Section I
Initiating the Appeal
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Section I

Initiating the Appeal

This section discusses what must be done to initiate an appeal, beginning with the Notice of Appeal through the completion of the transcript. Counsel faces several important deadlines, as highlighted on the Direct Appeal Flowchart in the Introduction.

- The Notice of Appeal must be filed within thirty (30) days after sentencing. The Notice is a more detailed pleading and must be filed with the appellate clerk—not the trial court clerk.

- The trial court clerk must file the Notice of Completion of the Clerk's Record within thirty (30) days of the Notice of Appeal.

- The transcript is due to be completed by the court reporter within forty-five (45) days of the Notice of Appeal. When complete, the court reporter files the transcript with the trial court clerk, and within five (5) days the trial court clerk must file the Notice of Completion of Transcript.

- If the clerk or court reporter misses a deadline, appellate counsel must file a motion to compel within seven (7) days of the missed deadline.

Counsel cannot simply sit by and wait. Doing so can lead to the forfeiture of an appeal.

This section is divided into seven parts.

Part A discusses the jurisdiction of the Indiana Supreme Court and Court of Appeals. In short, almost every appeal will begin at the Indiana Court of Appeals, except in death penalty cases, some LWOP cases, and those rare instances in which a trial court declares a statute unconstitutional.

Part B explains indigency and in forma pauperis status on appeal. To avoid the defendant being charged filing fees and transcript costs, the trial court must make a finding of indigency. If the trial court refuses to make such a finding, the issue may be appealed.

Part C discusses the Notice of Appeal, which must be filed within thirty (30) days of sentencing or the denial of a motion to correct error to preserve the right to appeal. The notice must request the specific parts of the Transcript needed for the appeal. If additional portions are later needed, a supplemental notice must be filed. The notice must include fairly detailed information and be filed with the appellate clerk—not the trial court clerk.

Part D explains belated appeals, which may be pursued when a timely Notice of Appeal is not filed. Requests in direct criminal appeals must begin in the trial court and meet specific requirements. If denied, the issue may be appealed. Requests in other cases (probation violations, post-conviction relief, termination of parental rights, etc.) require extraordinary circumstances and a request in the appellate court.

Part E discusses the Clerk's Record and trial clerk's duties. The trial court clerk must file a notice that the Clerk's Record (trial court file) is assembled. If the notice is not filed within thirty (30) days of the Notice of Appeal, appellate counsel must file a motion to compel. The trial court clerk must also file a Notice of Completion of Transcript within five (5) days of the court reporter filing the

transcript with the trial court clerk. If the Notice of Completion of Transcript is not filed within 5 days of the court reporter filing the transcript with the trial court clerk, appellate counsel must file a motion to compel.

Part F turns to the transcript and court reporter's duties. The transcript must be completed within forty-five (45) days of the filing of the Notice of Appeal. If it is not, appellate counsel must file a motion to compel. If the Transcript does not include exhibits necessary for the appeal, counsel should promptly contact the court reporter or, if that fails, seek the timely intervention of the Court of Appeals.

Part G explains the procedures for correcting the Clerk's Record or Transcript. Appellate counsel cannot simply note that something is unavailable, missing, or incorrect. Rather, counsel has a duty to fill in the gaps or correct errors by filing appropriate motions in the trial court.

Finally, **Part H** introduces Indiana Rules on Access to Court Records, which has important implications on how cases are captioned and restrictions on certain types of information and documents throughout an appeal.

Effective January 1, 2012, the Appellant's Case Summary has been abolished. Much of the information previously included in the ACS is now included in the Notice of Appeal.

A. JURISDICTION: WHERE DOES THE APPEAL GO?

I. The Rules

Rule 4. Supreme Court Jurisdiction

A. Appellate Jurisdiction.

(1) *Mandatory Review.* The Supreme Court shall have mandatory and exclusive jurisdiction over the following cases:

(a) Criminal Appeals in which a sentence of death or life imprisonment without parole is imposed under Ind. Code § 35-50-2-9 and Criminal Appeals in post conviction relief cases in which the sentence was death.

(b) Appeals of Final Judgments declaring a state or federal statute unconstitutional in whole or in part.

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(2) *Discretionary Review.* The Supreme Court shall have discretionary jurisdiction over cases in which it grants Transfer under Rule 56 or 57 or Review under Rule 63.

(3) *Certain Interlocutory Appeals.* The Supreme Court shall have jurisdiction over interlocutory appeals authorized under Appellate Rule 14 in any case in which the State seeks the death penalty or in life without parole cases in which the interlocutory order raises a question of interpretation of IC 35-50-2-9.

Rule 5. Court of Appeals Jurisdiction

A. Appeals from Final Judgments. Except as provided in Rule 4, the Court of Appeals shall have jurisdiction in all appeals from Final Judgments of Circuit, Superior, Probate, and County Courts, notwithstanding any law, statute or rule providing for appeal directly to the Supreme Court of Indiana. See Rule 2(H).

B. Appeals from Interlocutory Orders. The Court of Appeals shall have jurisdiction over appeals of interlocutory orders under Rule 14.

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Rule 6. Appeal or Original Action in Wrong Court

If the Supreme Court or Court of Appeals determines that an appeal or original action pending before it is within the jurisdiction of the other Court, the Court before which the case is pending shall enter an order transferring the case to the Court with jurisdiction, where the case shall proceed as if it had been originally filed in the Court with jurisdiction.

II. Practical Considerations

A threshold question in any appeal is <u>where</u> the appeal is going: the Indiana Court of Appeals or the Indiana Supreme Court. Be sure to caption your documents with the correct court and choose the

correct court in the drop-down menu when E-filing. The answer 99% of the time is the Indiana Court of Appeals.

A. Indiana Court of Appeals

The Indiana Court of Appeals has general jurisdiction to hear appeals of all final judgments and interlocutory orders, except those in death penalty or life without parole cases. App. R. 5(A) & (B); Ind. Const. Art VII, § 6.

B. Indiana Supreme Court

The Indiana Supreme Court hears very few cases on direct appeal. These include death penalty cases, life without parole cases filed under the death penalty statute (Indiana Code section 35-50-2-9), and cases in which a trial court has declared a statute unconstitutional. Finally, the Indiana Supreme Court will sometimes grant emergency transfer under Rule 56(A), and an appeal will then go directly to it.

B. INDIGENCY/*IN FORMA PAUPERIS* STATUS ON APPEAL

I. The Rule

Rule 40. Motion to Proceed *In Forma Pauperis*

A. Appeal From a Trial Court.

(1) *Prior Authorization by the Trial Court.* A party who has been permitted to proceed in the trial court in *forma pauperis* may proceed on appeal *in forma pauperis* without further authorization from the trial court or Court on Appeal. See Rule 9(E).

(2) *Motion to the Trial Court.* Any other party in a trial court who desires to proceed on appeal in *forma pauperis* shall file in the trial court a motion for leave to so proceed, together with an affidavit conforming to Forms # App.R. 40-1 and #App.R. 40-2, showing in detail the party's inability to pay fees or costs or to give security therefor, the party's belief that the party is entitled to redress, and a statement of the issues the party intends to present on appeal. If the trial court grants the motion, the party may proceed without further motion to the Court on Appeal. If the trial court denies the motion, the trial court shall state in a written order the reasons for the denial.

(3) *Revocation of Authorization by the Trial Court.* Before or after the Notice of Appeal is filed, the trial court may certify or find that a party is no longer entitled to proceed *in forma pauperis*. The trial court shall state in a written order the reasons for such certification or finding.

(4) *Motion to the Court on Appeal.* If the trial court denies a party authorization to proceed in *forma pauperis* the party may file a motion in the Court on Appeal for leave to so proceed within fifteen (15) days of service of the trial court's order. See Form #App.R. 40-1. The motion shall be accompanied by a copy of any affidavit supporting the party's request filed in the trial court. If no affidavit was filed in the trial court or if the affidavit filed in the trial court is no longer accurate, the motion shall be accompanied by an affidavit conforming to Form # App.R. 40-1. The motion shall be accompanied by a copy of the order setting forth the trial court's reasons for denying the party *in forma pauperis* status on appeal.

* * * *

C. Filings Required in the Court on Appeal

With the first document a party proceeding or desiring to proceed in *forma pauperis* files in the Court on Appeal, the party shall file with the Clerk:

(1) the trial court's authorization to proceed in *forma pauperis* on appeal;

(2) an affidavit stating that the party was permitted to proceed in *forma pauperis* in the trial court and that the trial court has made no certification or finding under Rule 40(A)(3); or

(3) a motion to the Court on Appeal to proceed in *forma pauperis*.

If the trial court subsequently enters an order containing a certification or finding under Rule 40 (A)(3), the party shall promptly file the trial court's order with the Clerk.

D. Effect of In *Forma Pauperis* Status.

A party proceeding in *forma pauperis*:

(1) is relieved of the obligation to prepay filing fees or costs in either the trial court or the Court on Appeal or to give security therefor; and

(2) may file legibly handwritten or typewritten briefs and other papers.

II. Practical Considerations

Criminal Rule 11 requires trial courts to advise defendants of their right to appeal and appoint counsel for those unable to afford appellate counsel. Chapter 16 of the IPDC Pre-Trial Manual explains the right to counsel in various types of proceedings. It is important that trial courts make an indigency determination for purposes of appeal. The appellate clerk will expect a filing a fee of $250 for filing a Notice of Appeal or $125 for a Petition to Transfer if there is no indigency determination. The clerk will expect to be paid for photocopies of the Clerk's Record, and the court reporter will expect that arrangements be made to pay for the Transcript.

Problems occasionally arise regarding indigency. If a defendant was indigent for trial, this determination will almost always persist on appeal. Even defendants who hired private counsel for trial often become indigent for purposes of appeal if they are convicted and sent to serve a lengthy prison sentence.

A. Indigency Determination Must be in Writing

Unless a defendant is indigent, the appellate clerk must collect a filing fee of $250 when served with the Notice of Appeal. App. R. 9(E). Rule 9(F)(8) requires counsel attach to the Notice of Appeal "documents required by Rule 40(C), if proceeding in *forma pauperis.*"

B. You Must Ask the Trial Court First

If you find yourself involved in an appeal for an indigent defendant in which the trial court did not enter an order finding your client indigent, Rule 40(A)(2) and Form App.R. 40-1 explains the requirements to establish indigency in the trial court. "If the trial court grants the motion, the party may proceed without further motion to the Court on Appeal. If the trial court denies the motion, the trial court shall state in a written order the reasons for the denial." If the trial court simply denies the motion without a written order including "the reasons for the denial," you should consider filing a Motion to Reconsider, including a reminder about the requirements of Rule 40(A)(2). A Motion to Reconsider will not stay the requirement, explained below, that you file a motion in the court of appeals within fifteen (15) days of the trial court's denial.

C. If the Trial Court Denies Pauper Status, File a Motion in the Court of Appeals

If the trial court denies the motion for pauper status and enters an order including reasons for the denial, the next step is to file a motion for pauper status in the Indiana Court of Appeals. The motion must be filed within fifteen (15) days of the trial court's denial of your motion. Two attachments must be included: (1) "a copy of any affidavit supporting the party's request filed in the trial court" (or a new affidavit if one was not filed or the information has since changed) and (2) "a copy of the order setting forth the trial court's reasons for denying the party in *forma pauperis* status on appeal."

D. Revocation of Indigency Status

Rule 40(A)(3) allows trial courts to revoke an indigency determination either before or after a Notice of Appeal is filed. This must be done by written order with reasons for the denial. When confronted with such a revocation, counsel may consider filing a motion for in *forma pauperis* status anew under Rule 40(A)(2). If it is denied, counsel could then proceed with an appeal as explained in part C, above.

E. Effect of Indigency Status

A determination that your client is indigent for a direct appeal will absolve you of the requirement of paying the filing fees in the Indiana Court of Appeals ($250) or Indiana Supreme Court ($125 for filing a petition to transfer). Litigants in civil cases, however, are not entitled to a free transcript under existing Court of Appeals' authority. See Campbell v. Criterion Group, 605 N.E.2d 150, 161 (Ind. 1992) (requiring counsel to instead re-create the record).

If your client is found indigent, you may also be absolved of trial court expenses such as copying of the Clerk's Record. With E-filing you should be able to secure the Clerk's record without the need for paper (although some trial court clerk offices still print the Clerk's record.) You may also be absolved from paying for the Transcript. But be aware that Transcript costs and who is responsible for payment to the court reporter may vary depending upon whether the county has a public defender office where transcript costs are reimbursed under Indiana Public Defender commission standards.

Counsel must, however, prepare motions and briefs in typewritten form. The provision for legibly handwritten filings in Rule 40(D)(2) applies only to *pro se* litigants.

C. NOTICE OF APPEAL

I. The Rule

Rule 9. Initiation of the Appeal

A. Filing the Notice of Appeal.

(1) *Appeals from Final Judgments.* A party initiates an appeal by filing a Notice of Appeal with the Clerk (as defined in Rule 2(D)) within thirty (30) days after the entry of a Final Judgment is noted in the Chronological Case Summary. However, if any party files a timely motion to correct error, a Notice of Appeal must be filed within thirty (30) days after the court's ruling on such motion is noted in the Chronological Case Summary or thirty (30) days after the motion is deemed denied under Trial Rule 53.3, whichever occurs first.

(2) *Interlocutory Appeals.* The initiation of interlocutory appeals is covered in Rule 14.

* * * *

(4) *Abolition of Praecipe.* The praecipe for preparation of the Record is abolished.

(5) *Forfeiture of Appeal.* Unless the Notice of Appeal is timely filed, the right to appeal shall be forfeited except as provided by P.C.R. 2.

* * * *

E. Payment of Filing Fee. The appellant shall pay to the Clerk the filing fee of $250. No filing fee is required in an appeal prosecuted in *forma pauperis* or on behalf of a governmental unit. The filing fee shall be paid to the Clerk when the Notice of Appeal is filed. The Clerk shall not file any motion or other documents in the proceedings until the filing fee has been paid. A party may proceed on appeal in *forma pauperis* pursuant to Rule 40.

F. Content of Notice of Appeal. The Notice of Appeal shall include the following:

(1) *Party Information*.

(a) Name and address of the parties initiating the appeal, and if a party is not represented by counsel, the party's FAX number, telephone number, and electronic mail address, if any;

(b) Name, address, attorney number, FAX number (if any), telephone number and electronic mail address of each attorney representing the parties initiating the appeal;

(c) Certification that the contact information listed on the Indiana Supreme Court Roll of Attorneys for each attorney is accurate as of the date the Notice of Appeal is filed (Attorneys can review and update their Roll of Attorneys contact information on the Indiana Courts Portal);

(d) Acknowledgement that all orders, opinions, and notices in the matter will be sent to the email address(es) specified by the attorney on the Roll of Attorneys regardless of the contact information listed on the Notice of Appeal; and

(e) Acknowledgment that each attorney listed on the Notice of Appeal is solely responsible for keeping his/her Roll of Attorneys contact information accurate per Ind. Admis. Disc. R. 2(A).

(2) *Trial Information*.

(a) Title of case;

(b) Names of all parties;

(c) Trial court or Administrative Agency;

(d) Case number;

(e) Name of trial judge;

(3) *Designation of Appealed Order or Judgment.*

(a) The date and title of the judgment or order appealed;

(b) The date on which any Motion to Correct Error was denied or deemed denied, if applicable;

(c) The basis for appellate jurisdiction, delineating whether the appeal is from a Final Judgment, as defined by Rule 2(H); an interlocutory order appealed as of right pursuant to Rule 14(A), or (D); an interlocutory order accepted for discretionary appeal pursuant to Rule 14(B) or 14(C); or an expedited appeal pursuant to Rule 14.1; and

(d) A designation of the court to which the appeal is taken.

(4) *Direction for Assembly of Clerk's Record.* Directions to the trial court clerk to assemble the Clerk's Record.

(5) *Request for Transcript.* A designation of all portions of the Transcript necessary to present fairly and decide the issues on appeal. If the appellant intends to urge on appeal that a finding of fact or conclusion thereon is unsupported by the evidence or is contrary to the evidence, the Notice of Appeal shall request a Transcript of all the evidence. In Criminal Appeals, the Notice of Appeal must request the Transcript of the entire trial or evidentiary hearing, unless the party intends to limit the appeal to an issue requiring no Transcript.

(6) *Public Access Information*. A statement whether all or any portion of the court records were sealed or excluded from Public Access r.

(7) *Appellate Alternative Dispute Resolution Information*. In all civil cases, an indication whether Appellant is willing to participate in appellate alternative dispute resolution and, if so, provide a brief statement of the facts of the case.

(8) *Attachments*.

(a) A copy of the judgment or order being appealed (including findings and conclusions in civil cases and the sentencing order in criminal cases);

(b) A copy of the order denying the Motion to Correct Error or, if deemed denied, a copy of the Motion to Correct Error, if applicable;

(c) A copy of all orders and entries relating to the trial court or agency's decision to seal or exclude information from public access, if applicable;

(d) A copy of the order from the Court of Appeals accepting jurisdiction over the interlocutory appeal, if proceeding pursuant to Rule 14(B)(3);

(e) The documents required by Rule 40(C), if proceeding *in forma pauperis.*

(9) *Certification*. A certification, signed by the attorney or pro se party, certifying the following:

(a) That the case does or does not involve issues of child custody, support, visitation, adoption, paternity, determination that a child is in need of services, termination of parental rights, and all other appeals entitled to priority by rule or statute;

(b) That the attorney or pro se party has reviewed and complied, and will continue to comply, with the requirements of Rule 9(J) and the Rules on Access to Court Records, to the extent they apply to the appeal; and

(c) That the attorney or pro se party will make satisfactory payment arrangements for any transcripts ordered in the Notice of Appeal, as required by Rule 9(H).

(10) *Certificate of Filing and Service.* The Certificate of Service required by Rule 24. This Certificate shall also certify the date on which the Notice of Appeal was filed with the Clerk. (See Form # App.R. 9-1)

G. Supplemental Request for Transcript. Any party to the appeal may file with the trial court clerk or the Administrative Agency, without leave of court, a request with the court reporter or the Administrative Agency for additional portions of the Transcript.

H. Payment for Transcript. The Court Reporter may require from the appellant a fifty percent (50%) deposit based on the estimated cost of the Transcript, except no deposit may be charged for state or county paid Transcript. Within ten (10) days after the filing of a Notice of Appeal a party must enter into an agreement with the Court Reporter for payment of the balance of the cost of the Transcript. Unless a court order requires otherwise, each party shall be responsible to pay for all transcription costs associated with the Transcript that party requests.

* * * *

J. All Court Records Excluded from Public Access. In cases where all Court Records are excluded from Public Access pursuant to Rule 5(A) of the Access to Court Records Rules, the Clerk shall make the appellate Chronological Case Summary for the case publicly accessible but shall identify the names of parties and affected persons in a manner reasonably calculated to provide anonymity and privacy.

II. Practical Considerations

A. No More Praecipe

Before the new Appellate Rules were adopted in 2001, counsel filed a Praecipe to request the relevant parts of the appellate record and get the appellate process rolling. Rule 9(A)(4) makes clear that the Praecipe is "abolished." Counsel should now instead file a Notice of Appeal, as explained below.

B. Notice of Appeal is filed with the Clerk of the Indiana Supreme Court, Court of Appeals and Tax Court

Prior to 2012, the Notice of Appeal was filed in the trial court. However, under Appellate Rule 9(A)(1), the Notice of Appeal is now filed with the Clerk of the Indiana Supreme Court, Court of Appeals and Tax Court.

C. The Deadline: 30 Days for Direct Appeals—15 for Interlocutory Appeals

The Notice of Appeal must be filed with the Clerk "within thirty (30) days after the entry of a Final Judgment." The failure to file a timely Notice of Appeal results in the forfeiture of the right to appeal except as provided by Post-Conviction Rule 2. In re Adoption of O.R., 16 N.E.3d 965 (Ind. 2014); App. R. 9(A)(5).

If pursuing an Interlocutory appeal, the Notice of Appeal must be filed within fifteen days of the Court of Appeals' order authorizing the Interlocutory Appeal. App. R. 14(B)(3).

1. File with the Appellate Clerk

The rules changed significantly effective January 1, 2012. Previously, the Notice of Appeal had to be filed with the trial court clerk. Now it must be filed with the Appellate Clerk and served on many parties, as explained below. The methods of proper service of documents in the trial court are explained in Trial Rule 5, although the court of appeals has held "for purposes of determining the timeliness of a filing required by the Appellate Rules, the filing provisions of those rules trump those of the Trial Rules." Marlett v. State, 878 N.E.2d 860, 864 (Ind. Ct. App. 2007).

2. Sentencing is Final Judgment

In most criminal cases, final judgment occurs at sentencing, which "disposes of all claims as to all parties." If, however, counsel files a Motion to Correct Error, the deadline for filing a Notice of Appeal is extended as explained below.

3. Motion to Correct Error Extends Time

Counsel may file a Motion to Correct Error pursuant to Trial Rule 59 within thirty (30) days of the entry of final judgment. A Motion to Correct Error is not, however, a prerequisite for an appeal, except when a party seeks to address newly discovered evidence capable of production within thirty (30) days of final judgment. Ind. Trial Rule 59(A).

If a Motion to Correct Error is filed, the time for filing the Notice of Appeal is tolled until the Motion to Correct is ruled upon or deemed denied pursuant to Trial Rule 53.3. A Motion to Correct Error is generally deemed denied under Trial Rule 53.3 if the trial court fails to set it for a hearing for forty-five (45) days or fails to rule upon it for thirty (30) days after it was heard. Ind. Trial Rule 53.3. A motion for

the trial court to reconsider its ruling on a Motion to Correct Error does not toll the thirty-day deadline for filing a Notice of Appeal. See Fancher v. State, 436 N.E.2d 311, 312 (Ind. 1982) ("A motion to reconsider or to rehear a motion to correct errors does not extend the time for taking an appeal. . . . Once a timely Motion to Correct Errors has been denied, the time for perfecting an appeal begins to run.").

4. If the Deadline is Blown, See Rule PC-2 or Adoption of O.R. procedure

If the Notice of Appeal is not timely filed as explained above, counsel must pursue a belated appeal under Post-Conviction Rule 2 (criminal direct appeals) or the procedure outlined in Adoption of O.R. in other appeals, as explained in Section I.D. of this manual.

D. Serve the Parties Listed in Rule 24(A)

A Notice of Appeal must be served on several different parties, as listed in Rule 24(A). These include all parties of record in the trial court and the Attorney General in all Criminal Appeals.

In civil appeals involving termination of parental rights or children in need of services (CHINS), you must serve the parties in the trial court as well as the Attorney General, who represents DCS. If a guardian ad litem was part of the case, they must be served.

Appellate Rule 26(D) requires the Appellate Clerk transmit the Notice of Appeal to the trial court clerk, court reporter and trial court.

Rule 26. Electronic Transmission By Clerk . . . D. Transmission of Notice of Appeal to Trial Court or Administrative Agency. The Clerk shall electronically transmit the Notice of Appeal to: (1) the Court Reporters in the trial court county or Administrative Agency; (2) the clerk of the trial court or Administrative Agency; and (3) the judge of the trial court before whom the case was heard.

E. Content of Notice of Appeal

A Notice of Appeal must include several specific pieces of information. Counsel should consider using Sample Form 9-1 located online under FORMS at the end of the Rules of Appellate Procedure to ensure that everything is included. The primary components: (1) party information (2) trial information, (3) designation of the appealed order or judgment, (4) directions for the assembly of the Clerk's Record, (5) and request for transcript. Some other certifications and attachments are required and explained below.

1. Party Information

As explained in Rule 9(F)(1), the Notice of Appeal must include specific contact information for both the party and counsel. As to the party information, use initials instead of names (both here and in the caption) if the case implicates the restrictions of Indiana Rules on Access to Court Records, Rule 5, e.g., juvenile, civil commitment, and CHINS/TPR cases. Inclusion of the counsel information obviates the need to file a separate appearance.

2. Trial Information

Rule 9(F)(2) requires inclusion of specific information about the proceedings in the trial court, including the name of the case, names of all parties, name of the trial court, trial court cause number, and name of the trial judge.

3. Designation of Appealed Order

Under Rule 9(F)(3), the notice must also include the date and title of the judgment or order appeals, the basis for appellate jurisdiction, and designation of the court to which the appeal is being taken. In most criminal cases, the sentencing date will govern, and the judgment may be the guilty verdicts and/or the sentencing. Unless the case is an interlocutory appeal, the basis for appellate jurisdiction will be a final order (sentencing). Finally, nearly all appeals are taken to the Indiana Court of Appeals, except as explained in section I.A.

4. Clerk's Record

The part of the Notice of Appeal regarding the Clerk's Record must simply include "[d]irections to the trial court clerk to assemble the Clerk's Record." App. R. 9(F)(4). The Clerk's Record consists of all filings in the trial court and the CCS. App. R. 2(E). Simply put, if the trial court's file is properly maintained, filing a Notice of Appeal does not require the Clerk to do anything except file a Notice of Completion. App. R. 10(C).

As explained in part E below, most of these documents will be available electronically. The best practice is to call or email the trial court clerk and ask them what their practice is in providing the clerk's portion. Some of the clerks may give you access to all the trial court filings through MyCase while others might still be using U.S. mail.

5. Transcript

The Notice of Appeal must designate "all portions of the Transcript necessary to present fairly and decide the issues on appeal. . . . In Criminal Appeals, the Notice of Appeal must request the Transcript of the entire trial or evidentiary hearing, unless the party intends to limit the appeal to an issue requiring no Transcript." App. R. 9(F)(5). All evidence must be included if a sufficiency challenge is raised.

a. Appeals after Trial

At a minimum, the Transcript for a direct appeal after a trial should include all testimony and evidence at trial and sentencing. At one time, some appellate public defenders were requesting only trial testimony and closing argument—but not opening statements and voir dire. The better practice is to request the entire trial and all pretrial hearings. "Appellate counsel had a duty to thoroughly review the entire record of Wilson's proceedings, including the transcripts from Wilson's pre-trial hearings." Wilson v. State, 94 N.E.3d 312, 321 (Ind. Ct. App. 2018), trans. denied. In Wilson, appellate counsel was found ineffective for failing to challenge the waiver of counsel on appeal. The Court of Appeals emphasized that the record on appeal includes "all proceedings before the trial court." Ind. Appellate Rule 2(L). Moreover, neither counsel nor the defendant are "required to inform appellate counsel of the possible issue of Wilson's waiver of his right to counsel because it was preserved in the record of the pre-trial hearings."

If appellate counsel plans to limit the request in the Notice of Appeal, it is imperative to review the CCS and talk with trial counsel to be sure to include pre-trial hearings addressing a motion to dismiss or a motion to suppress. Having all the hearings is especially important if you are likely to raise a speedy trial challenge under Criminal Rule 4, for example. The events of each hearing are important in deciding whether the defendant or State should be charged with period of delay.

b. Sentencing Appeals

In sentencing appeals, the Notice of Appeal should request both the sentencing hearing and guilty plea hearing. A claim that a sentence is inappropriate under Rule 7(B) requires consideration of the "nature of the offense," which was likely explained in at least some detail at the guilty plea hearing.

c. Consequences of Inadequate Transcript

The failure to include a complete Transcript may result in the waiver of a claim. For example, in Lightcap v. State, 863 N.E.2d 907 (Ind. Ct. App. 2007), the court found a claim that there was insufficient evidence to support the revocation of probation waived. Although the defendant was acquitted at the trial on new charges, the trial court revoked his probation after finding he "had unsupervised contact with a child in violation of the terms of his probation." Id. at 911. Because the defendant failed to include the evidence from the trial, the Court of Appeals concluded it had "no means to review the evidence upon which the trial court relied." Id.

6. Attachments and Certifications

As detailed in 9(F)(8), appointed counsel in a criminal appeal must attach to the Notice of Appeal, at a minimum: a copy of the appealed order and documentation of *in forma pauperis* status. Counsel must also sign a certification regarding whether the case involves children, which requires expedited status under Rule 21 and compliance with Administrative Rule 9 as explained at the end of this section.

Counsel must also certify the contact information listed on the Indiana Supreme Court Roll of attorneys is current and accurate as of the date the Notice of Appeal is filed and acknowledge that all orders, opinions and notices in the matter will be sent to the email address(es) specified by the attorney on the Roll of Attorneys regardless of the contact information listed on Notice of Appeal and acknowledge that the attorney listed on the Notices of Appeal is solely responsible for keeping his/her Roll of Attorneys contact information accurate per Ind. Admis. Disc. R. 2(A)

F. Supplemental Notice of Appeal

Ideally, the Notice of Appeal will request everything that is needed for the appeal. However, sometimes it turns out the notice was underinclusive and other hearings or parts of the trial must be transcribed. In such cases, counsel should file a Supplemental Notice of Appeal. (Do **not** file an **Amended** Notice of Appeal, which might be seen to start the 45-day court reporter's clock anew.)

It is important to read the transcript as soon as it is available to be sure it is complete. If appellate counsel learns that additional hearings are needed, it is best to contact the court reporter immediately. If you are early in the process of drafting your brief, an informal request for a hearing might be accommodated without filing any motions or requests. Rather, the court reporter could prepare the additional transcript and file it with the clerk, who would then file a Notice of Completion of Amended Transcript.

If the court reporter cannot prepare an additional transcript in a reasonably short period of time, it may be necessary to file a motion. Counsel should first ask the court reporter for an estimate of how long the supplemental transcript will take to complete. As explained in Section III.B, the Court of Appeals looks on motions for a lengthy extension of time with disfavor. Therefore, counsel should file a Motion for Additional Transcripts under Appellate Rule 9(G). The Motion for Additional Transcript must be filed in the trial court and should be filed as early as possible after counsel learns that additional portions of the Transcript are needed. It should request the hearing(s) or part(s) of trial needed with specificity. It

should include a date by which the additional hearings are requested. If the supplemental transcript cannot be completed in time to allow for the preparation of the Appellant's Brief, counsel should file a motion with the Court of Appeals. This should not be titled a Motion for Extension of Time but rather something like, "Motion to Set Deadline for Supplemental Transcript and Briefing" or "Motion for New Briefing Schedule," And counsel should attach a copy of the Motion for Additional Transcript that was filed in the trial court.

D. BELATED APPEALS

I. The Rule

Rule PC 2. Belated Appeals

Eligible defendant defined. An "eligible defendant" for purposes of this Rule is a defendant who, but for the defendant's failure to do so timely, would have the right to challenge on direct appeal a conviction or sentence after a trial or plea of guilty by filing a notice of appeal, filing a motion to correct error, or pursuing an appeal.

Appellate court jurisdiction. Jurisdiction of an appeal under this Rule is determined pursuant to Rules 4 and 5 of the Indiana Rules of Appellate Procedure by reference to the sentence imposed as a result of the challenged conviction or sentence.

Section 1. Belated Notice of Appeal

(a) *Required Showings*. An eligible defendant convicted after a trial or plea of guilty may petition the trial court for permission to file a belated notice of appeal of the conviction or sentence if;

(1) the defendant failed to file a timely notice of appeal;

(2) the failure to file a timely notice of appeal was not due to the fault of the defendant; and

(3) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

(b) *Form of petition*. There is no prescribed form of petition for permission to file a belated notice of appeal. The petitioner's proposed notice of appeal may be filed as an Exhibit to the petition.

(c) *Factors in granting or denying permission*. If the trial court finds that the requirements of Section 1(a) are met, it shall permit the defendant to file the belated notice of appeal. Otherwise, it shall deny permission.

(d) *Hearing*. If a hearing is held on a petition for permission to file a belated notice of appeal, it shall be conducted according to Ind. Post-Conviction Rule 1(5).

(e) *Appealability*. An order granting or denying permission to file a belated notice of appeal is a Final Judgment for purposes of Ind. Appellate Rule 5.

(f) *Time for initiating appeal*.

(1) If the petition includes a proposed notice of appeal as an Exhibit, an order granting the petition shall also constitute the filing of that notice of appeal in compliance with the time requirements of App. R. 9(A).

Section 2. Belated Motion to Correct Error.

(a) *Required Showings.* An eligible defendant convicted after a trial or plea of guilty may petition the court of conviction for permission to file a belated motion to correct error addressing the conviction or sentence, if:

(1) no timely and adequate motion to correct error was filed for the defendant;

(2) the failure to file a timely motion to correct error was not due to the fault of the defendant; and

(3) the defendant has been diligent in requesting permission to file a belated motion error under this rule.

(b) *Merits of motion.* The trial court shall not consider the merits of the motion until it has determined whether the requirements of Section 2(a) are met.

(c) *Hearing.* Any hearing on whether the petition should be granted shall be conducted according to P-C. R. 1(5).

(d) *Factors in granting or denying permission.* If the trial court finds that the requirements of section 2(a) are met, it shall permit the defendant to file the motion, and the motion shall then be treated for all purposes as a motion to correct error filed within the prescribed period.

(e) *Appealability of Denial of Permission.* If the trial court finds that the requirements of Section 2(a) are not met, it shall deny defendant permission to file the motion. Denial of permission shall be a Final Judgment for purposes of App. R. 5.

(f) *Time for initiating appeal.* The time for filing a notice of appeal from denial of permission is governed by App. R. 9(A).

Section 3. Belated Perfection of Appeal.

An eligible defendant convicted after a trial or plea of guilty may petition the appellate tribunal for permission to pursue a belated appeal of the conviction or sentence if:

(a) the defendant filed a timely notice of appeal;

(b) no appeal was perfected for the defendant or the appeal was dismissed for failing to take a necessary step to pursue the appeal;

(c) the failure to perfect the appeal or take the necessary step was not due to the fault of the defendant; and

(d) the defendant has been diligent in requesting permission to pursue a belated appeal.

II. Practical Considerations

As explained in Part C, the Notice of Appeal must be filed within thirty (30) days of sentencing or the denial of a motion to correct error. If this notice is late—by even one day—it is essential that counsel pursue a belated appeal.

This section is largely focused on the typical scenario—a belated direct appeal of a conviction or sentencing. Part E discusses belated appeals in other types of cases: post-conviction, TPR, CHINS, and civil commitment.

Rule PC-2 is most commonly invoked for motions to file a belated notice of appeal, which is the focus below. Belated motions to correct error are seldom pursued. A belated motion to correct error is appropriate only when counsel has new evidence it wants to get before the trial court—and good reason why that evidence was not submitted within thirty (30) days of sentencing and the appeal was not otherwise timely begun.

Finally, section 3 of the rule explains a different scenario: the failure to perfect an appeal after the timely filing of a notice of appeal. In such circumstances, the defendant should not petition the trial court but rather should petition the appellate court for permission to pursue a belated appeal, explaining why the failure to perfect the appeal was not due to the defendant's fault and that the defendant has been diligent in requesting permission to pursue a belated appeal.

A. What May be Appealed Belatedly?

Criminal defendants pursuing a direct appeal of a conviction or sentence may seek to pursue a belated appeal. Ind. Rule PC-2, § 1(a) ("An eligible defendant convicted after a trial or plea of guilty may petition the trial court for permission to file a belated notice of appeal of the conviction or sentence."). This includes appeals of a sentence after a guilty plea that affords any discretion to the trial court, see generally Childress v. State, 848 N.E.2d 1073 (Ind. 2006), and appeals of convictions after a trial. The procedure may not be invoked when a deadline is missed in appealing a violation of probation, petition for post-conviction relief, or civil matters such as CHINS, TPR, and civil commitment proceedings. See generally Greer v. State, 685 N.E.2d 700, 702 (Ind. 1997); Dawson v. State, 943 N.E.2d 1281 (Ind. 2011). Section E outlines the procedure to follow for non-criminal direct appeals.

B. Which Public Defender is Responsible?

Kling v. State, 837 N.E.2d 502 (Ind. 2005), discusses the role of county appellate public defenders and the State Public Defender in pursuing belated sentencing appeals imposed following a guilty plea. Generally, the State Public Defender represents defendants in only post-conviction proceedings, whereas county defenders are responsible for providing representation in direct appeals. The Indiana Supreme Court held in Kling that deputy state public defenders must consult with clients who have filed a PCR without first appealing their sentence. "[T]his process should involve some assessment of the relative chances for success in each proceeding, including some consideration [of] whether the client would be able to meet the burden of proving [a] lack of fault and diligence under P-C.R. 2." Id. at 507. If a defendant wishes to pursue a P-C.R. 2 belated appeal, the State Public Defender must represent the defendant in the filing of the petition, any hearing on the petition, and any appeal if the petition is denied. Id.

In all other instances in which a PCR has not been filed, the county public defender is responsible for pursuing a belated appeal for an indigent defendant.

C. Start with Motion in Trial Court

A belated appeal or belated motion to correct error must begin with the filing of a petition in the trial court. "There is no prescribed form" for either petition, as the rule explains.

1. Required Showing

Either motion must allege: (1) no timely or adequate motion or notice was filed for the defendant; (2) the failure to file a timely motion or notice was not due to the fault of the defendant; and (3) the defendant has been diligent in requesting permission to file a belated motion under this rule. The defendant must prove these requirements by a preponderance of the evidence. Beatty v. State, 854 N.E.2d 406, 409 (Ind. Ct. App. 2006).

In addition to the requirements of the rule, case law mentions other factors for courts to consider in deciding whether to allow a belated appeal: "the defendant's level of awareness of his procedural remedy, age, education, and familiarity with the legal system, as well as whether he was informed of his appellate rights and whether he committed an act or omission that contributed to the delay . . . ." Jackson v. State, 853 N.E.2d 138, 140 (Ind. Ct. App. 2006).

2. Attachments

Many defendants will include an affidavit in support of these allegations. If transcripts of the guilty plea or sentencing hearing are available, they will often be helpful in supporting an allegation that the defendant was not advised of the right to appeal. See generally Baysinger v. State, 835 N.E.2d 223 (Ind. Ct. App. 2005), trans. denied.

A notice of appeal should **not** be included with the motion to file belated appeal. If the motion is granted by the trial court, a Belated Notice of Appeal must be filed with the Appellate Clerk within thirty days.

3. Hearing

The trial court may hold a hearing, but one is not required. As explained in part D, appellate review is de novo if a hearing is not held. Appellate counsel should consider requesting a hearing in order to obtain the more favorable standard of review. See, e.g., Pryor v. State, 949 N.E.2d 366 (Ind. Ct. App. 2011).

D. Motion in Court of Appeals

If a motion for belated appeal or belated motion to correct error is denied by the trial court, the denial may be appealed to the Indiana Court of Appeals.

1. Deadline for Appeal

If either request is denied, a Notice of Appeal must be filed within thirty (30) days as required for any appeal under Rule 9(A).

2. Required Showing and Standard of Review

The same factors outlined in the rule and case law cited above apply in appellate review of the denial of a request to file a belated notice of appeal.

If a hearing was held in the trial court, the appellate court will review the trial court's ruling for an abuse of discretion. Williams v. State, 873 N.E.2d 144, 146 (Ind. Ct. App. 2007). If no hearing was held, the standard of review is de novo. Id. If the appellate court cannot "make the necessary factual

determinations" on the available record, the case may be remanded to the trial court to conduct a hearing. Jackson v. State, 853 N.E.2d 138, 141 (Ind. Ct. App. 2006).

As a final point, if the appellate court upholds the denial because of an insufficient record, a defendant may go back to the trial court and create a new record. Townsend v. State, 855 N.E.2d 1011 (Ind. 2006) (order denying transfer).

E. Belated Appeals in non-Criminal Direct Appeals

The foregoing advice was limited to the typical appeal of a conviction or sentence on direct appeal. If the thirty-day deadline is blown in any other type of case (VOP, post-conviction, juvenile, CHINS, TPR, civil commitment), a different procedure applies. Following the wrong procedure will likely lead to dismissal of an appeal. See, e.g., Core v. State, 122 N.E.3d 974, 975 (Ind. Ct. App. 2019) (dismissing post-conviction appeal pursued under PC-2).

1. Request in the Appellate Court

Unlike the procedure outlined above for direct appeals, a request to pursue a belated appeal in other types of appeals must be initiated in the Court of Appeals. This is typically done by filing a Motion for Leave to File Belated Appeal and attaching the Notice of Appeal.

2. **Required Showing**

Under In re Adoption of O.R., 16 N.E.3d 965 (Ind. 2014), an appellant who seeks to pursue a belated appeal must show an "extraordinarily compelling reason." A common reason for belated appeals is that counsel did not receive timely notice of the appointment. In a more recent case challenging a child support modification order "in clear violation of the Child Support Guidelines," the court found an "obvious injustice is an extraordinarily compelling reason" to restore an otherwise forfeited right to appeal. Cannon v. Caldwell, 74 N.E.3d 255, 259 (Ind. Ct. App. 2017). Thus, in some cases counsel may wish to argue that the belated appeal should be allowed because the ruling or judgment at issue is erroneous or unjust.

E. CLERK'S RECORD AND CLERK'S DUTIES

I. The Rules

Rule 10. Duties of Trial Court Clerk or Administrative Agency

A. Notice to Court Reporter of Transcript Request. If a Transcript is requested, the trial court clerk or the Administrative Agency shall give immediate notice of the filing of the Notice of Appeal and the requested Transcript to the court reporter.

B. Assembly of Clerk's Record. Within thirty (30) days of the filing of the Notice of Appeal, the trial court clerk or Administrative Agency shall assemble the Clerk's Record. The trial court clerk or Administrative Agency is not obligated to index or marginally annotate the Clerk's Record.

C. Notice of Completion of Clerk's Record. On or before the deadline for assembly of the Clerk's Record, the trial court clerk or Administrative Agency shall issue and file a Notice of Completion of Clerk's Record with the Clerk and shall serve a copy on the parties to the appeal in accordance with Rule 24 to advise them that the Clerk's Record has been assembled and is complete. The Notice of Completion of Clerk's Record shall include a certified copy of the Chronological Case Summary and shall state whether the Transcript is (a) completed, (b) not completed, or (c) not requested. (See Form # App.R. 10-1). Copies of the Notice of Completion of Clerk's Record served on the parties shall include a copy of the Chronological Case Summary included with the original, but the copies served on the parties need not be individually certified.

D. Notice of Completion of Transcript. If the Transcript has been requested but has not been filed when the trial court clerk or Administrative Agency issues its Notice of Completion of the Clerk's Record, the trial court clerk or Administrative Agency shall issue and file a Notice of Completion of Transcript with the Clerk and shall serve a copy on the parties to the appeal in accordance with Rule 24 within five (5) days after the court reporter files the Transcript. (See Form # App.R. 10-2)

F. Failure to File Notice of Completion of Clerk's Record. If the trial court clerk or Administrative Agency fails to issue, file, and serve a timely Notice of Completion of Clerk's Record, the appellant shall seek an order from the Court on Appeal compelling the trial court clerk or Administrative Agency to complete the Clerk's Record and issue, file, and serve its Notice of Completion. Failure of appellant to seek such an order not later than seven (7) days after the Notice of Completion of Clerk's Record was due to have been issued, filed, and served shall subject the appeal to dismissal.

G. Failure to File Notice of Completion of Transcript. If the trial court clerk or Administrative Agency fails to issue, file, and serve a timely Notice of Completion of Transcript required by Rule 10(D), the appellant shall seek an order from the Court on Appeal compelling the trial court clerk or Administrative Agency to issue, file and serve the Notice of Completion of Transcript. Failure of appellant to seek such an order not later than seven (7) days after the Notice of Completion of Transcript was due to have been issued, filed, and served shall subject the appeal to dismissal.

Rule 12. Transmittal of the Record

A. Clerk's Record. Unless the Court on Appeal orders otherwise, the trial court clerk shall retain the Clerk's Record throughout the appeal. A party may request that the trial court clerk copy the Clerk's Record, or a portion thereof, and the clerk shall provide the copies within seven (7) days, subject to the payment of any usual and customary copying charges.

[See remaining portions of the Rule below under Transcript and Court Reporter's Duties.]

II. Practical Considerations

As explained in Part C, the trial court clerk must simply file a Notice that the Clerk's Record (court file) has been assembled. The Appendix filed with the appellant's brief, however, must include copies of documents from the Clerk's Record. App. R. 50(B). See Section IV.A.

The trial court clerk is unlikely to copy the file, unless counsel specifically makes contact and asks. With most documents available electronically, appellate counsel should secure the relevant parts of the Clerk's Record from MyCase. In situations where documents are not available electronically, Rule 12(A) requires the clerk to provide copies if requested. If the defendant is indigent and appellate counsel does not have access to the trial filings through trial counsel, contact the clerk, explain your appointment and your client's indigency, and specifically ask for a copy of the court's file (or the specific documents you need to prepare the Appendix). In addition, be sure to secure a copy of the CCS, which must be included at the beginning of the Appendix.

A. Deadline for Filing Notices of Completion

The Notice of Completion of the Clerk's Record must be filed by the trial court clerk within thirty (30) days of the filing of the Notice of Appeal. In addition, if the Transcript is not completed at the time of this filing, the trial court clerk must file a Notice of Completion of the Transcript within five (5) days after the court reporter files the Transcript. App. R. 10(D).

B. Duty to Compel

If the trial court clerk fails to file a Notice of Completion of the Clerk's Record within thirty (30) days of the filing of the Notice of Appeal, counsel for the appellant must file a Motion to Compel with the Court of Appeals. Similarly, if the trial court clerk fails to file a Notice of Completion of the Transcript within five (5) days of its filing, counsel for the appellant must file a Motion to Compel with the court of appeals.

Motions to Compel must be filed within seven (7) days of the day on which the trial court clerk should have filed the Notice of Completion. App. R. 10(F)&(G). Failing to file a Motion to Compel within seven days "shall subject the appeal to dismissal." Id.

Although the language of the rule suggests that dismissal is mandatory when a timely Motion to Compel is not filed, the Court of Appeals has denied a motion to dismiss when the delay involved was short and no prejudice was shown. In State v. Moore, 796 N.E.2d 764, 766 (Ind. Ct. App. 2003), the State failed to file a motion to compel within the deadline for the clerk to file a notice of completion. Nevertheless, the Court of Appeals denied the defendant's motion to dismiss the appeal, emphasizing "the preference that we apply an ameliorative approach to remedy failures by the parties to provide a complete record upon appeal" and the lack of prejudice to the defendant because the notice was filed just one day

after the fifteen-day deadline lapsed. Id. However, the court emphasized that dismissal may be appropriate in cases involving longer delays.

If you miss a deadline for filing a Motion to Compel, file a "Belated Motion to Compel" as soon as possible. If the State seeks dismissal, and the delay is short, cite Moore in arguing that dismissal is not appropriate.

If the State is the appealing party and blows a deadline for filing a Motion to Compel, even by a day, file a motion to dismiss. The rule specifically states that failure to compel "shall subject the appeal to dismissal." If the motion is denied, raise it again in your brief. See generally Davis v. State, 771 N.E.2d 647, 649 n.5 (Ind. 2002) (quoting Douglas E. Cressler, A Year of Transition in Appellate Practice, 35 Ind. L. Rev. 1133, 1144 (2002) ("If a party fails to obtain requested relief from a pre-briefing motion to dismiss (assuming the motion has colorable merit), the best practice is to raise the issue again in the party's brief on the merits.").

C. Content of a Motion to Compel

The Rule does not prescribe a specific form for a Motion to Compel Completion of the Clerk's Record. Such a motion can generally be quite short. It must include the following:

- Nature of the appeal and date of judgment
- Date the Notice of Appeal was filed
- Date the Notice of Completion was due to be filed
- Statement that the Notice of Completion has not been filed

In addition, if counsel has made an effort to contact the trial court clerk or had a discussion with the clerk about the matter, this information could also be included. If the motion includes factual assertions that are not part of the Record on Appeal, it must be verified. See App. R. 34(F).

F. TRANSCRIPT AND COURT REPORTER'S DUTIES

I. The Rule

Rule 11. Duties of Court Reporter

A. Preparation of Transcript. The court reporter shall prepare, certify and file the Transcript designated in the Notice of Appeal with the trial court clerk or Administrative Agency in accordance with Rules 28, 29, and/or 30. Preparation of the separately-bound volumes of exhibits as required by Rule 29 is considered part of the Transcript preparation process. The court reporter shall provide notice to all parties to the appeal that the transcript has been filed with the clerk of the trial court or Administrative Agency in accordance with Rules 28, 29, and/or 30. (See Form # App.R. 11-1) (Standards for Preparation of Electronic Transcripts can be found in Appendix A of the Appellate Rules, after Forms. Court Reporters should be aware of the standards and comply with them in preparation of the transcript.)

B. Deadline for Filing Transcript. For appeals filed on or after July 1, 2016, the Court Reporter or Administrative Agency shall have forty-five (45) days after the appellant files the Notice of Appeal to file the Transcript with the trial court clerk or Administrative Agency.

C. Extension of Time to File Transcript. If the Court Reporter believes the Transcript cannot be filed within the time period prescribed by this rule, then the Court Reporter shall promptly move the Court on Appeal designated in the Notice of Appeal for an extension of time to file the Transcript pursuant to Rule 35(A) and shall state in such motion the factual basis for inability to comply with the prescribed deadline despite exercise of due diligence. (See Form # App.R. 11-2). The Court Reporter shall serve a copy of the motion on the parties to the appeal in accordance with Rule 24. Motions for extension of time in interlocutory appeals, appeals involving worker's compensation, issues of child custody, support, visitation, paternity, adoption, determination that a child is in need of services, and termination of parental rights are disfavored and shall be granted only in extraordinary circumstances.

D. Failure to Complete Transcript. If the Court Reporter fails to file the Transcript with the trial court clerk within the time allowed, the appellant shall seek an order from the Court on Appeal compelling the Court Reporter to do so. The motion to compel shall be verified and affirmatively state that the motion was served on the Court Reporter and that the appellant has complied with the agreement for payment made in accordance with Rule 9(H). Failure of appellant to seek such an order not later than seven (7) days after the Transcript was due to have been filed with the trial court clerk shall subject the appeal to dismissal.

Rule 12: Transmittal of the Record

* * * *

B. Transcript.

(1) Except as otherwise provided below, the trial court clerk shall retain the Transcript until the Clerk notifies the trial court clerk that all briefing is completed, and the trial court clerk shall then transmit one (1) copy of the Transcript to the Clerk in accordance with Rules 28 and 29.

(a) In Criminal Appeals in which the appellant is not represented by the State Public Defender, the Clerk shall notify the trial court clerk when the Appellant's Brief has been

filed, and the trial court clerk will then transmit one (1) copy of the Transcript to the Clerk in accordance with Rules 28 and 29.

(b) In Criminal Appeals in which the appellant is represented by the State Public Defender, the trial court clerk shall transmit one (1) copy of the Transcript to the Clerk in accordance with Rules 28 and 29 when the Court Reporter has completed the preparation, certification and filing in accordance with Rule 11(A).

(c) In juvenile termination of parental rights and juvenile child in need of services appeals, the Clerk shall notify the trial court clerk when the Appellant's Brief has been filed, and the trial court clerk will then transmit one (1) copy of the Transcript to the Clerk in accordance with Rules 28 and 29.

(d) Any party may move the Court on Appeal to order the trial court clerk to transmit the Transcript at a different time than provided for in this Rule.

(2) Any party may withdraw the Transcript, or, at the trial court clerk's option, a copy, at no extra cost, from the trial court clerk for a period not to exceed the period in which the party's brief is to be filed.

C. Access to Record on Appeal. Unless limited by the trial court, any party may copy any document from the Clerk's Record and any portion or all of the Transcript. After a Transcript or Appendix has been transmitted to or filed with the Clerk, a party to the appeal may arrange to have access to that Transcript or Appendix during the time period that party is working on a brief, subject to any internal rules the Clerk may adopt to provide an accounting for the location of those materials and for ensuring fair access to the Transcript and Appendices by all parties.

II. Practical Considerations

A. Deadline for Completing the Transcript

The court reporter must file the Transcript with the trial court within forty-five (45) days of the filing of the Notice of Appeal, unless an extension of time is sought. This deadline was previously ninety (90) days.

B. Duty to Compel

As explained in Part E, appellate counsel is responsible for ensuring that the clerk and court reporter fulfill their obligations under the Appellate Rules. If the court reporter fails to complete the Transcript within forty-five (45) days, counsel must file a Motion to Compel within seven (7) days. App. R. 11(D). Failure to file a Motion to Compel "shall subject the appeal to dismissal." Id. As explained in Part E, however, the Court of Appeals may be forgiving of a short delay if no prejudice is shown by the other side. See State v. Moore, 796 N.E.2d 764, 766 (Ind. Ct. App. 2003).

C. Content of a Motion to Compel

The motion to compel shall be verified and affirmatively state that the motion was served on the Court Reporter and that the appellant has complied with the agreement for payment in accordance with Rule 9(H).

Such a motion can generally be quite short. It must include the following:

- Nature of the appeal and date of judgment

- Date the Notice of Appeal was filed
- Date the Transcript was due to be filed
- Statement that the Transcript has not been filed

In addition, if counsel has made an effort to contact the court reporter or had a discussion with the court reporter about the matter, this information could also be included.

D. Proper Form of the Transcript and Inclusion of Exhibits

Appellate Rule 28 spells out the format requirement for the Transcript, including margins, typeface, spacing, and headers/footers. Rule 29 explains the form of the Exhibit volume. If the Transcript or Exhibit Volume does not conform with these requirements, counsel should contact the court reporter and ask that corrections be made—if the transcript has not yet been submitted to the Court of Appeals. After a transcript is filed with the Court of Appeals, counsel will have to file a written motion with the Court of Appeals for any corrections.

Soon after receiving the Transcript, counsel should check the exhibits. If something like cash or drugs has been included, appellate counsel should arrange to have those items returned. If important evidence such as a videotaped confession or oversized picture of the crime scene is missing, counsel should arrange to have it included. This is best done by calling the court reporter and explaining the need for the exhibit. If the court reporter is unwilling to include it, counsel should file a motion to compel with the Court of Appeals, explaining the missing exhibit(s) and their need for a fair resolution of the issues on appeal. This should be done early in the briefing period. If counsel is unable to file a brief because of a missing exhibit, counsel should title the motion something like "Motion to Compel Court Reporter to Provide Necessary Exhibit and Request for Briefing Schedule"—not simply a "Motion for Extension of Time to File Brief." As explained in Section III.B, requests for extension may be viewed with disfavor.

In addition, counsel is required to ensure compliance with Indiana Rules on Access to Court Records, Rule 5. If the Transcript or Exhibits include confidential information, the court reporter must place that information in a separate/confidential volume. If it is not, counsel should contact the court reporter, note the error, and ask for a timely correction if the Transcript has not yet been transmitted to the Court of Appeals. After the transcript has been transmitted, counsel must file a written motion with the Court of Appeals under Appellate Rule 28(F)(4).

Finally, Part G explains the procedures by which counsel may correct an error in a Transcript.

E. Where's the Transcript?

Most trial court clerks now transmit the transcript electronically to the Clerk of the Court upon completion, and appellate practitioners may download a copy from MyCase. Some clerks and/or court reporters also email a copy to counsel of record. If there are large over-sized exhibits, it may be necessary to contact the trial court clerk to determine if the over-sized exhibits were transmitted to the Appellate Clerk. If they were transmitted to the Appellate Clerk, it may be necessary to contact the Appellate Clerk to review over-sized exhibits. Some counties also use The RecordXchange, which provides a portal for counsel to download a copy of the transcript.

G. CORRECTING THE CLERK'S RECORD OR TRANSCRIPT

I. The Rules

Rule 31. Statement of Evidence When No Transcript is Available

A. Party's Statement of Evidence. If no Transcript of all or part of the evidence is available, a party or the party's attorney may prepare a verified statement of the evidence from the best available sources, which may include the party's or the attorney's recollection. The party shall then file a motion to certify the statement of evidence with the trial court or Administrative Agency. The statement of evidence shall be submitted with the motion.

B. Response. Any party may file a verified response to the proposed statement of evidence within fifteen (15) days after service.

C. Certification by Trial Court or Administrative Agency. Except as provided in Section D below, the trial court or Administrative Agency shall, after a hearing, if necessary, certify a statement of the evidence, making any necessary modifications to statements proposed by the parties. The certified statement of the evidence shall become part of the Clerk's Record.

D. Controversy Regarding Action of Trial Court Judge or Administrative Officer. If the statements or conduct of the trial court judge or administrative officer are in controversy, and the trial court judge or administrative officer refuses to certify the moving party's statement of evidence, the trial court judge or administrative officer shall file an affidavit setting forth his or her recollection of the disputed statements or conduct. All verified statements of the evidence and affidavits shall become part of the Clerk's Record.

Rule 32. Correction or Modification of Clerk's Record or Transcript

A. Submission of Disagreement Regarding Contents to Trial Court or Administrative Agency. If a disagreement arises as to whether the Clerk's Record or Transcript accurately discloses what occurred in the trial court or the Administrative Agency, any party may move the trial court or the Administrative Agency to resolve the disagreement. The trial court retains jurisdiction to correct or modify the Clerk's Record or Transcript at any time before the reply brief is due to be filed. After that time, the movant must request leave of the Court on Appeal to correct or modify the Clerk's Record or Transcript. The trial court or Administrative Agency shall issue an order, which shall become part of the Clerk's Record, that either:

(1) confirms that the Clerk's Record or Transcript reflects what actually occurred; or

(2) corrects the Clerk's Record or Transcript, including the chronological case summary if necessary; to reflect what actually occurred.

B. Transmission of Order. The trial court clerk shall transmit to the Court on Appeal:

(1) the trial court's order or order of an Administrative Agency and any corrections to the Clerk's Record; and

(2) any corrections to the Transcript by means of a supplemental Transcript. See Rule 9(G). The title of any corrected Transcript shall indicate that it is a corrected Transcript.

II. Practical Considerations

In most appeals, counsel will receive everything needed from the clerk and Court Reporter. In rare cases, however, either the Clerk's Record or Transcript may be missing something or contain an error. When this occurs, Rules 31 and 32 provide the procedures through which the matter can be corrected in the trial court. Counsel should not attempt to argue in their briefs or other pleadings to the Court of Appeals that the Record on Appeal is incorrect or to try to fill in the gaps. These claims must first be presented to the trial court.

A. Something is Missing

If the Transcript or Clerk's Record is missing something that was requested in the Notice of Appeal, counsel should first call the court reporter or clerk and inquire about the missing material. The omission may be an oversight that can be easily resolved. If, however, the clerk says the document does not exist or the court reporter says the tape of the hearing has been lost, it is counsel's duty to fill in the gap.

1. Missing Documents in Clerk's Record

Occasionally a document filed in the trial court may not make it into the court file or does not remain there. As explained in Section IV.A., the Appellant's Appendix must include all parts of the Clerk's Record in a criminal case. The Appendix will also include the CCS. If an important document is not referenced as being filed on the CCS and/or not included in the Clerk's Record, it imperative that counsel correct this by filing a Motion to Correct the Clerk's Record with the trial court under Rule 32. See Part IV for a discussion on filing supplemental Appendices until the final reply brief is filed without leave of court pursuant to Rule 49(A).

The motion should explain what is missing and attach a copy.

2. Missing Portions of the Transcript

If a portion of the trial or relevant hearing was not transcribed, counsel for the appellant must similarly make an effort to fill in the gap(s). Ford v. State, 704 N.E.2d 457, 461 (Ind. 1999) (finding the defendant was not denied his right to appeal when the trial court failed to record bench conferences because trial counsel were able to reconstruct the bench conferences by affidavits under predecessor rule). In some cases, the missing information may be crucial, such as objections at a bench conference that were required to preserve an issue for appeal or objections during voir dire that was not transcribed. Cf. Fox v. State, 717 N.E.2d 957, 960-61 (Ind. Ct. App. 1999) (noting in reviewing a claim of error regarding jury selection that counsel did not follow the proper procedure under predecessor appellate rule but that both defense counsel and the trial court recounted what had occurred off the record, which was sufficient to review the claim on its merits); Higgins v. State, 783 N.E.2d 1180, 1184 n.1 (Ind. Ct. App. 2003) (observing that trial counsel's objections to a challenged instruction did not appear in the transcript and could have been included pursuant to Rule 31 and 32 but declining to find the claim waived in part because the defendant had requested the discussion in his Notice of Appeal and the CCS indicated that objections had been made).

Counsel does not have an obligation to recreate the record on issues that are sufficiently addressed by the portions of the transcript that are "substantially complete." Farris v. State, 818 N.E.2d 63, 70 (Ind. Ct. App. 2004) (rejecting the State's argument that the defendant waived review of claim regarding photo arrays because the Transcript did not include the bench conference at which initial objections were made or a Rule 31 recreation).

B. Something is Incorrect

In addition to the problem of missing information discussed above, sometimes a Transcript or Clerk's Record will include incorrect information. If the incorrect information is important to the issue(s) raised on appeal, counsel for the appellant must attempt to correct it.

The Court of Appeals may, on its own motion, seek to correct or clarify the Clerk's Record or Transcript. Cf. Ringham v. State, 768 N.E.2d 893, 897-98 (Ind. 2002) ("When the Court of Appeals realized that the Record on Appeal was incomplete, it remanded to the trial court for findings. The trial court held an evidentiary hearing, then transmitted its findings of fact and conclusion of law, along with the appointment papers, to the Court of Appeals, which added them to the Record on Appeal. This is exactly what Indiana Appellate Rule 32 requires.").

C. Deadlines for Filing

Counsel should file a Rule 31 or Rule 32 motion with the trial court at the earliest opportunity. It will sometimes take several days or longer for opposing counsel to respond and for the trial court to rule on the motion. Rule 31 provides fifteen (15) days to opposing counsel to respond. Moreover, in the case of alleged inaccuracies in the Transcript, the court reporter will likely need to retrieve the tape or CD.

In cases in which the Transcript is not available, the Rule 31 additions must be finalized before the Appellant's Brief is filed. If they are not, counsel cannot rely on this information in the appeal.

In cases in which the Clerk's Record or Transcript is incorrect, the correction should similarly be finalized before the Appellant's Brief is finalized to allow counsel to cite and rely on the information in their brief. However, Rule 32 permits the trial court "to correct or modify the Clerk's Record or Transcript at any time before the reply brief is due to be filed." App. R. 32(A). Therefore, if the Appellee cites something from the Transcript or Clerk's Record that is incorrect, appellant's counsel may correct it before filing their reply brief. This is what occurred in a civil commitment case in which the Appellee's Brief quoted language from the Transcript that was incorrectly transcribed and painted the Respondent in an especially poor light.