

Introduction

This manual cannot answer every question that will arise in every appeal, but it seeks to answer the most common ones. The focus is on criminal appeals, but it also discusses other types of appeals in which public defenders may be appointed, such as children in need of services (CHINS), termination of parental rights (TPR), civil commitments, and contempt cases.

Overview of this Manual

This manual is divided into six sections, roughly tracking the progression of an appeal from its inception to its conclusion.

Section I: Initiating the Appeal. This section covers the filings and procedures necessary to begin an appeal. Before 2012, appeals began by filing a notice of appeal in the trial court. Effective January 1, 2012, a notice of appeal, which requires considerable information and attachments, must be filed with the appellate clerk. Pursuing an appeal is not a passive activity. Counsel is not only responsible for filing things on time but must be sure the trial court clerk and court reporter also fulfill their duties in a timely manner.

Section II: Interlocutory Appeals. This section explains the procedures, beginning in the trial court, by which a ruling may be appealed while a case is pending, i.e., before sentencing has occurred. In criminal cases, interlocutory appeals are most commonly sought when a motion to suppress is denied. With any interlocutory order, a defendant must obtain timely certification from the trial court and then approval from the court of appeals. This section also includes a discussion of the seldom-used appeals involving payment of placements by the Department of Child Services (DCS).

Section III: Motions Practice. This section explains the general requirements for filing appellate motions as well as the requirements and practical considerations for filing several specific motions, including a Motion for Extension of Time, Motion to Dismiss, Motion to Remand, Motion to Stay/Motion for Appeal Bond, Motion to Strike, and Motion for Expedited Appeal. Even if the rules do not specifically address a topic, appellate counsel may file a motion making any *reasonable* request of the court.

Section IV: Briefs and Appendices. This section is the longest and arguably the most important one of the manual. It addresses the selection of issues for appeal, legal research, and the preparation of the appendix and briefs. Most cases succeed or fail on the brief, and this section includes important information to consider in crafting each section of a winning brief.

Section V: After the Opinion is Issued. An appeal is not over when the appellate court issues its decision. The losing party may seek rehearing from the court of appeals or discretionary review (through a petition to transfer) by the Indiana Supreme Court. This section discusses when each is appropriate and strategies for writing effective petitions.

Section VI: Oral Argument. Finally, the last section addresses oral arguments. Although many appellate lawyers dread public speaking, oral argument can be an important part of winning a case. This section addresses when it is appropriate to request oral argument, how to make the request, and how to deliver a successful oral argument.

Audience

With rare exceptions, most appeals begin with the Indiana Court of Appeals. See Section I.A. (explaining cases that are directly appealed to the Indiana Supreme Court). There are currently fifteen members of the court and a few senior judges that also take part in deciding cases. Although the court is divided into five districts, the districts are important only to the selection of judges. The districts are illustrated at: <https://www.in.gov/courts/appeals/districts/>. Each case is randomly assigned to a panel of three judges, and these panels rotate every four months. Therefore, the judges assigned to any given case may or may not be from the same district or the district where the case originated. Counsel will not know which judges are assigned to decide a case unless oral argument is scheduled. See Section VI.

Although cases begin in the Indiana Court of Appeals, the Indiana Supreme Court decides about 50 cases each year on “transfer” from the court of appeals. See Section V. The Indiana Supreme Court currently has five members, each of whom participates in decisions in every case.

Biographies of the justices and judges are available on the courts’ websites:

<http://www.in.gov/judiciary/supreme/>

<http://www.in.gov/judiciary/appeals/>

Judges come from a variety of backgrounds, and counsel should not assume the judges deciding a case will be experts in the particular area of law involved.

The Indiana Rules of Appellate Procedure

The Indiana Rules of Appellate Procedure were overhauled in 2001. They are available online at: <http://www.in.gov/judiciary/rules/appellate/index.html>. The rules are significantly different from the pre-2001 appellate rules. If you have not litigated an appeal for several years, you should begin by reviewing the appellate rules. They are comprehensive, logically organized, include an index, sample forms, and answer most of the common questions that arise in an appeal.

Appellate Rule 2 includes several definitions. The definitions most important to criminal appeals are the following:

C. Appendix. An Appendix is a compilation of documents filed by a party pertaining to an appeal under Rule 49 and Rule 50.

- D. Clerk.** The Clerk is the Clerk of the Indiana Supreme Court, Court of Appeals and Tax Court.
- E. Clerk's Record.** The Clerk's Record is the Record maintained by the clerk of the trial court or the Administrative Agency and shall consist of the Chronological Case Summary (CCS) and all papers, pleadings, documents, orders, judgments, and other materials filed in the trial court or Administrative Agency or listed in the CCS.
- F. Court and Court on Appeal.** The terms "Court" and "Court on Appeal" shall refer to the Supreme Court and the Court of Appeals.
- G. Criminal Appeals.** Criminal Appeals are those cases which were designated by the originating court as a Murder – MR, Class A Felony – FA, Class B Felony – FB, Class C Felony – FC, Class D Felony – FD, Level 1 Felony – F1, Level 2 Felony – F2, Level 3 Felony – F3, Level 4 Felony – F4, Level 5 Felony – F5, Level 6 Felony – F6, Criminal Felony--CF; Class D Felony--DF; Criminal Misdemeanor--CM; Post Conviction Relief--PC; Juvenile Status--JS; Juvenile Delinquency--JD; Infraction--IF; Miscellaneous Criminal--MC; Local Ordinance Violation--OV, and Exempted Ordinance Violation--OE. This definition is for ease of reference and does not change the substantive rights of the parties.
- I. Notice of Appeal.** The Notice of Appeal initiates the appeal under Rule 9 and replaces the praecipe for appeal.
- J. Petition.** The term "Petition" shall mean a Petition for Rehearing, a Petition to Transfer an appeal to the Supreme Court, and a Petition for Review of a Tax Court decision by the Supreme Court. A request for any other relief shall be denominated a "motion."
- K. Transcript.** Transcript shall mean the transcript or transcripts of all or part of the proceedings in the trial court or Administrative Agency that any party has designated for inclusion in the Record on Appeal and any exhibits associated therewith.
- L. Record on Appeal.** The Record on Appeal shall consist of the Clerk's Record and all proceedings before the trial court or Administrative Agency, whether or not transcribed or transmitted to the Court on Appeal.
- O. Court Reporter.** "Court Reporter" shall mean a person who is designated by a court or Administrative Agency to perform official reporting services, including preparing the Transcript.
- P. Case Management System ("CMS").** Case Management System is the system of networked software and hardware used by any Indiana court that may receive, organize, store, retrieve, transmit, and display all relevant documents in any case before it.
- Q. Conventional Filing.** Conventional Filing is the physical non-electronic presentation of

documents to the Clerk or Court.

- R. Electronic Filing (“E-Filing”).** E-Filing is a method of filing documents with the clerk of any Indiana court by electronic transmission utilizing the Indiana E-Filing System. E-Filing does not include transmission by facsimile or by email.
- S. E-Filing Manager (“EFM”).** E-Filing Manager is the centralized entity approved by the Supreme Court that receives and transmits all E-Filing submissions between E-Filing Service Provider(s) and the appropriate CMS.
- T. E-Filing Service Provider (“EFSP”).** E-Filing Service Provider is the organization and software selected by a User and approved by the Supreme Court to receive and transmit all E-Filing submissions between the User and the Indiana E-Filing System.
- U. Electronic Service (“E-Service”).** E-Service is a method of serving documents by electronic transmission on any User in a case via the Indiana E-Filing System.
- V. Indiana E-Filing System (“IEFS”).** Indiana E-Filing System is the system of networked hardware, software, and service providers approved by the Supreme Court for the filing and service of documents via the Internet, into the CMS(s) used by Indiana courts.
- W. Notice of Electronic Filing (“NEF”).** Notice of Electronic Filing is the notice generated automatically when a document is submitted and transmitted through the IEFS, which sets forth the time of transmission, the name of the Court, User, party, attorney, trial court clerk, or Administrative Agency transmitting the document, the title of the document, the type of document, and the name of the Court, attorney, party, or other person meant to receive the Notice. The time noted in an NEF will be the time at the location of the court where the case is pending. An NEF will appear immediately on the User’s screen upon submission of the document for E-Filing.
- X. Public Access Terminal.** A Public Access Terminal is a publicly accessible computer provided by a clerk or court that allows a member of the public to access the IEFS and public court records.
- Y. User Agreement.** A User Agreement is an agreement in a form approved by the Division of State Court Administration that establishes obligations and responsibilities of the User within the IEFS.
- Z. User.** User is a Registered User or Filing User.
 - (1) **Filing User.** Filing Users include court and clerk staff, unrepresented litigants, attorneys, or an agent whom an attorney has expressly designated to make a filing on the attorney’s behalf and who has an IEFS user ID, password, and limited authority to file documents electronically.

- (2) **Registered User.** A Registered User is a person or entity with a user ID and password assigned by the IEFS or its designee who is authorized to use the IEFS for the electronic filing or service of documents.

AA. Service Contacts. A Service Contact is a person for whom an email address and other identifying information has been entered into the IEFS by a Registered User.

- (1) **Firm Service Contact.** A Firm Service Contact is a Service Contact associated in the IEFS with an attorney, organization, or law firm.
- (2) **Public Service Contact.** A Public Service Contact is a Service Contact who is listed on the Public Service List for purposes of E-Service. A Registered User may add a Service Contact to the Public Service List only if authorized by the Service Contact.
- (3) **Public Service List.** The Public Service List is a directory of Public Service Contacts who are available for E-Service.

Importance of Following the Rules/Deadlines: Notice of Defect

The most common and significant problems in an appeal often arise because counsel failed to follow the rules. The rules set clear requirements for every step of a proceeding and deadlines that must be followed. The flowchart at the end of this Introduction provides an overview of these deadlines. The tables that follow include information on the number of copies that must be filed, page and word limits, filing/service requirements, and legal citation.

If a brief or other document tendered to the Clerk fails to comply with the appellate rules, the Clerk will issue a notice of defect. Appellate Rule 23(D) explains the consequences and procedures for curing a defect. Appendix B lists the areas in which the Clerk will issue a notice of defect:

- (1) A Notice of Defect may be issued if one or more of the following is missing, insufficient, or incomplete.
- (a) A certificate of service, see Ind. Appellate Rules 24, 57(G)(7), 68(F);
 - (b) A word count certificate, see App. Rs. 34(G)(2), 44(E) & (F), 54(E), 57(G)(6);
 - (c) A table of contents or table of authorities, see App. Rs. 46(A)(1) & (2), 46(B), 46(E)(1), 50(A)(2), 50(B)(1), 50(C), 57(G)(2);
 - (d) For any document filed after the Notice of Appeal, a filing fee or material required by Appellate Rule 40; see App. Rs. 9(E), 40, 56(B), 63(P);
 - (e) For a motion to proceed in forma pauperis, a copy of any affidavit supporting the request to proceed in forma pauperis that was filed with the trial court or an affidavit conforming to Form #App. R. 40-2; or a copy of the order setting forth the trial court's reasons for denying the in forma pauperis status on appeal;
 - (f) Document was tendered without first filing an appearance, see App. R. 16;
 - (g) For an Appendix, a verification of accuracy, see App. Rs. 50(A)(2)(i), 50(B)(1)(f);

- (h) For an Appellant's Brief, an accompanying copy of the trial court's written opinion, memorandum of decision, or findings of fact and conclusions relating to the issue(s) raised in appeal, see App. R. 46(A)(12);
 - (i) For an Appellant's Brief in a criminal appeal where the sentence is at issue, an accompanying copy of the sentencing order, see App. R. 46(A)(12);
 - (j) For a Petition to Transfer, a brief statement, set out by itself on the page immediately following the front page, identifying the issue, question presented, or precedent warranting transfer, see App. R. 57(G)(1);
 - (k) For a Petition for Review or brief in response, a brief section entitled Reasons for Granting or Denying Review, set out by itself immediately before the Argument section, explaining why review should or should not be granted, see App. R. 63(I).
 - (l) For a non-public access version of a document, a conspicuous designation of "Not for Public Access" or "Confidential" on the first page, see App. R. 23(F).
- (2) A Notice of Defect may be issued if one or more of the following prohibited items is included:
- (a) For any Brief, any additional documents, other than the appealed judgment or order, see App. Rs. 46(F), 46(H);
 - (b) For any document, information excluded from public access when the document is not accompanied by a Notice to Maintain Exclusion from Public Access, see App. R. 23(F)(3).
- (3) A Notice of Defect may be issued if the document is otherwise defective because:
- (a) Document Production issues exist, except for hyperlinks, which may appear in a color other than black, see App. Rs. 43(C), 51(A), and/or 54(F);
 - (b) Page numbering issues exist, see App. Rs. 23(F)(3)(b), 34(G), 43(F) and/or 51(C);
 - (c) The document was conventionally filed but should have been electronically filed through the Indiana E-Filing System, see App. R. 68(C).

Clerk's Online Docket

MyCase includes access to all appellate cases (which can be filtered by checking a box), and the Clerk of the Indiana Supreme Court, Court of Appeals and Tax Court has an online docket that is invaluable to appellate practitioners. Case information may be accessed by cause number, litigant name, or counsel name.

Communicating with the Clerk or Court

Questions about filings in a case should be directed to the Clerk's office at 317-232-1930.

Communication with the Indiana Supreme Court or Court of Appeals is generally done through written motion. It is inappropriate to ask to speak to a judge about a pending case or their vote or decision in a decided case. If you have a question about what procedure or motion to file in a unique situation not covered by the rules, contact a staff attorney with the appropriate court at the numbers below.

317-232-2540: Indiana Supreme Court Administrator's Office

317-232-6906: Indiana Court of Appeals Administrator's Office

Citation Guide

You probably hated the Bluebook in law school. Even if you mastered it then, you may have forgotten it since. Even if you understood it then, proper citation has changed in recent years. Law clerks and judges understand citation—and so must you. Failing to cite information or citing it incorrectly can have serious consequences in an appeal. If the court cannot find the case or other source you have cited, it may well reject your argument—and chastise you in the opinion.

The primary goal of citation should be to allow the court to find your source and the appropriate page or part of that source. Beyond that, the appellate rules provide clear guidelines about the proper form of citation.

Cases

“All Indiana cases shall be cited by giving the title of the case followed by the volume and page of the regional and official reporter (where both exist), the court of disposition, and the year of the opinion, e.g., Callender v. State, 193 Ind. 91, 138 N.E. 817 (1922); Moran v. State, 644 N.E.2d 536 (Ind. 1994).” Ind. Appellate Rule 22(A). Rule 22(A) further requires, “Where both a regional and official citation exist, and pinpoint citations are appropriate, pinpoint citations to one of the reporters shall be provided.” App. R. 22(A). Finally, Rule 22(A) requires, “Designation of disposition of petitions for transfer shall be included, e.g., State ex rel. Mass Transp. Auth. of Greater Indianapolis v. Indiana Revenue Bd., 144 Ind. App. 63, 242 N.E.2d 642 (1968), trans. denied by an evenly divided court 251 Ind. 607, 244 N.E.2d 111 (1969); Smith v. State, 717 N.E.2d 127 (Ind. Ct. App. 1999), trans. denied.”

Although the rule is fairly explicit, appellate counsel sometimes make the following five types of citation errors.

1. Citing cases that are not good law. Counsel should Shepardize or KeyCite every case cited before filing a brief. If a subsequent case has overruled or disapproved the case, the case may no longer be good law on that point—and should not be cited. If transfer has been granted, the Court of Appeals opinion is vacated—and cannot be cited unless it has been adopted or summarily affirmed by the Indiana Supreme Court. App. R. 58(A).

Appellate Rule 65 was recently amended to allow counsel to cite memorandum (unpublished) decisions for persuasive value. But this applies only to memorandum decisions **issued on or after January 1, 2023**. Citing memorandum decisions issued before that date is prohibited under Rule 65.

2. Failing to include subsequent history. If the subsequent case overruled the case on

another legal issue, this should be noted parenthetically, e.g., State v. Hurst, 688 N.E.2d 402, 408 (Ind. 1998), overruled on other grounds by Cook v. State, 810 N.E.2d 1064, 1067 (Ind. 2004). Discretionary denials, such as rehearing or certiorari, should be included if the opinion cited is less than two years old. The denial of transfer should be included in every case, as required by Rule 22.

3. Failing to include a pinpoint cite. It is not enough to provide a citation to a case, some of which may span twenty pages or longer. You must include a citation to the specific page from which information is taken. For example, if you are relying on information found on page 539 of the Moran case, the citation would be as follows: Moran v. State, 644 N.E.2d 536, 539 (Ind. 1994). Be sure the information relied on is taken from the court’s opinion—not the headnotes written by LEXIS or West Publishing, which are *not* part of the case.

4. Subsequent citations. Rule 22 does not provide the form for later citations of the same case. Consistent with the Bluebook, counsel should use either the short form or *Id.* when referring to a previously cited case. For example, if referring to something from page 538 of the Moran opinion immediately after the full citation included above, the citation would be “*Id.* at 538.” If, however, there are intervening citations to other sources, the correct citation would be “Moran, 644 N.E.2d at 538.”

5. Typeface. Case names may either be underlined or *italicized*—not both and not bolded. The rest of the citation should appear in regular Roman type.

Statutes and Court Rules

Rule 22(B) provides specific guidelines for citing statutes and court rules. If referring to a statute or court rule in a textual sentence, counsel should spell it out, e.g., “according to Indiana Code section 35-38-1-7.1(a)” or “Criminal Rule 4 provides” When citing the statute or rule in a citation sentence, the following form should be used:

<u>INITIAL</u>	<u>SUBSEQUENT</u>
Ind. Code § 34-1-1-1 (20 xx)	I.C. § 34-1-1-1
Ind. Trial Rule 56	T.R. 56
Ind. Crim. Rule 4(B)(1)	Crim. R. 4(B)(1)
Ind. Post-Conviction Rule 2(2)(b)	P-C.R. 2(2)(b)
Ind. Appellate Rule 8	App. R. 8
Ind. Evidence Rule 301	Evid. R. 301
Ind. Jury Rule 12	J.R. 12
Ind. Access to Court Records Rule 7	A.C.R. 7

Although not explained in Rule 22, the Indiana Supreme Court has made clear that Articles of the Indiana Constitution should be in Arabic (and not Roman) numerals. For example, Article 7, Section 4—not Article VII. See Bonner v. Daniels, 907 N.E.2d 516, 518 n.2 (Ind. 2009).

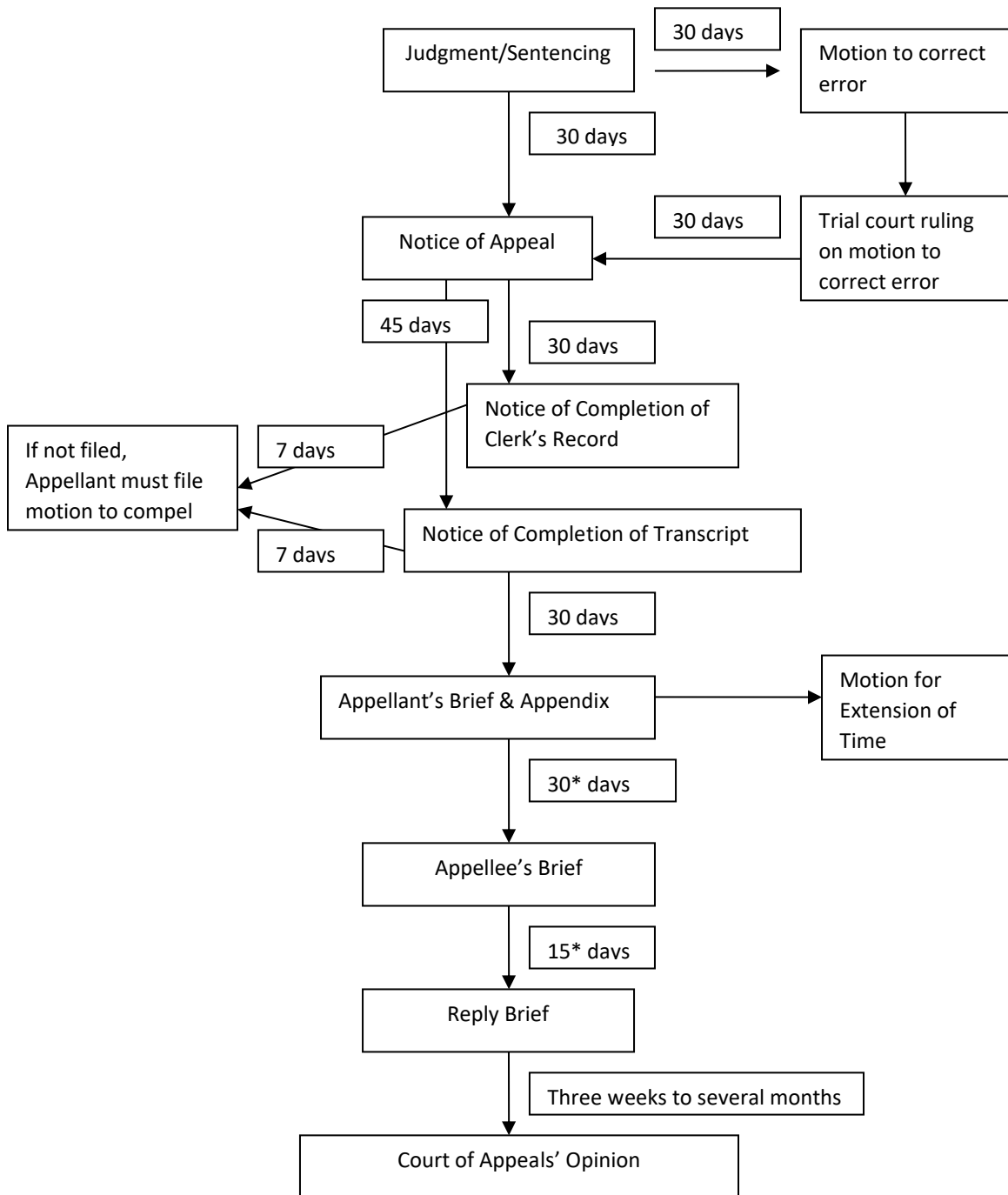
Abbreviations

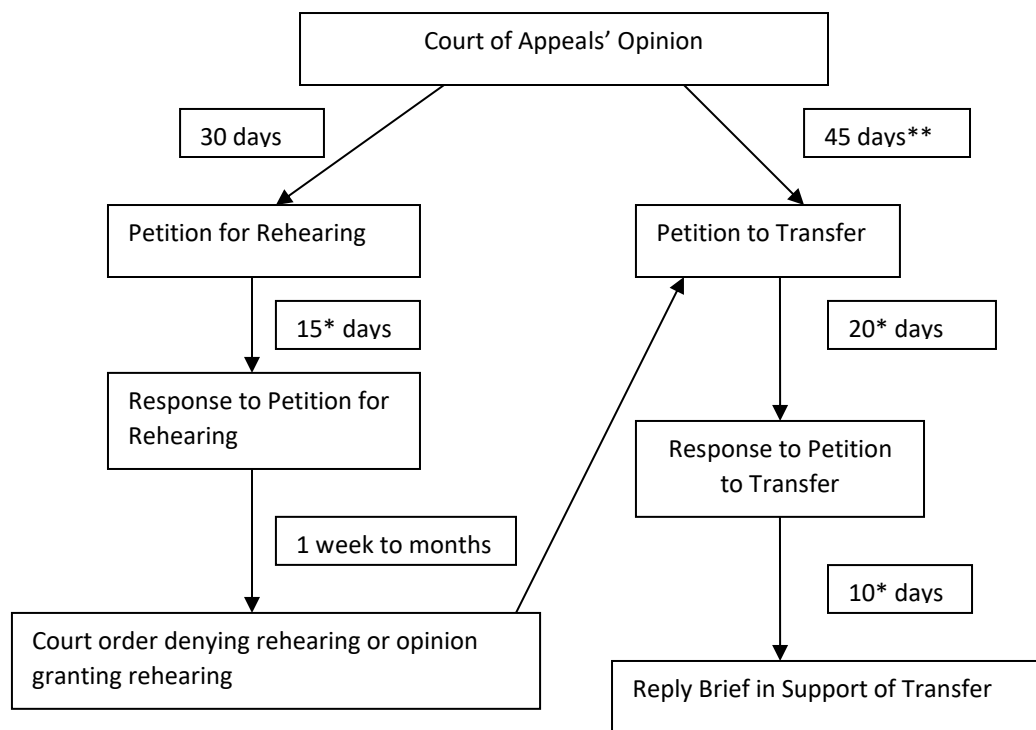
“The following abbreviations may be used without explanation in citations and references: Addend. (addendum to brief), App. (appendix), Br. (brief), CCS (chronological case summary), Ct. (court), Def. (defendant), Hr. (hearing), Mem. (memorandum), Pet. (petition), Pl. (plaintiff), Supp. (supplemental), Tr. (Transcript).” App. R. 22(E).

The Record on Appeal

Finally, Rule 22(C) reminds counsel that citations to the Appendix or Transcript are required for all factual statements in motions and briefs. The rule provides the following two examples: Appellant's App. Vol. II p.5; Tr. Vol. I, pp. 231-32. These can be long and cumbersome. Volume I is always the Table of Contents, which will not be cited. Thus, in cases with a short appendix or transcript (Volume II—and no subsequent volumes), counsel may wish to shorten the citations to “App. 5” and briefly note the shortened form in a footnote.

Direct Appeal Flowchart of Deadlines





*If a document is served by mail, these deadlines are extended by three days.

If either party sought rehearing, a petition to transfer must be filed no later than **30 days after the Court of Appeals disposed of the petition for rehearing. App. R. 57(C).