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The Appellate Advocate

Newsletter of the Appellate Practice Section of the Indiana State Bar Association

Welcome Back: A Word From the Editors

Welcome back! After a hiatus, the ISBA Appellate Practice Section's newsletter has returned. The Section's Council is happy to resume providing the section with articles on important and timely topics that should lead to thoughtful discussions on important issues facing Indiana appellate practitioners.

We are always looking for articles. Send submissions to the Appellate Advocate's Co-Editors, Adam Sedia, Teresa Griffin, and Will Ramsey,and please feel free to email us with questions regarding submissions.

Thanks, and happy reading!

-Adam, Teresa, and Will
asedia@hwelaw.com
Teresa.Griffin@fagrebd.com
war@barrettlaw.com

INSIDE THIS ISSUE

Pro Bono Appellate Opportunities

Would you like to do pro bono work that allows you to use and develop your appellate skills? The Appellate Pro Bono Project is being revived. This project began as a project of this section, but has been dormant lately. The project is being revived through Indiana Legal Services, which has the capacity to screen clients and screen appeals for merit.

But what we don't have is pro bono volunteers who would like to do appellate work. This announcement solicits lawyers to serve on a panel that would be notified when appellate pro bono cases are available.

If you would like to volunteer to be on the panel (which doesn't obligate you to take any particular case), please email Jeff Heck at Indiana Legal Services (***jeff.heck@ilsi.net***). If you have questions, feel free to email Jeff or me.

Jon Laramore
Indiana Legal Services, Inc.
Jon.laramore@ilsi.net

Taxing Costs on Appeal in Indiana: Don't Bother

Adam J. Sedia

Under the Federal Rules of Appellate Procedure, an award of costs depends on the disposition of the appeal: costs are taxed against the appellant if the appeal is dismissed or the judgment is affirmed, against the appellee if the judgment is reversed, and only taxed as ordered by the Circuit Court if disposed otherwise. Fed. R. App. P. 39(a). Practitioners in the Seventh Circuit know that costs are routinely requested and awarded as a matter of course.

Costs under the Indiana Appellate Rules are less straightforward. Indiana Appellate Rule

67(C) provides: "When a judgment or order is affirmed in whole, the appellee shall recover costs. When a judgment has been reversed in whole, the appellant shall recover costs in the Court on Appeal and in the trial court or Administrative Agency as provided by law. In other cases, the recovery of costs shall be decided in the Court's discretion." A party is absolutely entitled to reimbursement for appellate costs only when a "judgment" is reversed or affirmed "in whole."

The Rules do not define what constitutes "in whole," but the Indiana Supreme Court has tersely addressed that issue: the court on appeal has discretion to award costs when "neither side completely prevail[s] in [an] appeal." *St. Joseph Cty. Comm'rs v. Nemeth*, 929 N.E.2d 703, 722 (Ind. 2010). Furthermore, our Supreme Court cited with approval the following definition of "prevailing party": "'The party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention. The one in whose favor the decision or verdict is rendered and judgment entered.'" *Reuille v. E.E. Brandenberger Constr., Inc.*, 888 N.E.2d 770, 771 (Ind. 2008) (quoting Black's Law Dictionary 1188 (6th ed. 1990)).

Under this definition, the standard for whether a party "prevails" is determined by comparing the relief requested against the relief granted. The additional requirement in *Nemeth* that a party must "completely" prevail to be absolutely entitled to recover costs restricts the definition cited in *Reuille*: a party must succeed in all respects to be absolutely entitled to recover costs. Anything short of that, and the court on appeal can use its discretion.

What does the court's discretion look like? The Court of Appeals has awarded costs – along with attorney's fees under Appellate Rule 66(E) – against a party whose arguments were "utterly devoid of all plausibility and, therefore, were pursued in bad faith." *Chaney v. Clarian Health Partners, Inc.*, 954 N.E.2d 1063, 1070 (Ind. Ct. App. 2011). Aside from that, Indiana's appellate courts appear reluctant to order costs. Indeed, the Court of Appeals has said that it will exercise its discretion to award costs only "when an appeal is 'permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay.'" *Johnson v. Eldridge*, 799 N.E.2d 29, 36 n.3 (Ind. Ct. App. 2003) (quoting *Commercial Coin Laundry Systems v. Enneking*, 766 N.E.2d 433, 442 (Ind. Ct. App. 2002) (citing *Orr v. Turco Mfg. Co. Inc.*, 512 N.E.2d 151, 152 (Ind. 1987)). In that case, the court denied an appellee's request for costs simply because the appellee never alleged that the appeal was "meritless or in bad faith." *Id.* Thus, short of a frivolous appeal, costs appear to be unavailable.

Rule 67 contains another unique feature. An appellee can recover costs when a "judgment *or order*" is affirmed, but an appellant can only recover costs when a "judgment" is reversed. Trial Rule 54(A) defines "judgment" as "any order from which an appeal lies, Appellate Rule 5(A) provides that an appeal lies from a judgment when it is final, and Appellate Rule 2(H) defines when a judgment is final. Reading all these rules together, it appears that costs are unavailable to an appellant who wins reversal on interlocutory appeal.

This might appear as an inconsistency at first, but policy reasons could very well exist for treating interlocutory appeals differently. An interlocutory appeal is either taken as of right in cases where the appellant suffers some sort of immediate harm, *see* Ind. App. R. 14(A), or it has been certified for appeal by both the trial court and the Court of Appeals. Interlocutory appeals that survive the double-certification process almost always address unresolved issues of law that require a pronouncement from an appellate tribunal to better guide the trial court in pronouncing its judgment. Rendering costs unavailable (more so than they already are) may be intended to eschew punishing a party who loses on

appeal simply because a point of law needs clarification.

To conclude, unless an appeal is frivolous or groundless, a party should not bother seeking costs under the Indiana Appellate Rules. The courts have largely read Rule 67 out of existence for all but punitive purposes. Given Indiana's loyalty to the "American Rule" by which each party must pay for its own litigation expenses, this "should come as no surprise." *R.L. Turner Corp. v. Town of Brownsburg*, 963 N.E.2d 453, 458-59 (Ind. 2012). It remains on the books as a useful means of chastisement, but serves little other purpose.

Adam J. Sedia,
Hoeppner Wagner & Evans, LLP
asedia@hwelaw.com

Keeping the Record Straight: The Rule Against Supplementing the Record on Appeal and Exceptions Thereto

William A. Ramsey

I. The General Rule

In general, appellate courts will not consider evidence that was not presented to the trial court or administrative agency. *See Carrillo v. State*, 982 N.E.2d 461, 467 (Ind. Ct. App. 2013); *Schaefer v. Kumar,* 804 N.E.2d 184, 187 n. 3 (Ind. Ct. App. 2004). Appellate Rule 50 reinforces this rule by requiring a party to verify that its appendix includes only documents included in the appellate record. As a result, the Court of Appeals "must decide the case on the record before [the court] and cannot speculate as to the actual facts of a case." *Frye v. Vigo Cnty.*, 769 N.E.2d 188, 195 (Ind. Ct. App. 2002).

In explaining the reason for this rule, appellate courts note that a lower court or agency "can decide the issues only upon that evidence which is properly brought before it and placed in the record." *Chesterfield Mgmt., Inc. v. Cook*, 655 N.E.2d 98, 101 (Ind. Ct. App. 1995), *trans. denied*. Allowing parties on appeal to submit new materials to the Court of Appeals without restriction would transform an appeal, the very purpose of which is to correct errors made by a trial court or agency, to a hearing or trial de novo.

If a party submits material outside the record, the Court of Appeals will generally strike the material upon motion by the opposing party. *See*, *e.g.*, *In re A.P.*, 882 N.E.2d 799, 802 n.2 (Ind. Ct. App. 2008); *Boczar v. Meridian St. Found.*, 749 N.E.2d 87, 92 (Ind. Ct. App. 2001). Parties have tried, unsuccessfully, to supplement the record on appeal with a variety of evidence, including: alleged discussions that went to the futility of exhausting administrative remedies, *see LHT Capital, LLC v. Indiana Horse Racing Comm'n*, 891 N.E.2d 646, 654 (Ind. Ct. App. 2008), *reh'g denied*, 895 N.E.2d 124 (Ind. Ct. App. 2008), *trans. denied*; expert witness affidavits, *see Randles v. Indiana Patient's Comp. Fund*, 860 N.E.2d 1212, 1225 (Ind. Ct. App. 2007); jury instructions, *Williams v. Pittsburgh, C., C. & St. L. Ry. Co.*, 68 Ind. App. 93, 120 N.E. 46, 46 (1918), a ruling on a motion for continuance, *see Scott v. Kell*, 127 Ind. App. 472, 483, 137 N.E.2d 449, 449 (1956), and the amusing example of an actual box of bathroom cleaner, *see Lincoln Operating Co. v. Gillis*, 232 Ind. 551, 561, 114 N.E.2d 873, 878 (1953). Attempts to supplement the record will, no doubt, continue.

II. Exceptions

A. Mootness

When recognizing the mootness exception a century ago, the Supreme Court stated:

"An appellate court may receive proof or take notice of facts appearing outside the record for the purpose of determining the moot character of a question presented to it." *Kieselbach v. Feuer*, 183 Ind. 582, 109 N.E. 842, 843 (1915). The Court of Appeals has consistently allowed parties to supplement the record to show that an appeal is moot. *See In re Commitment of J.B.*, 766 N.E.2d 795, 798 (Ind. Ct. App. 2002); *Dell v. City of Tipton*, 618 N.E.2d 1338, 1341 (Ind. Ct. App. 1993), *trans. denied*.

B. Lack of Prejudice

The Court of Appeals, relying on former Appellate Rule 15(J), has examined an affidavit submitted by an attorney for the purposes of determining whether any prejudice was caused by a trial court's decision to enter a final judgment following a preliminary injunction hearing. *See Holman v. Koorsen Prot. Servs., Inc.*, 580 N.E.2d 984, 987 (Ind. Ct. App. 1991). The Court of Appeals agreed that the appellant was unable to point to evidence in the record demonstrating prejudice, but recognized "the difficulty with which a litigant is faced when the trial court, without notice to either party, dispenses with a trial on the merits and enters a final judgment." *Id.* As the Court of Appeals recognized, prohibiting the appealing party from offering new evidence on appeal would have allowed the appellee to claim failure to show prejudice "yet deny [the appellant] his opportunity to make that showing." *Id.* Although the *Holman* Court addressed a specific and relatively uncommon factual situation, the holding suggests that the Court of Appeals would accept evidence outside the record to show prejudice or the lack thereof in other circumstances as well.

C. Judicial Notice

Indiana Rule of Evidence 201 allows the Court of Appeals or Supreme Court to take judicial notice of certain matters. The Court of Appeals recognized the tension between Rule 201 and the general proscription on supplementing the record in *Banks v. Banks*, 980 N.E.2d 423, 426 (Ind. Ct. App. 2012). In *Banks*, a party asked the Court of Appeals to take judicial notice of a determination the Social Security Administration rendered after the underlying proceeding. The Court of Appeals found the issue irrelevant to the ultimate outcome, but recognized the uncertain state of the law:

> Indiana law currently is unclear on whether this court may judicially notice either the ultimate legal determination of the SSA regarding Timothy's disability or the factual findings of the SSA administrative law judge regarding the extent of his illness. Obviously, the SSA's decision was not yet in existence when the trial court ruled in this matter. Ordinarily, this court may not consider evidence outside the record presented to the trial court in resolving an appeal.
>
> Indiana Evidence Rule 201(f) does provide that judicial notice may be taken at any stage of the proceeding, which includes appeals. On the other hand, judicial notice may not be used on appeal to fill evidentiary gaps in the trial record.

Banks, 980 N.E.2d at 426 (internal citations and quotations omitted). The Court did not rely on the SSA decision when deciding the appeal, but also declined to strike the materials regarding the decision from the appendix, thereby leaving the door open for requests to supplement the record on appeal by way of judicial notice.

III. Supplementation in other Jurisdictions

Federal courts have recognized that although "a court of appeals will not ordinarily enlarge the record to include material not before the district court, it is clear that the authority to do so exists." *Gibson v. Blackburn*, 744 F.2d 403, 405 (5th Cir. 1984) (collecting cases). In light of this authority, federal courts do not categorically apply the general rule against supplementing the record on appeal. *See*

Brown v. Watters, 599 F.3d 602, 604 n.1 (7th Cir. 2010); *Rovalcaba v. Chandler*, 416 F.3d 555, 562 n.2 (7th Cir. 2005), *cert. denied*, 546 U.S. 1101 (2006).

Appellate courts from other states also consider matters outside the record for a variety of purposes. *See*, *e.g.*, *Rosen v. Rae*, 647 P.2d 640, 642 (Ariz. Ct. App. 1982) ("[W]here matters have occurred since the filing of the appeal which may make review of the proceedings of the lower court inappropriate, such matters may be shown by extrinsic evidence and considered by this court."); *In re Commitment of Sandry*, 857 N.E.2d 295, 307 (Ill. Ct. App. 2006) (noting that Illinois courts can consider materials outside the record when addressing the admissibility of expert testimony); *Nevada Gold & Casinos, Inc. v. Am. Heritage, Inc.*, 110 P.3d 481, 484 (Nev. 2005) ("[W]e may consider relevant facts outside the record in determining whether appellants have waived their appeal."); *Crawford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 319 N.E.2d 408, 412 (N.Y. App. Div. 1974) (granting an exception to the general rule "to relieve the courts of an unnecessary burden and to give some impetus to the policy favoring speedy resolution of arbitrable controversies"); *Burgess v. State*, 313 S.W.3d 844, 848 n.5 (Tex. Ct. App. 2010) ("We may consider documents submitted by the parties that are outside of the trial court's record for the purpose of determining our own civil jurisdiction.").

As these cases illustrate, appellate courts from other jurisdictions appear to take a more liberal approach to supplementation of the appellate record than do Indiana courts.

IV. Parties Should Be Entitled to Supplement the Record If the Interests of Justice So Require

Appellate Rule 1 allows parties to seek leave to deviate from the Appellate Rules, presumably including Rule 50. Rule 1, however, provides no standard for an appellate court to apply when ruling on such a motion.

Appellate courts in other jurisdictions will consider materials outside the record if the interests of justice so require. *See Brown*, 599 F.3d at 604 n.1; *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1170 (11th Cir. 2006); *Miller v. Benson*, 51 F.3d 166, 168 (8th Cir. 1995); *Dakota Industries, Inc. v. Dakota Sportswear, Inc.*, 988 F.2d 61, 63 (8th Cir. 1993); *In re AOV Indus., Inc.*, 797 F.2d 1004, 1012 (D.C. Cir. 1986); *Turk v. United States*, 429 F.2d 1327, 1329 (8th Cir. 1970); *Gibson v. United States*, 457 F.2d 1391, 1394 (3d Cir. 1972).

Although the "interests of justice" test may provide less certainty than a bright-line test, the Supreme Court uses such a standard in a variety of circumstances. *See*, *e.g.*, *Hardiman v. Cozmanoff*, 4 N.E.3d 1148, 1153 (Ind. 2014) (recognizing that courts have the inherent "discretion to impose a stay when the 'interests of justice' so require"); *TRW Vehicle Safety Sys., Inc. v. Moore*, 936 N.E.2d 201, 228 (Ind. 2010) (recognizing that the Supreme Court will remand for a new trial to allocate fault if the interests of justice so require); *Timm v. State*, 644 N.E.2d 1235, 1237 (Ind. 1994) ("[C]ourts do not favor continuances to allow more time to prepare for trial and should grant such motions only where good cause is shown and it is in the interests of justice."). In fact, the Supreme Court has explained that the interests of justice may lead courts not to follow a general procedural rule.

> [A] court should not blindly adhere to all of its rules. Although our procedural rules are extremely important, it must be kept in mind that they are merely a means for achieving the ultimate end of orderly and speedy justice. We must examine our technical rules closely when it appears that invoking them would defeat justice; otherwise we become slaves to the technicalities themselves and they acquire the position of being the ends instead of

> the means. Before a court may set aside its own rule, and it should not be set aside lightly, the court must assure itself that it is in the interests of justice to do so, that the substantive rights of the parties are not prejudiced, and that the rule is not a mandatory rule.

Meredith v. State, 679 N.E.2d 1309, 1311 (Ind. 1997) (internal quotations, citation, and footnote omitted). This statement, although made in the context of the identification of witnesses, applies equally to the rule regarding the record on appeal.

V. Conclusion

Parties will often look back on a trial or other proceeding and wish that they had provided additional information to a court or administrative body. The general rule is – and should be – that Monday-morning quarterbacking should not permit a free-for-all on appeal. However, given the authority of Indiana appellate courts to entertain supplemental material, it is reasonable to have a test in place to determine when such consideration is appropriate.

An "interests-of-justice" exception should remain quite narrow, and the Court of Appeals would undoubtedly follow the general rule against supplementing the record in the vast majority of cases. But rare cases could arise in which justice would clearly be served if the Court of Appeals examined materials not presented to the lower court or agency. Whether through an amendment to the Appellate Rules or by judicial decision, parties should be able to rely on supplemental materials upon a showing that the interests of justice so require.

William A. Ramsey,
Barrett McNagny LLP
war@barrettlaw.com

Reflections on Oral Argument at the United States Supreme Court

Jon Laramore

In January 2015 I had the honor of arguing a case in the U.S. Supreme Court, and five months later I learned that the Court had ruled in favor of my client, Moones Mellouli. The case is an immigration matter, *Mellouli v. Lynch,* 136 S.Ct. 1135, holding that the statute under which Moones was deported, 8 U.S.C. 1227(a)(2)(B)(i), cannot be used to deport someone based on a low-level conviction like his. Shortly after the opinion was issued, I wrote this article for The Appellate Advocate. Because of a gap in publication, the article is being published now. Although the decision is now two years old, I hope the story of our case remains interesting to my colleagues in the Indiana appellate bar.

Doing a case in the U.S. Supreme Court is like doing any other appeal, only more so. Everything about it is bigger and more intense than an appeal in the Indiana Supreme Court or the Seventh Circuit.

Before I say more about that, let me explain how an appellate lawyer in Indiana got a Supreme Court case about a man from Tunisia who was deported after pleading guilty to a Kansas drug paraphernalia misdemeanor. My then-law firm, Faegre Baker Daniels, has a strong relationship with the immigration clinic at the University of Minnesota Law School, called the Center for New Americans. The clinic represented Moones on rehearing in the Eighth Circuit after he lost his fight against deportation before a panel. After the Eighth Circuit denied rehearing, the clinic looked for a law firm to collaborate on a cert petition and take the case to the U.S. Supreme Court. I volunteered. The case was pro bono.

The petition

Writing a successful cert petition is about convincing the court that your issue is

important enough for it to spend its time on – not unlike the transfer process in the Indiana Supreme Court (although the U.S. Supreme Court grants cert only on questions presented in the petition – sometimes not even all the questions presented – whereas in Indiana transfer moves the entire case to the Supreme Court, not just specific issues).

In our case, there was a true circuit split. The specific question under 8 U.S.C. 1227(a)(2)(B)(i) was whether, to justify deportation, a state-court conviction had to specifically mention a substance listed under the federal Controlled Substances Act. Two circuits, the Third and Seventh, said yes. At least three other circuits said no. The second sentence of our petition said straightforwardly that if Moones had been convicted in the Third or Seventh Circuits, he would not have been deported, as he was under the Eighth Circuit's interpretation. The split was clear. The results were stark. And the legal issue affects the lives of thousands every year.

Moones also provided sympathetic facts to present the legal issue to the Supreme Court. Immigration lawyers across the country were interested in the proper construction of 1227(a)(2)(B)(i), and they looked for a case that would present the case favorably.

Moones's case fit that bill. He came to the U.S. from Tunisia, got his college degree and two master's degrees, then taught math and worked as an actuary. He was arrested for drunk driving, and when he was checked into the jail, police found four pills in his sock. It was alleged that the pills were Adderall, a federally controlled substance, and he was charged with trafficking contraband. But he was allowed to plead to a misdemeanor, possession of drug paraphernalia – the paraphernalia being his sock! He was deported for the crime of possessing a sock somehow associated with a controlled substance, but nowhere in the record of his conviction was any particular substance named (and none was ever proved).

Cert grant and briefing

Whether because of the circuit conflict or because of Moones's stark facts, the Court granted our petition for certiorari in June 2014. We immediately began work on merits briefing. We learned that the court was likely to schedule argument in the case for December 2014 or January 2015 (ultimately, it was on January 14), and the clerk's office was very flexible in allowing both sides adequate time for briefing – each side got about 10 weeks to do its merits brief, and we got another 4 weeks for reply.

Our team for this work included my Faegre Baker Daniels colleagues Daniel Pulliam and Lucetta Pope as well as Ben Casper and Kate Evans from the Minnesota clinic. Many other lawyers and law students played roles. We also connected with national experts from NYU Law School, the National Center for Immigrant Justice, and the National Association of Criminal Defense Lawyers. They gave us advice and ultimately provided amicus briefs on Moones's behalf. Throughout the work on this case, we used the enormous *Supreme Court Practice* book as our guide. Now in its tenth edition, the book used to be called Stern & Gressman and now is authored by Shapiro, Geller, Bishop, Hartnett and Himmelfarb. I also benefited immensely from David Frederick's book, *The Art of Oral Advocacy*, which was a terrific help for argument prep.

The briefing process was not generically different from briefing any other appeal, but everything was more intense. We worked harder to be sure we had uncovered every case in our research and thought through every theory – including many we ended up not using. For the reply brief, to illustrate the impact of the ruling we were asking for, we included an appendix detailing the drug paraphernalia possession statutes of all 50 states, an appendix that was longer than the reply brief itself.

Argument prep

Once briefing was completed, we had about 5 weeks to prepare for argument (including the Christmas and New Year's holidays). As oralist, I did a complete review of the record and the lower court briefing. I re-read every case in all the briefs and made extensive notes on the most important ones. With the help of others, we drafted 15 single-spaced pages of likely questions and their answers. I spent a lot of time composing an opening for the argument, knowing that I might spend all the rest of my time responding to questions (which is pretty much what happened).

To further prepare for the argument, I did three moot courts. The first was with some colleagues at Faegre (including some Minneapolis colleagues by video). The rule for this initial moot was that I was allowed to give at least a three-sentence response to each question before being interrupted; that let me get a handle on whether the substance of my answers was solid. The second moot was in D.C. with immigration lawyers and some experienced Supreme Court counsel, organized by the advocacy group Public Citizen. The third was through the Georgetown Law School Supreme Court project, before 5 lawyers with Supreme Court experience. These practices were very helpful; the Georgetown moot caused me to change my opening significantly, and all the moots helped me identify likely questions and shape answers.

I departed from my usual practice in just one way. In my prior arguments, I limited the material I took to the podium to a few sheets in (or attached to) a manila folder. That practice always had served me well. But the Frederick book convinced me that I needed a full-fledged binder, with all the statutes, certain cases, and other notes that I could refer to at the podium if I needed to. I spent a lot of time on that binder, which was in itself helpful preparation. But in the argument, I referred to only three pages in the binder.

Argument

There's a lot of ritual the day of the argument. Arguing counsel and their teams are required to arrive an hour and a half before the 10 a.m. start time. Counsel meet with the court's clerk, who reminds them of all the rules and procedures they've already read about in multiple sources and memorized. Counsel are admitted to the courtroom about 45 minutes before 10, passing through two different metal detectors. Those arguing the first case sit at counsel tables, and those arguing the second case sit at "backup" tables, so that they can easily move to counsel table when the time comes. As with any oral argument, it's difficult to know how to spend the time immediately before court begins. In my case, I just reviewed all the notes in my binder over and over.

The court came in at 10 o'clock precisely. First, the Chief Justice swore in new members of the Supreme Court bar, a well-choreographed ritual that takes just a few minutes. Then the court announced opinions that were ready for release, with each opinion's author giving a short summary. Then the Chief Justice called the first case – us.

The court did not interrupt my opening, which took about a minute. But before I could say anything further I got my first question – from Justice Alito, whom we predicted based on prior opinions would not be friendly. In fact, he asked what we had determined in preparation would be the most difficult question we could get – I expected to be asked the question, but it threw me a little that it was first (if it was the hardest question, then it would all be downhill from there – or would it?) I gave my prepared answer, which did not satisfy Justice Alito. But before he could say much more, other justices stepped in to rescue me with friendlier questions (the argument audio is available at http://www.oyez.org/cases/2010-2019/2014/2014_13_1034). I spent 26 minutes at the podium, and it was over before I knew it.

Rachel Kovner, the assistant to the solicitor general who argued for the government, gave a more polished argument, but she got more resistance from the court than I had gotten. She had to argue a difficult position

– in its briefing the government had taken a different position than the Eighth Circuit, offering an alternative basis for affirmance. When I got up for rebuttal, no justice made any eye contact or expressed any interest, so I sat down after just a few sentences. Based on the argument, I "counted" four votes in our favor at that point – Justices Ginsburg, Breyer, Sotomayor, and Kagan. I believed we might get the votes of the Chief Justice and Justice Scalia as well, but I wasn't sure; and Justice Kennedy had said nothing during the argument, although his prior votes indicated that he might lean our way. We didn't believe we could get Justice Alito's vote, and we thought it unlikely we could get Justice Thomas.

In the end, all the justices we thought might go our way did so, making for the 7-2 outcome. Justice Ginsburg's opinion was very much along the lines of the reasoning in our brief, which was very gratifying. The opinion brings some order to disordered area of immigration law, and it restricts the government's power to go beyond what we asserted was Congress's intent in enacting 1227(a)(2)(B)(i).

We celebrated after the argument with a wonderful lunch that included our whole team, plus family, friends, and colleagues (my spouse and our children were able to attend). Our team continues to reflect on the incredible experience of taking this case to the Supreme Court, and the opinion already has been cited more than 60 times in the federal courts. We also can celebrate with Moones himself, who was able to return to his family here in the United States as a result of our success in his case.

Jon Laramore
Executive Director, Indiana Legal Services, Inc.
jon.laramore@ilsi.net

Electronic Filing: Lessons Learned from the Appellate Clerk's Office

Gregory R. Pachmayr

July 1, 2016, marked a noteworthy day in Indiana's appellate courts;[1] electronic filing became mandatory in all "subsequent filings"[2] tendered by attorneys.[3] In the first month of mandatory e-filing, there were approximately 2,080 filings in the appellate courts. The revolutionary change in the way courts do business is allowing for better access and greater efficiencies. As the number of e-filed documents steadily increases, the Appellate Clerk's Office has grown familiar with a few of the pitfalls that cause attorneys to receive notices of defect. Our office wants to help lawyers avoid these common mistakes. This article is aimed at helping attorneys ensure their electronically-tendered documents will be successfully filed. The majority of this article will focus on common errors that lead to defects.[4] The article will also include some tips on where to go with e-filing questions.

Seasoned appellate practitioners – and appellate court jurists – immediately identify appellate documents by the color of their covers. In the electronic world, where PDFs are created from word processing programs, scanning a document with a color cover wastes money, time, and megabytes. To provide readers with a visual cue akin to colored covers, Appellate Rule 43(H) now requires left justified headers identifying the document and the filing party.

In the conventional paper world, page numbering in briefs and petitions began after the table of contents and table of authorities. Under the new rules, Appellate Rule 43(F) now requires page numbering to start on the front page and continue consecutively throughout the document. This allows the page numbers in the PDF file to align with the page numbers on the document itself. Doing so eliminates confusion when citing page

numbers. Appellate Rule 44(C) excludes the cover, table of contents, table of authorities, etc., from the length limits of briefs and petitions.

Certificates of service are a source of confusion in the electronic world. Appellate Rule 24(C) allows for personal service, service through the USPS, or a third party commercial carrier for documents exempted from e-filing; however, it also cross-references Rule 68(F), which requires e-service to other parties who are on the Public Service Contact list through the e-filing system. Please note that this is not the same as e-mail and that e-mail is not an appropriate method of service. Appellate Rule 24(D)(1)(a) requires certification that service *has been made* not that it will be made. As such the certificate of service should not include future-tense language.

Appellate Rule 46(A)(12) now requires that the judgment or order being appealed be submitted as a separate attachment to the appellant's brief rather than within the brief itself. When e-filing, please include the judgment or order being appealed in the same "envelope" as an attachment to the brief in the e-filing system.

There are significant changes to the way appendices are arranged. First, a note on appendices' terms of art: the appellant files a single *appendix* that contains multiple *volumes* of which there may or may not be public and confidential *versions*. These distinctions are important when creating the table of contents. Appellate Rule 51(F) now requires that a single table of contents for the entire appendix be tendered as Volume 1. Subsequent volumes do not contain individual tables of contents. The reader should be able to tell from the table of contents the volume and page number of the documents listed. Each volume is limited to the lesser of 250 pages or 20 megabytes and the front page is included in the page limit.[5] Each volume should be consecutively paginated starting with page 1; the pagination should not continue from one volume to the next.[6] Also note, Appellate Rule 49 now allows the Appendix to be filed on or before that date on which the appellant's brief is filed.

Appellate Rule 23(F) addresses confidential documents in appendices. In the paper world, confidential documents were pulled out and compiled into their own filing. Now there should be "mirrored" public access and non-public versions of any volume that contains confidential information. The public access version should contain a place holder for each page of confidential information and the non-public access version should contain both the public access and non-public access documents. The placeholder pages in the public access version ensure that the PDF page numbers align with the actual page numbers on the document. The visual cue of green paper signifying confidential documents has been eliminated. Instead, the confidential documents in the non-public access version should have a header, label, or stamp indicating that the document is confidential or excluded from public access.[7] The front page should indicate what *version* of the volume is contained within, e.g., "Volume 2 – Public Access Version" and "Volume 2 – Non-Public Access Version." Having mirrored versions allows the public to know that something was excluded from public access and allows the court on appeal to work from a single non-public access version rather than clicking between a public access version and a version that only contains excluded documents. Finally, do not forget the notice of exclusion in accordance with Appellate Rule 23(F)(3)(a); this document should explain the reasons documents were excluded.

Appellate Rule 68(H) requires signatures on e-filed documents to be either an image of a signature or the indicator "/s/" followed by the person's name. This detail is easily overlooked but is required by the rules.

While not something that will result in a defect, the use of "envelopes" in the e-filing system is worth mentioning. The e-filing

system allows filers to tender multiple PDF files in the same electronic transaction or "envelope." The Clerk's Office encourages filers to include as many documents in each envelope as possible. Similarly, attachments to motions should be consolidated into a single PDF file. This will save the filer time when tendering their documents and it also makes it easier on Clerk's Office staff to process the filings.

There are numerous resources to help practitioners navigate the e-filing landscape. While the appellate rules contain the new formatting requirements, the website www.courts.in.gov/efile is a treasure trove of information related to e-filing. On this website, you will find the E-filing User Guide, which addresses topics such as: choosing a provider, setting up your account, understanding confidential information, timing and deadlines, electronic service and the public service list, and preparing documents to be e-filed. The e-filing website also contains a FAQ section and a guide on confidential filings.

The Appellate Clerk's Office is always happy to assist with case-related questions. However, given the number of different e-filing service providers, the Clerk's Office is unable to help with technical questions. Each e-filing service provider offers training and support and links are available on the www.courts.in.gov/efile website. Also on the Court's e-filing website is an online form that allows users to email questions related to appellate e-filing.[8]

Electronic filing in the appellate courts has proven to be an exciting development in the practice of law. Rule changes were promulgated to help implement e-filing, but understandably the changes have resulted in attorneys still unfamiliar with the new way of doing business to receive notices of defect. Hopefully, this article will help appellate practitioners learn from the mistakes of others and transition smoothly into the e-filing world.

1. Appellate motions filed by attorneys in non-confidential cases also became accessible online on July 1, 2016. Appellate Motions Available online July 1, Judicial Branch of Indiana (March 18, 2016), http://www.in.gov/activecalendar/EventList.aspx?fromdate=1/1/2016&todate=12/31/2016&display=Month&type=public&eventidn=247570&view=EventDetails&information_id=244495 (last visited August 24, 2016).
2. Documents that generate a new appellate cause number, such as the Notice of Appeal, should be conventionally filed.
3. E-filing Progress Continues with Certain Cases and Counties Requiring the Move Away From Paper, Judicial Branch of Indiana (April 12, 2016), http://in.gov/activecalendar/EventList.aspx?eventidn=245063&view=EventDetails&information_id=241097&forceredirect=Y (last visited August 24, 2016).
4. This article is not a comprehensive overview of the Appellate Rules. Practitioners should familiarize themselves with the Appellate Rules before tendering documents.
5. App. R. 51(D).
6. App. R. 51(C)
7. App. R. 23(F)(3)(b)(ii)(b)(3).
8. Ask a Question About Appellate E-filing, Judicial Branch of Indiana, http://www.in.gov/judiciary/4433.htm (last visited August 24, 2016).

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