N.E.2d 195, 204 (Ind. Ct. App. 2010) (holding that appellate fees may be available under [Ind. Code § 22-2-5-2 \(2011\)](#)) (citing [St. Vincent Hosp. & Health Care Ctr., Inc. v. Steele](#), 766 N.E.2d 699, 705-06 (Ind. 2002)).
- 155 [Steve Silveus Ins., Inc. v. Goshert](#), 873 N.E.2d 165, 172 (Ind. Ct. App. 2007).
- 156 Ind. App. R. 46(A)(8)(a).
- 157 916 N.E.2d 723 (Ind. Ct. App. 2009).
- 158 *Id.* at 726 n.2 (“We prefer to decide cases on the merits, but when flaws in a brief require us to become advocates for a party, a line must be drawn.”); see also [Young v. Butts](#), 685 N.E.2d 147, 151 (Ind. Ct. App. 1997) (“A court which must search the record and make up its own arguments because a party has not adequately presented them runs the risk of becoming an advocate rather than an adjudicator.”).
- 159 *Id.* at 729 (citing [Watson v. Auto Advisors, Inc.](#), 822 N.E.2d 1017, 1027 (Ind. Ct. App. 2005)).
- 160 926 N.E.2d 504 (Ind. Ct. App. 2010).
- 161 *Id.* at 506-07.
- 162 *Id.* at 507.
- 163 *Id.*
- 164 *Id.*
- 165 *Id.*
- 166 *Id.*
- 167 *Id.*
- 168 *Id.* at 510 n.4.
- 169 *Id.*
- 170 *Id.* (citing Ind. App. R. 46(A)(8)(a), (B)(2)); see also [Spaulding v. Harris](#), 914 N.E.2d 820, 833 (Ind. Ct. App. 2009), trans. denied, 929 N.E.2d 788 (Ind. 2010) (“A party generally waives any issue for which it fails to develop a cogent argument or support with adequate citation to authority and portions of the record.” (citation omitted)).
- 171 See [Babb et al.](#), *supra* note 24, at 597-601.
- 172 919 N.E.2d 565 (Ind. Ct. App. 2010).
- 173 *Id.* at 569 n.1.
- 174 *Id.* Ind. App. R. 46(A)(3) requires a statement of supreme court jurisdiction when an appeal is taken directly to the Indiana Supreme Court. Ind. App. R. 46(A)(5) describes what must be briefly described within the statement of the case. Ind. App. R. 46(A)(8)(b) demands that the argument section of an appellant's brief “include for each issue a concise statement of the applicable standard of review.”
- 175 879 N.E.2d 1076 (Ind. 2008).
- 176 [Ky. Nat'l Ins. Co.](#), 919 N.E.2d at 573 n.14 (quoting [Filip](#), 879 N.E.2d at 1081).

- 177 The supreme court's 2010 fiscal year ran from July 1, 2009 through June 30, 2010. See Ind. Supreme Court, 2009-2010 Annual Report 1 (2010), available at <http://www.in.gov/judiciary/supremeadmin/docs/0910report.pdf> [hereinafter 2010 Supreme Court Report].
- 178 Id. at 43-44.
- 179 See Ind. Supreme Court, 2008-2009 Annual Report 43 (2009), available at <http://www.in.gov/judiciary/supremeadmin/docs/0809report.pdf>; see also Babb et al., supra note 24, at 601.
- 180 See 2010 Supreme Court Report, supra note 177, at 44.
- 181 Id.
- 182 Id. at 45.
- 183 Id. at 7.
- 184 Id.
- 185 Id.
- 186 See James F. Maguire, Supreme Court Welcomes Justice Steven David, Ind. Ct. Times, Dec. 1, 2010, available at <http://indianacourts.us/times/2010/12/supreme-court-welcomes-justice-steven-david>.
- 187 Id.
- 188 Id.
- 189 Id.

End of Document

© 2011 Thomson Reuters. No claim to original U.S. Government Works.