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The Unpromulgated Rules of Appellate Procedure: A Plea for Re-Examination of Old Traditions

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THE UNPROMULGATED RULES OF APPELLATE PROCEDURE: A PLEA FOR A RE-EXAMINATION OF OLD TRADITIONS

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Men grind and grind in the mill of a truism, and nothing comes out but what was put in. But the moment they desert the tradition for a spontaneous thought, then poetry, wit, hope, virtue, learning, anecdote, all flock to their aid.[1]

There can be no question that the appellate courts of Indiana, in the last decade or so, have demonstrated a strong distaste for decisions based upon procedural technicalities, rather than substantive issues, in the sphere of trial practice.[2] To a lesser degree, this abhorrence has even manifested itself in a liberalization of the Appellate Rules.[3] Yet, notwithstanding the obviously good intentions of the Indiana courts and their demonstration of those intentions in reviewing procedural problems occurring in the trial courts, too many procedural traps and pitfalls still exist in appellate practice for the unwary.[4] Compounding the problem, many of the procedural technicalities, inherent in appellate practice, can only be found by reviewing obscure cases, and are not readily available through a review of the trial and appellate rules. Moreover, these procedural rules, possibly first enunciated at the turn of the century, begin to assume a life of their own and the rationale behind the rules is lost and rarely re-examined.

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1. R. EMERSON, LITERARY ETHICS (1938), *quoted in* J. BARTLETT, FAMILIAR QUOTATIONS, 496 n.13 (15th ed. 1980).

2. *See, e.g.*, State v. Bridenhager, 257 Ind. 699, ____, 279 N.E.2d 794, 796 (1972); *see also*, Farm Bureau Insurance Company v. Clinton, 149 Ind. App. 36, ____, 269 N.E.2d 780, 782 (1971).

3. *See, e.g.*, the Indiana Supreme Court's 1982 Amendment to Appellate Rule 7.2(C)(2), in which it is provided that incompleteness or inadequacy of the record shall not constitute a grounds for dismissal or preclude review on the merits, IND. CT. R. APP. P. 7.2(C)(2) (1982); *see also*, Thompson Farms v. Corno Feed Products, 173 Ind. App. 682, ____, 366 N.E.2d 3, 9 (1977).

4. Hamacher, *Appellate Procedure: Are We Playing The Game Without A Complete Set Of Rules?* (1982) (unpublished manuscript) (scheduled for publication in 16 IND. L. REV. ____ (1983)).

One example of this can be found in the requirement for filing the record of the proceedings. Indiana Appellate Rule 3 discusses the procedure in the following language:

> (A) SUBMISSION. Every appeal shall be deemed submitted and the appellate tribunal deemed to have acquired jurisdiction thereof on the date the record of the proceedings is filed with the clerk of the Supreme Court and Court of Appeals.
>
> (B) TIME WITHIN WHICH THE APPEAL MUST BE SUBMITTED. In all appeals and reviews, except those from interlocutory orders, the record of the proceedings must be filed with the clerk of the Supreme Court and Court of Appeals within ninety [90] days from the date of the judgment or the ruling on the motion to correct errors, whichever is later. In appeals and reviews of interlocutory orders the record of the proceedings shall be filed within thirty [30] days of the ruling. However, if the statute under which the appeal or review is taken fixes a shorter time, the time fixed by the statute shall prevail.[5]

Based on the language used in the Rule, an attorney would not necessarily be cognizant or assume that the failure to file the record of the proceedings within the time specified, or any extension of time properly granted, would preclude the appellate court from obtaining jurisdiction, although he might suspect that the appellate court would look favorably upon a motion to dismiss or affirm. Certainly, as can be seen by reviewing the much stronger language found in Indiana Appellate Rule 2(A), our Supreme Court was completely capable of specifying the result of a failure to timely act when it adopted the Appellate Rules.[6] Nevertheless, appellate cases are constantly being dismissed, due to the failure of the appellant to timely file the record of the proceedings or obtain an extension of time in which to file that record.[7] Most of these dismissals do not "merit" the issuance of a written opinion, let alone one for publica-

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5. IND. CT. R. APP. P. 3 (emphasis in original).

6. An appeal is initiated by filing with the clerk of the trial court a praecipe designating what is to be included in the record of the proceedings, and *that said praecipe shall be filed within thirty [30] days after the court's ruling on the Motion to Correct Errors or the right to appeal will be forfeited.* A copy of such praecipe shall be served promptly on the opposing parties. IND. CT. R. APP. P. 2(A) (emphasis added).

7. Hendrickson v. American Fletcher Nat'l Bank & Trust Co., 158 Ind. App. 20, ___, 301 N.E.2d 530 (1973).

tion, and hence, are never reported in the official or Northeastern Reporters.

The history of this unpromulgated rule goes back to the 1800's. The earliest case to discuss the need to perfect an appeal within a specified period of time appears to be *Harshman v. Armstrong*.[8] In *Harshman*, the statute required that an appeal be perfected by filing the transcript within three (3) years from the date of the judgment. However, *Harshman* discusses the rule without discussing the reasons for it.[9] The 1888 case of *Smythe v. Boswell*, involving a statute requiring the perfection of the appeal by filing a transcript within one (1) year from the date of the judgment, provides a clearer understanding of the reasons behind the rule that a failure to timely file a transcript deprives an appellate court of jurisdiction.[10] In *Smythe*, the Indiana Supreme Court acknowledges the authority of the Indiana General Assembly to establish time limitations within which an appeal may be taken.[11] The court goes on to distinguish between statutory enactments and court rules by stating that the former binds both the parties and the courts, and are mandatory on both.[12] The implication, of course, is that the court would not have been bound by a court-created rule.

As indicated by the *Smythe* case, the 1800's and, even the first third of the 1900's, was a period when the Indiana Supreme Court acknowledged and conceded the Indiana General Assembly's authority over it concerning the creation and amendment of rules of procedure for both the trial courts and the appellate courts. However, during the 1930's, this concession of authority to the Indiana General was apparently eroded and, in 1937, the Indiana General Assembly delegated the rule-making power to the Indiana Supreme Court[13]

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8. 43 Ind. 126 (1873).

9. *Id.*; Also, *see* Anderson, Adm'x., v. Mitchell, 58 Ind. 592 (1877), for another case discussing the rule but not the reason behind it.

10. Smythe v. Boswell, 117 Ind. 365, 20 N.E. 263 (1888).

11. *Id.* at 366.

12. *Id.* at 366-67.

13. 1937 Ind. Acts ch. 91, § 1 provides:

> Section 1. *Be it enacted by the general assembly of the State of Indiana:* All statutes relating to practice and procedure in any of the courts of this state shall have, and remain in, force and effect only as herein provided. The Supreme Court shall have the power to adopt, amend and rescind rules of court which shall govern and control practice and procedure in all the courts of this state; such rules to be promulgated and to take effect under such rules as the Supreme Court shall adopt, and thereafter all laws in conflict therewith shall be of no further force or effect. The pur-

and the Indiana Supreme Court adopted Rules of Appellate Procedure for the first time.[14] Moreover, on September 2, 1940, the Indiana Supreme Court adopted a provision for obtaining an extension of time to file the transcript.[15] Further, the present ninety (90) day period for filing a record of the proceedings is less than one-tenth (1/10) of the time provided for that same act in 1873.[16]

Yet, notwithstanding this shift from rules created by the Indiana General Assembly to rules created by the Indiana Supreme Court, and even though the time limitation for filing a transcript had, over a period of time, decreased from three (3) years to ninety (90) days, our appellate courts continue to follow the rule that a failure to timely perfect the appeal, through a timely filing of the transcript or record of proceedings, deprives an appellate court of jurisdiction.[17] In so ruling, our appellate courts continue to cite the old cases, such as *Smythe v. Boswell*, even though the rationale behind that rule no longer exists.[18]

In January of 1970, both the Indiana Supreme Court and the Indiana General Assembly adopted a new (or revised) set of trial and appellate rules. The Indiana General Assembly's rules clearly indicated a dissatisfaction with the continuing use of the failure to timely file the transcript as a means for disposing of appeals on a procedural basis rather than on the merits.[19] Specifically, the Indiana General Assembly's rules provided:

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pose of this act is to enable the Supreme Court to simplify and abbreviate the pleadings and proceedings; to expedite the decision of causes; to remedy such abuses and imperfections as may be found to exist in the practice; to abolish all unnecessary forms and technicalities in pleading and practice and to abolish fictions and unnecessary process and proceedings. (Emphasis in original.)

14. Note the Indiana Supreme Court's Order of June 21, 1937 (effective July 1, 1937), which abrogated Acts 1937, ch. 185, and provided for the adoption of rules, promulgated by the Supreme Court, for both trial and appellate practice. 2 BURNS' ANN. STAT., pt. 1, R. 1-1 at 3 (replacement ed. 1946) (compiler's note).

15. Drzewiecki v. George, 111 Ind. App. 126, 40 N.E.2d 1004 (1942).

16. One cannot help but wonder, considering the fact that ninety (90) days is less than one-tenth (1/10) of the three (3) years provided for filing a record in 1873, whether our appellate courts are doing anything in one-tenth (1/10) of the time that they used to.

17. *See, e.g.*, Bachelder v. Parker, 118 Ind. App. 66, 74 N.E.2d 926 (1947); Anderson v. State *ex rel.* Stamm, 106 Ind. App. 255, 18 N.E.2d 962 (1939).

18. *See supra* note 17.

19. 1969 Ind. Acts ch. 191 at 546-717. Nor was this concern for procedural technicalities a novel idea. *See supra* note 13.

> (C) Noncompliance with rules—Effect. *Failure of an appellant or appellee to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, or the jurisdiction of the court on appeal* and is ground only for such action as the court on appeal deems appropriate, including without limitation an order directing a party to correct, exclude or include matter from or in the record, transcript, appendices or briefs; assessment as costs, attorneys fees and other expenses incurred by another party as a consequence of noncompliance with these rules on appeal; and dismissal of the appeal only after a party or his lawyer neglects to comply with the action ordered by the court within the time allowed or if no time is allowed within a reasonable time.[20]

Thus, the Indiana General Assembly has clearly indicated its feeling that an appeal should not be dismissed based upon the concept of lack of jurisdiction because of a failure to timely file a transcript.[21] While the Indiana General Assembly's rules were superseded, to the extent of any conflict, by the Indiana Supreme Court's adoption of the Indiana Rules of Court, a legal argument could be made that this particular rule was not superseded due to a lack of conflict.[22]

Notwithstanding the fact that the original reason for the rule no longer exists, that the time limits involved have been significantly decreased, and that the Indiana General Assembly, purportedly responsible for the rule, has suggested a contrary policy, our appellate courts continue to blindly apply the rule.[23] Moreover, no recent Indiana case has reviewed the history of this unpromulgated rule or attempted to determine whether the basis for the rule is still valid. This is a particularly disturbing fact.

Although the doctrine of *stare decisis* provides valuable stability and predictability to the law, the blind and unthoughtful application of prior decisions which are not re-examined to determine their cur-

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20. 1969 Ind. Acts ch. 191, R. 73(C) at 672 (emphasis added).

21. Thus, even the original party responsible for the rule that a failure to timely file a transcript deprives an appellate court of jurisdiction has "washed its hands" of it.

22. *Compare*, South Indiana Rural Elec. Coop v. Civil City of Tell City, ___ Ind. App. ___, 384 N.E.2d 1145 (1979) *with* Richards v. Crown Point Community School Corp., 256 Ind. 347, ___, 269 N.E.2d 5, 7-8 (1971).

23. *See, e.g.*, Eggers v. Wright, 253 Ind. 44, 245 N.E.2d 331 (1969); *In re* Walnut Creek Conservation Dist., ___ Ind. App. ___, 419 N.E.2d 170 (1981).

rent validity can be devastating. In his treatise on the law of judicial precedents, Henry Campbell Black had the following to say about the continuing validity of prior precedents, where the reasons for them no longer exist:

> *Where the decisions in ancient cases depended upon the existence of a state of society which is now obsolete, or upon views of public policy or the policy of the law which have now given place to entirely different opinions, their authority should be held to have evaporated, and it is not incumbent on the courts to submit to their doctrines.*[24]

Indiana courts also have recognized the need to re-examine rules stated in prior cases to determine if the reason for that precedent still exists. For example, in *McLaughlin v. Miller*, the appellate court stated: "[I]t is always incumbent on a court when the question is properly raised, to investigate the wisdom of precedents established many years ago."[25] Thus, rules gleaned or extracted from previous Indiana cases should, periodically, be reviewed and re-examined in order to determine if the rationale behind those rules continues to exist.

In light of the recent changes in the Rules of Appellate Procedure providing for the filing of the praecipe in the Court of Appeals and the easy extension of this requirement to cases involving the Indiana Supreme Court (whether or not that court decides to hold pre-appeal conferences), the time has come to re-examine and re-evaluate the "unpromulgated rule" that a failure to timely file a transcript precludes an appellate court from obtaining jurisdiction in a particular case. Furthermore, the time has come to re-examine the rule that the time to file a motion to correct errors can not be extended.[26] This rule, like the rule involving the transcript or record of proceedings, appears to date back to the 1800's and to have the same original rationale for its existence.[27]

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24. H. C. BLACK, LAW OF JUDICIAL PRECEDENTS 146-47 (1912) (emphasis added).

25. McLaughlin v. Miller, 139 Ind. App. 443, ____, 217 N.E.2d 50, 52 (1966).

26. While the rule (that the time for filing a motion to correct errors will not be extended) cannot, accurately, be described as "unpromulgated," it is not clearly set out in Indiana Trial Rule 59. In order to discover this, the practitioner either has to read cases or texts on the subject, or an obscure portion of Indiana Trial Rule 6(B)(2). *See*, IND. TR. R. 6(B)(2).

27. For a case holding that the statutory limitation for filing the old motion for a new trial is "imperative" and that the Indiana Supreme Court can not extend that time, *see* Wilson v. Vance, 55 Ind. 394, 396 (1876).

Recent Indiana appellate decisions have required a high degree of specificity in the statement and discussion of issues in the motion to correct errors. For instance, the failure to set out the exact objections to evidence raised at trial can constitute a basis for waiver of the issue on appeal.[28] With this exacting requirement as to the degree of specificity needed in a motion to correct errors, an attorney responsible for preparing a motion to correct errors assumes a substantial risk if he relies on his memory of the trial, trial notes, or even the recollection of witnesses. Thus, it is clear that the motion should rarely, if ever, be prepared without a copy of the transcript of the evidence.

Yet, there is no method for obtaining an extension of time in which to obtain a transcript of the evidence, if the court reporter cannot transcribe it before the end of this sixty (60) day period. Further, since one of the purposes of the motion to correct errors is to provide the trial court with an opportunity to make an informed decision as to its alleged errors and, hence, to reduce the number of appeals, the availability of a transcript for review by that court and the ability of the parties to cite from that transcript would substantially enhance the possibility of achieving these goals. Similarly, there is no possibility for an extension of time based on illness or hospitalization. Apparently, attorneys are not permitted to be sick or undergo hospitalization or surgery during the sixty (60) days after a judgment. Certainly, no one can accurately prepare a motion to correct errors without a transcript, except the attorney present at the trial. Is there any reason for believing that a trial court cannot effectively grant or deny a request for an extension of time to file a motion to correct errors? The current Trial Rules entrust the trial courts of this State with the authority to make that decision in almost every other situation. If they are capable of making those decisions, they should be equally capable of exercising their discretionary authority in this area.

The original justification for both the unpromulgated rule that a failure to timely file a transcript (now a record of the proceedings) deprives an appellate court of jurisdiction and the concept that the time for filing a motion to correct errors cannot be extended has

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28. *See, e.g.*, Shepler v. State, ___ Ind. ___, ___, 412 N.E.2d 62, 68 (1980); *see also*, Floyd v. Jay County Rural Elec. Membership Corp., ___ Ind. App. ___, ___, 405 N.E.2d 630, 634 (1980), where the court found most of the issues waived, due, in part, to an incomplete statement of the facts in the statement of facts and grounds portion of the motion to correct errors.

long since ceased to have any continuing validity. In today's world, where the parties can be protected through the requirement of bonds and other, less severe, solutions, the use of these procedural antiquities to deprive a party of his right to an appeal,[29] especially for the "sins of his counsel," appears to have no legitimate justification, except as a docket control mechanism. (Which, of course, would directly conflict with the "publicly enunciated" goal of our courts to abolish procedural traps so that more cases can be decided on their merits.) The time has come for a re-examination of both of these procedural rules.

Therefore, contemporaneous with the publication of this article, a letter is being sent to the Indiana Supreme Court Committee on Rules of Practice and Procedure requesting changes in the rules of court that would conform with the discussion in this article. Essentially, those proposed changes provide: (1) for the filing of the praecipe, as a notice of appeal, with either the Indiana Supreme Court or the Indiana Court of Appeals, as currently required for the pre-appeal conference in the court of appeals; (2) for an extension of time to file the motion to correct errors, if filed at least fifteen (15) days before the motion is due and if the petition for extension shows both good cause and lack of fault on the part of the moving party; and (3) for a motion to compel the filing of the transcript or for other protection for the moving party based upon a showing of harm resulting from an untimely filing. The full text of these proposed changes are set out in the Appendix.[30] The author believes that the effect of these changes will be to protect the non-responsible party, while avoiding the dismissal of an appeal because of procedural technicalities.

29. IND. CONST. art. VII, § 6.
30. *See* Appendix.

APPENDIX

The following are the proposed amendments that have been sent to the Committee (the underlined material is a proposed addition and the crossed-out material would be deleted):

Amendment To Appellate Rule 3

(C) FAILURE TO TIMELY FILE TRANSCRIPT. If the party responsible for filing the transcript fails to do so, within ninety [90] days from the date of the denial of the motion to correct errors, then the opposing party may file, with the applicable appellate court, a verified motion to compel the filing of the transcript, showing that more than ninety [90] days have elapsed and any harm caused, or that will be caused, to appellee by the delay. The party responsible for the filing the transcript will then have five [5] days to file a verified response, which shall set out any ameliorating reasons for the delay in filing the transcript. Thereafter, the court will enter an order, which may:

(1) assess attorney's fees, costs, and expenses against the responsible party or the attorney for said party;

(2) require additional security, an increased rate of interest, or other protection that the court may deem proper; and/or

(3) order the responsible party to file the transcript within a specified period of time, not less than ten [10] days after receipt of the order.

If an order is issued, requiring the filing of the transcript within a specified period of time, and it not complied with by the responsible party, the appeal will be deemed dismissed, as a matter of law.

Amendment To Trial Rule 59(C)

(1) A motion to correct error shall be filed not later than sixty [60] days after the final entry of a final judgment or an appealable final order. A copy of the motion to correct error shall be served, when filed, upon the judge before whom the case is pending pursuant to Trial Rule 5.

(2) A verified petition for extension of time to file the motion to correct errors or statement in opposition must be filed at least fifteen [15] days before the expiration of the time to be extended and must set out "good cause" for the requested extension and that the basis for the delay is not the result of the movant's negligence or fault. Upon receipt of the motion, the opposing party may file a verified motion, either contesting the facts set out in the motion for an extension or requesting additional protection or security. A hearing may be set on the motion for an extension, at the request of the non-movant or the court, which hearing shall be held within five [5] days. Even if the court finds that the movant is entitled to an extension, it may still require the movant to provide additional security or other protection to the non-movant.

Amendment To Trial Rule 6(B)

(B) ENLARGEMENT. When an act is required or allowed to be done at or within a specified time by these rules, the court may at any time for cause shown:

(1) order the period enlarged, with or without motion or notice, if request therefor is made before the expiration of the period originally prescribed or extended by a previous order; or

(2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; but, the court may not extend the time for taking any action for judgment on the evidence under Rule 50(A), amendment of findings and judgment under Rule 52(B), ~~to correct errors under Rule 59(C)~~, or to obtain relief from final judgment under Rule 60(B), except to the extent and under the conditions stated in those rules.

Amendment To Appellate Rule 2

(C) PRAECIPE AS A NOTICE OF APPEAL. In all appeals taken to the Court of Appeals and the Indiana Supreme Court, the appellant shall, within ten [10] days of the filing

of the praecipe with the Clerk of the trial court, file with the Clerk of the Supreme Court and Court of Appeals a copy of that praecipe, which shall constitute a notice of appeal to the applicable Court.

(D) COURT OF APPEALS PRE-APPEAL CONFERENCE.

(1) In addition to the praecipe discussed above and within the same period of time discussed above, if the appeal is to the Court of Appeals, the appellant shall, also, file with the Clerk of the Supreme Court and Court of Appeals a copy of the motion to correct errors and the ruling thereon, a statement of the nature of the case, the judgment entered, and in criminal cases a statement of whether the defendant is at liberty on bond, or is incarcerated, and if so in which institution.

[Remainder of text as in the current Appellate Rule 2(C).]

Readers of this article are asked to submit letters, whether supporting the change, suggesting alternative changes, or opposing the change, to the Indiana Supreme Court Committee on Rules of Practice and Procedure, c/o Bruce A. Kotzan, Executive-Secretary, 323 State House, Indianapolis, Indiana 46204. Let your opinion, whatever it may be, be heard by that Committee.

NOTES