Section III
Motions Practice
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Motions Practice

This section discusses many of the most common motions filed during an appeal and not discussed elsewhere in this manual. For example, Motions to Compel the clerk or court reporter to complete their duties regarding the record or transcript are discussed in Section I. Interlocutory Appeals, which require a motion to the court of appeals, are the entire subject of Section II. Notices of Additional Authority and Amended Briefs are intimately connected to briefing and therefore included in Section IV. Motions for Emergency Transfer and Motions to Publish are discussed in Section V. Finally, motions for oral argument are discussed Section VI.

What remains are several other motions that may prove important to the success of an appeal, or, at a minimum, are important to litigating an appeal. **Part A** begins with a discussion of the general requirements for motions, which is explained in Appellate Rule 34. It then turns to several specific motions.

Part B discusses Motions for Extension of Time. The Court of Appeals will generally give counsel at least one thirty-day extension of time if the motion is adequately supported with specific reasons. Longer extensions are disfavored, and multiple requests are unlikely to be granted.

Part C explains Motions to Dismiss, which come in two varieties. A defendant may seek a ***voluntary dismissal*** when there is nothing to appeal, or the appeal could do more harm than good. Counsel must include in any request for voluntary dismissal that the client has been consulted. If the State is the appealing party, you may seek an ***involuntary dismissal*** based on serious violations of the appellate rules or missed deadlines.

Part D discusses Motions to Remand, which request the appellate court to remand the case or some part of it to the trial court while the appeal is pending. Such motions are most appropriate when the trial court has made an error that it is likely to correct, counsel has filed a motion for modification of sentence that cannot be ruled upon unless jurisdiction is returned to the trial court, or when counsel seeks to develop a factual record to support a claim in the trial court through a Davis petition or Belated Motion to Correct Error.

Part E covers Stays and Appeal Bonds, a seldom sought but potentially significant form of relief to clients while an appeal is pending. Most defendants must immediately begin serving a sentence, but a stay or appeal bond allows them to remain free while the appeal is pending. Such requests require a showing that the case is likely to be reversed on appeal and are generally more appropriate for first time offenders who arguably pose the least danger to the community.

Part F turns to the related topic of Expedited Appeals. Although CHINS and TPR cases are automatically expedited by rule, counsel may want to consider seeking expedited review of other types of cases, such as juveniles incarcerated at the Department of Correction or defendants sentenced to a short term of incarceration that will likely be served before the appeal is decided.

Part G discusses Motions to Strike, through which counsel may seek to have the court strike a document or part of a document filed by opposing counsel on the grounds that it is inappropriate, immaterial, or scandalous. Such motions should be sparingly used and are most appropriate when opposing counsel has included irrelevant, unsupported, and prejudicial information in a motion or brief.

Part H explains Motions to Reconsider. Although counsel may ask the court to reconsider its ruling on any motion, such requests should be limited to the rare case where new information is available or the stakes are particularly high.

Finally, **Part I** briefly discusses the possibility of filing other motions that make reasonable requests of the court. Although the appellate rules are comprehensive, they do not anticipate every possible scenario. Counsel should not make a habit of filing novel motions but should file such motions when they are appropriate and important to an appeal.

Published Orders

As explained in most of the parts of this section that follow, there is little case law explaining the particulars of how many motions work. Most are resolved by unpublished orders that only the parties in that case will see. Appellate Rule 65(A) specifically authorizes motions to publish ***memorandum decisions*** **f**rom the Court of Appeals but does not forbid motions to publish ***orders***. Indeed, both the Indiana Supreme Court and Court of Appeals have published some orders on its own motion. See, e.g., Care Grp. Heart Hosp., LLC v. Sawyer, 93 N.E.3d 743 (Ind. 2018) ("We issue this published order separately to disapprove of repeated attempts by Appellee's attorneys to submit unauthorized supplemental merits briefs under the pretext of motions practice."); In re Estate of Hester, 780 N.E.2d 848 (Ind. Ct. App. 2002), trans. denied.

A motion to publish an order should be filed only when the order meets the usual criteria for publication of memorandum decisions, *i.e.*, the order (a) establishes, modifies, or clarifies a rule of law or (b) criticizes existing law. App. R. 65(A)(1). The publication of orders "could help increase the body of law that addresses issues related to motions practice. In doing so, it would remove some of the guesswork associated with motions practice in Indiana's appellate courts." Kent Zepick, Published Orders, The Appellate Advocate 2 (Summer 2006).

If a Motion is Denied and Dispositive, Raise it in Your Brief

If a motion is denied, counsel may and often should raise the issue again in briefing. 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."). The Court of Appeals may even reconsider its motions panel's decision to grant a motion to accept interlocutory jurisdiction, but the practice is disfavored. Means v. State, 201 N.E.3d 1158, 1165 (Ind. 2023)

Renewing an issue in your brief will allow a different panel of judges—those who have to write an opinion in the case—to consider the issue anew. With the court's heavy caseload, counsel should be sure to give the court of appeals an easy way to resolve the appeal by renewing such requests. See generally Miller v. Hague Ins. Agency, Inc. 871 N.E.2d 406, 408 (Ind. Ct. App. 2007) (reversing the motions' panel ruling allowing the appellant to file a belated brief while observing that "the filing of a brief one day late has been considered a minor violation of our appellate rules" but "the filing of a brief thirty-eight days late is not").

A. MOTIONS: GENERAL REQUIREMENTS

I. The Rule

Rule 34. Motion Practice

A. Use of Motion. Unless a statute or these Rules provide another form of application, a request for an order or for other relief shall be made by filing a motion.

B. Motions Subject to Decision Without Response. The Court will not await a response before ruling on the following motions:

(1) to extend time;

(2) to file an oversize Petition, brief or motion;

(3) to withdraw appearance;

(4) to substitute a party; and

(5) to withdraw the record.

The Court will consider any responses filed before it rules on the motion. A response filed after ruling on the motion will automatically be treated as a motion to reconsider; any party may file a motion to reconsider a decision on a motion described in this Section within ten (10) days after the Court's ruling on the motion.

C. Response. Any party may file a response to a motion within fifteen (15) days after the motion is served. The fact that no response is filed does not affect the Court's discretion in ruling on the motion.

D. Reply. The movant may not file a reply to a response without leave of the Court. Any reply must be filed with the motion for leave, and tendered within five (5) days of service of the response.

E. Content of Motions, Responses and Replies. Except for the motions listed in Rule 34(B), a motion, response, or reply shall contain the following, but headings are not required:

(1) *Statement of Grounds.* A statement particularizing the grounds on which the motion, response, or reply is based;

(2) *Statement of Supporting Facts.* The specific facts supporting those grounds, including page citation to the Clerk's Record or Transcript or other supporting material;

(3) *Statement of Supporting Law.* All supporting legal arguments, including citation to authority;

(4) *Other Required Matters.* Any matter specifically required by a Rule governing the motion; and

(5) *Request for Relief.* A specific and clear statement of the relief sought.

F. Verification of Facts Outside the Record on Appeal. When the motion, response, or reply relies on facts not contained in materials that have been filed with the Clerk, the motion, response, or reply shall be verified and/or accompanied by affidavits or certified copies of documents filed with the trial court clerk or Administrative Agency.

G. Form of Motions, Responses and Replies.

(1) *Form; Citations; References.* Motions, responses and replies shall conform to the requirements for briefs under Rule 43(B)-(G).

(2) *Length.* Unless the Court provides otherwise, a motion or a response shall not exceed ten (10) pages or 4,200 words, and replies shall not exceed five (5) pages or 2,100 words. If the document exceeds the page limit, it must contain a word count certificate in compliance with Rule 44(F).

H. Oral Argument. Ordinarily oral argument will not be heard on any motion.

Other rules address broader requirements for filing appellate documents, including the inclusion of a signature and certificate of service. See generally Appellate Rules 24 & 68(H).

II. Practical Considerations

The court of appeals receives thousands of motions every year. Therefore, it is important that motions follow the rules and give the court sufficient reasons to rule in your favor. Common criticisms of appellate motions include:

- Failure to cite or follow the appropriate rules
- Too long with too much unhelpful boilerplate language
- Insufficient factual support—in the motion and/or in attachments
- Failure to verify when required
- Boring and unpersuasive

Following the general guidance of Rule 34 along with the specific guidance of the additional rules that follow will help enhance your motions' chances of success.

A. Form and Length of Motions

Unless the Court provides otherwise, motions and responses may not exceed ten (10) pages or 4,200 words. Replies may not exceed five (5) pages or 2,100 words. With rare exception, motions should be significantly shorter. Although counsel must support claim with citation to facts and authority, this can usually be done effectively in a few pages or less.

B. Content

Routine motions listed in Rule 34(B) may be especially short. All other motions should include four basic components, although headings for each are not required and usually not appropriate.

- Statement of Grounds: what is the basis of the motion?
- Statement of Supporting Facts: what facts support those grounds?
    - Citations to the Clerk's Record and/or Transcript should be included
- Statement of Supporting Law: what legal authorities (court rules and/or case law) and policy arguments support granting the motion?
- Requested Relief: what is the ***specific*** relief sought?

Counsel must also include a certificate of service under Appellate Rule 24 and a signature. For electronically filed documents, Appellate Rule 68(H) permits either: "(a) a graphic image of a handwritten signature, including an actual signature on a scanned document; or (b) the indicator "/s/" followed by the person's name."

C. Response/Reply

Parties may respond to a motion within fifteen (15) days after the motion was served. The moving party may not file a reply to the response unless granted leave by the Court. Counsel seeking to file a reply must tender a motion for leave and the reply within five (5) days of service of the response.

D. Verification Usually Required

Finally, any motion that relies on facts not contained in materials filed with the clerk must be verified. An acceptable verification is the following: "I affirm under penalties for perjury that the foregoing representations are true."

B. MOTION FOR EXTENSION OF TIME

I. The Rule

Rule 35. Motion For Extension of Time

A. Time for Filing. Any motion for an extension of time shall be filed at least seven (7) days before the expiration of time unless the movant was not then aware of the facts on which the motion is based. No motion for an extension of time shall be filed after the time for doing the act expires.

B. Content.

(1) *Required in All Motions.* All motions shall be verified and state

(a) The date of the appealed judgment or order.

(b) The date any motion to correct error was ruled on or deemed denied.

(c) The date the Notice of Appeal was filed.

(d) The time period that is sought to be extended, and the event which triggered it.

(e) The date the act is to be done, how that date was established, including, if relevant, the means of service, whether the current due date is pursuant to a previous extension of time, and if so, whether final.

(f) The due date requested. This date shall be a business day as defined by Rule 25.

(g) The reason, in spite of the exercise of due diligence shown, for requesting the extension of time, including, but not limited to, the following:

(i) Engagement in other litigation, provided such litigation is identified by caption, number and court;

(ii) The matter under appeal is so complex that an adequate brief cannot reasonably be prepared by the date the brief is due; or

(iii) Hardship to counsel will result unless an extension is granted, in which event the nature of the hardship must be set forth.

(h) If the motion is filed within seven (7) days before the expiration of time, the reasons why counsel was unaware of the need for the extension.

(2) *Criminal Appeals*. A motion in a Criminal Appeal shall also state, if applicable:

(a) the date the trial court granted permission to file a belated Notice of Appeal or a belated motion to correct error;

(b) the date of sentencing;

(c) the sentence imposed; and

(d) a concise statement of the status of the case, including whether the defendant has been released on bond, and whether the defendant has been incarcerated.

C. Proceedings in Which Extensions are Prohibited. No motion for extension of time shall be granted to file a Petition for Rehearing, a Petition to Transfer to the Supreme Court, a Petition for Review of the Tax Court decision by the Supreme Court, any brief supporting or responding to such Petitions, or in appeals involving termination of parental rights.

D. Restrictions on Extensions. Motions for extension of time in appeals involving worker's compensation, issues of child custody, support, visitation, paternity, adoption, and determination that a child is in need of services shall be granted only in extraordinary circumstances.

II. Practical Considerations

The text of Rule 35 has not always mirrored the Court of Appeals' practice in ruling on extensions. When Judge John Baker served as Chief Judge, for example, counsel would seldom be entitled to a thirty-day extension. Twenty days would likely be granted instead. Under most other Chief Judges, one thirty-day extension of time would be routinely granted upon a proper motion.

A. Extensions Prohibited in Some Cases

As Rule 35(C) makes clear, extensions are prohibited in all termination of parental rights' cases. Moreover, no extensions will be granted when filing or responding to a Petition for Rehearing or a Petition to Transfer. Although written in absolute terms, extensions have been granted, very rarely, in some of these proceedings. For example, if counsel encounters difficulty in securing a necessary part of the record, a Motion for New Briefing Deadline in a termination of parental rights' case could be granted. If counsel misses a transfer deadline, the Indiana Supreme Court has occasionally granted permission to file a belated petition or response—but likely with cautionary language about seeking future requests. In a truly extraordinary case discussed in Section 5, the Indiana Supreme Court permitted a petition to transfer to be filed several months after the deadline. Lee v. State, 43 N.E.3d 1271, 1275 (Ind. 2015).

B. Extensions Must be Justified by "Extraordinary Circumstances"

In some cases, extensions may be granted in "extraordinary circumstances," as explained in Rule 35(D). As regards indigent appeals, children in need of services' (CHINs) fall into this category. Juvenile delinquency appeals do not fall within this category.

C. All Other Cases

In all other cases, extensions may be sought pursuant to the requirements of Rule 35(A) & (B).

1. Timing of the Motion

A Motion for Extension of Time to file a brief should be filed at least seven (7) days before the deadline for the brief. If you are filing the motion fewer than seven (7) days before the deadline, you must specifically explain "the reasons why counsel was unaware of the need for the extension" at least seven (7) days before the deadline. App. R. 35(B)(1)(h).

2. Contents of the Motion

Rule 35(B)(1) lays out the general requirements for all extensions while Rule 35(B)(2) includes additional requirements for motions in criminal appeals.

a. The Rule

According to the Rule, a motion for an extension in a criminal appeal must include the following:

- The nature of the appeal and date of the judgment or order (i.e., sentencing) being appealed
- The sentence imposed
- A brief explanation of the defendant's status, i.e., whether incarcerated, on bond, on probation, etc.
- The date the Notice of Appeal was filed
- The time period sought to be extended, the current due date, and how it was calculated
- An explanation of whether this is a first request for an extension or if others have been granted
- The new deadline requested (provide a specific date)
- The reason(s) for the extension. The rule mentions three possible reasons:
    i. Other litigation, including caption, cause number, and court
    ii. Complexity of the case being appealed
    iii. Hardship to counsel, including a specific explanation of "the nature of the hardship"
- The reason(s) why the motion is being filed less than seven (7) days before the deadline, if applicable

b. The Reality of Extensions

The requirements of the rule are fairly straightforward and easy to follow. In practice, however, the Court of Appeals has not always granted extensions routinely. When Judge Baker became Chief Judge in March of 2007, extensions were granted less frequently and for less time than desired.

When Judge Margret Robb became Chief Judge in 2011 and Judge Vaidik in 2014, however, the granting of at least one thirty-day extension has become fairly routine. That practice has continued with Chief Judges Bradford and Altice. Counsel will usually be entitled to at least one thirty-day extension if adequate reasons are provided. A second request, if necessary, should generally be for a shorter period of time. Fifteen days appears to be the unwritten maximum for a second request.

3. Reply Briefs

Under Chief Judge Baker, the Court took an especially tough stance on extensions for filing a reply brief, saying, "The court will never grant an extension for a Reply Brief, unless counsel seeks only a one- or two-day extension for extraordinary reasons." This policy, too, appears to have relaxed, although only an extension of 30 days or fewer is likely to be granted.

D. If You Blow the Deadline: Don't Ask for an Extension

Rule 35(A) makes clear: "No motion for an extension of time shall be filed after the time for doing the act expires." If you miss a deadline, do not file a motion to extend that deadline. Instead, you must file a Motion to File a Belated Brief, as explained in Section I.D. of this manual. The court of appeals dismissed an appeal in which the brief was filed, after given permission by the motions panel, thirty-eight (38) days late. Miller v. Hague Ins. Agency, Inc. 871 N.E.2d 406, 408 (Ind. Ct. App. 2007) (concluding that "the filing of a brief one day late has been considered a minor violation of our appellate rules" but "the filing of a brief thirty-eight days late is not"). Be sure to cite Rule P-C.R.-2, Section 3, in support of your request—or the Adoption of O.R. case if the appeal is not a criminal direct appeal. Moreover, you might also cite the Sixth Amendment right to the effective representation of counsel, which is a subtle hint that the case may return to the court in a couple of years through a claim of ineffective assistance.

E. Be Sure to Include a Verification

As explained in part A, counsel must include a verification in any motion that "relies on facts not contained in materials that have been filed with the Clerk. . . ." App. R. 34(F). A motion for extension of time will always fall into this category and should therefore include a verification affirming under penalties of perjury that the facts asserted in the motion are true.

C. MOTION TO DISMISS

I. The Rule

Rule 36. Motion To Dismiss

A. Voluntary Dismissal. An appeal may be dismissed on motion of the appellant upon the terms agreed upon by all the parties on appeal or fixed by the Court.

B. Involuntary Dismissal. An appellee may at any time file a motion to dismiss an appeal for any reason provided by law, including lack of jurisdiction. Motions to affirm are abolished.

II. Practical Considerations

Counsel may move to dismiss an appeal voluntarily or may seek to dismiss an appeal involuntarily, i.e., against the wishes of the opposing party.

A. Voluntary Dismissal

1. Must be With Consent of Client

Appointed counsel should rarely seek to dismiss an appeal—and may generally do so only with the express approval of the client. The court of appeals is unlikely to grant a motion to dismiss filed by appointed counsel unless it is verified and includes a representation that the motion is being filed with the client's consent. (As an alternative, counsel could file a motion signed by the client.) Moreover, as explained in Section IV.B., it is not appropriate to file an Anders brief in Indiana.

2. Appropriate Circumstances

Dismissal of an appeal ***may*** be appropriate in four circumstances.

- **There is not an appealable issue.** For example, if a plea agreement provides a set term that affords no discretion to the trial court, the sentence may not be challenged on appeal. Childress v. State, 848 N.E.2d 1073, 1079 n.4 (Ind. 2006). However, Garza v. Idaho, 139 S. Ct. 738 (2019), requires counsel to file a notice of appeal whenever a client requests—and Indiana does not allow Anders briefs.

- **The desired relief was obtained on remand.** If the court grants a motion to remand and the trial court provides the desired relief, appellate counsel should promptly file a motion to dismiss the appeal.

- **The client no longer wishes to appeal.** Counsel should discuss this with the client, explain that the right to appeal will be lost forever, and secure a signed waiver.

- **An appeal may do more harm than good.** If the trial court or Department Correction made an error that works to your client's benefit, appealing may well bring attention to the error. The State may cross-appeal. Filing a motion to dismiss is appropriate if, after discussing the potential downside to the appeal, the client decides not to appeal. This may be true when considering a sentencing challenge, which allows the appellate court to ***increase*** a sentence on appeal. Akard v. State, 937 N.E.2d 811 (Ind. 2010).

B. Involuntary Dismissal

1. Responding to the State's Motion

Sometimes an appellee will seek to dismiss an appeal through a motion to dismiss. Common bases are a lack of jurisdiction, usually because the Notice of Appeal was not timely filed or the absence of a final judgment. Mootness may also be raised.

You should be sure to respond to any motion to dismiss filed by the State. If the State has a good point, such as a blown deadline for the Notice of Appeal, you should consider filing a Motion to Remand, if the deadline was missed through no fault of the defendant. As explained in part D, a remand would allow the trial court to make the required finding to allow the appeal to go forward.

If the State argues mootness, you should almost always contest the motion. Article 7, Section 6 of the Indiana Constitution guarantees an "absolute right to one appeal." Appeals of convictions are never moot because the stigma of a conviction persists long after a sentence is served. See generally Bennett v. State, 119 N.E.3d 1057, 1059 (Ind. 2019) (rejecting State's argument that defendant's release from prison after violating community corrections renders his case moot because "to the extent that Violating probation is now part of Bennett's record and has future impact on him, we remand to correct that"). Moreover, in civil commitment cases Indiana courts have consistently held that "a moot case may be decided on its merits when it involves questions of great public interest that are likely to recur." See E.F. v. St. Vincent Hosp. and Health Care Ctr., Inc., 188 N.E.3d 464, 467 (Ind. 2022) (collecting cases). Similarly, contempt proceedings are especially prone to excesses or abuses because of their informal nature and the absence of a jury trial. Nevertheless, lengthy terms of incarceration can result. Such cases are of great public interest and are likely to recur. See Jones v. State, 847 N.E.2d 190, 200 (Ind. Ct. App. 2006), trans. denied. Finally, our supreme court has recognized an exception to the mootness doctrine for cases "capable of repetition, yet evading review." Matter of Tina T., 579 N.E.2d 48, 52 (Ind. 1991). Specifically, the mootness doctrine does not apply when the claimed harm "would never be of such duration to afford full appellate review . . . ." Id.

2. Filing a Motion to Dismiss When the State is the Appellant

If the State is the Appellant, you may file a motion to dismiss in some circumstances. The most common, as explained in Part I, is the failure to timely file a Notice of Appeal or failure to compel the completion of the clerk's record or transcript. As with any motion, you should carefully document the facts that support your request to dismiss and include any attachments necessary to resolve the case.

The State may appeal in a criminal or juvenile delinquency proceeding in only limited circumstances. Ind. Code § 35-38-4-2; State v. I.T., 4 N.E.3d 1139, 1142 (Ind. 2014). The State's power to appeal is available only in "unusual cases where the power to appeal was expressly conferred." State v. McMillan, 274 Ind. 167, 172, 409 N.E.2d 612, 616 (1980) (citations omitted); see also McCullough v. State, 900 N.E.2d 745, 750 (Ind. 2009) ("The State identifies no provision of law that authorizes it to challenge . . . ."). The Indiana Supreme Court has held the State may appeal an illegal sentence. State v. Lotaki, 4 N.E.3d 656 (Ind. 2014).

Subsection (5) of the statute allows appeals "[f]rom an order granting a motion to suppress evidence, if the ultimate effect of the order is to preclude further prosecution of one (1) or more counts of an information or indictment." The grant of a motion to suppress is "tantamount to a dismissal of the action" and "appealable as a final judgment" under this statute. State v. Williams, 445 N.E.2d 582, 584 (Ind. Ct. App. 1983). The court of appeals dismissed a State's appeal because its notice of appeal was filed 52 days after a suppression order. State v. Hunter, 904 N.E.2d 371, 373-74 (Ind. Ct. App. 2009).

D. MOTION TO REMAND

I. The Rule

Rule 37. Motion To Remand

A. Content of Motion. At any time after the Court on Appeal obtains jurisdiction, any party may file a motion requesting that the appeal be dismissed without prejudice or temporarily stayed and the case remanded to the trial court or Administrative Agency for further proceedings. The motion must be verified and demonstrate that remand will promote judicial economy or is otherwise necessary for the administration of justice.

B. Effect of Remand. The Court on Appeal may dismiss the appeal without prejudice, and remand the case to the trial court, or remand the case while retaining jurisdiction, with or without limitation on the trial court's authority. Unless the order specifically provides otherwise, the trial court or Administrative Agency shall obtain unlimited authority on remand.

II. Practical Considerations

After the filing of the Notice of Completion of the Clerk' Record, jurisdiction lies in the court of appeals. App. R. 8. The trial court can take limited action in a case "to perform such ministerial tasks as reassessing costs, correcting the record, or enforcing a judgment." City of New Haven v. Allen County Bd. of Zoning Appeals, 694 N.E.2d 306, 310 (Ind. Ct. App. 1998). Trial courts may also rule on matters unrelated to the judgment being appealed. In re Guardianship of Hickman, 811 N.E.2d 843, 848 (Ind. Ct. App. 2004). Sometimes, the appellant may have good reason to want to return to the trial court to make a request or further develop the record for appeal. This may be done through a Motion to Remand, which could seek limited relief from the trial court, such as a modification of sentence, or potentially dispositive relief, such as a new trial based on newly discovered evidence.

A. Timing/Deadline

A Motion to Remand may be filed any time after the court of appeals assumes jurisdiction over an appeal. If the Clerk has not yet filed her notice of completion, counsel must file any motions in the trial court. See I.D. (discussing Belated Motions to Correct Error).

Although the rule does not specify a deadline, counsel should file a motion to remand as early as possible in the appellate process after counsel has had an opportunity to investigate the claim sufficiently to decide that a remand would be appropriate. Waiting until shortly before a brief is due or after an extension has been granted may reduce the chances of a remand being granted because it is more difficult to show that remand would "promote judicial economy." App. R. 37(A).

B. Content

1. Promote Judicial Economy

The key requirement of any motion for remand is that it "will promote judicial economy or is otherwise necessary for the administration of justice." Putting an appeal on hold is not a matter the court takes lightly. Therefore, a motion must include some allegation of a problem that the trial court is able to fix. A motion for remand should specifically explain why the issue better is resolved—or only resolved—by the trial court on remand.

2. Must be Verified

Rule 37(A) specifically requires that a motion to remand be verified. A typical verification is the following: "I affirm under penalties for perjury that the foregoing representations are true."

C. Examples

Remands can take many forms, so long as the requirements of promoting judicial economy or otherwise being necessary for the administration of justice are satisfied.

1. Allow the Trial Court to Correct Something

A general and broad basis for remand is to allow the trial court to correct something. Before filing such a motion, counsel should carefully consider the prospects that the trial court will correct the issue rather than creating a record to make it worse. Because these cases are not resolved by opinions, they are generally under the radar.

In one case, appellate counsel discovered while preparing his brief challenging the revocation of probation that the trial judge, who had been recently elected, had served as a prosecutor in the case at an earlier hearing. Counsel knew the trial judge had recused in many similar cases and thought it likely this was an oversight that would be corrected if the judge was given a chance. The court of appeals ordered a remand, and the trial judge vacated the revocation of probation and recused himself from further proceedings.

In another case, the trial court remarked at sentencing for a probation violation that it would give the defendant all the credit time to which he was entitled. A specific number of days was not entered until sometime after the hearing. The number of days was not correct, but appellate counsel believed the trial judge was likely to correct the issue—and it would be much more easily corrected in the trial court than attempting to raise the issue on appeal with a somewhat incomplete record. The court of appeals ordered a remand, and the trial court corrected the credit time.

2. Pursue a Modification of Sentence

Indiana Code section 35-38-1-17 allows defendants the opportunity to file a motion for modification of sentence but limits the ability of the trial court to grant a motion filed more than 365 days unless the State agrees to the modification. In most counties and most cases, prosecutors will not agree to a modification. Therefore, a modification must be sought within a year, which ironically is often how long it takes for an appeal to be resolved.

This may present a problem because trial courts may not have the authority to modify a sentence while an appeal is pending. App. R. 8 (explaining that the Court on Appeal acquires jurisdiction once the Clerk issues its Notice of Completion of Clerk's Record); cf. Clark v. State, 727 N.E.2d 18, 21-22 (Ind. Ct. App. 2000) (holding that trial courts retain jurisdiction to conduct probation revocation proceedings while an appeal is pending).

Before a modification is decided by the trial court, it is appropriate to file a motion for remand to provide the trial court with jurisdiction to rule on the modification. This may be done once a hearing is set on the motion. In one case, the court of appeals granted the motion, held the appeal in abeyance until the trial court had ruled on the motion, and directed appellate counsel to file a status report that included the trial court's ruling within ten days of the scheduled hearing. Piercefield v. State, 49A05-0701-CR-00067 (order dated July 9, 2007). The court further directed counsel to include an updated CCS and "an

indication whether Appellant will seek an additional Transcript in order to raise issues arising from the Modification hearing and order. Thereafter, this Court will resume jurisdiction and set the briefing schedule. Id.

3. Davis Petition

As explained in Section IV.B., raising a claim of ineffective assistance of counsel on direct appeal is almost always a bad idea. Defendants get only one shot at proving ineffective assistance of counsel, and this is almost always best done through a post-conviction proceeding at which a factual record to support the claim may be developed. Woods v. State, 701 N.E.2d 1208, 1210 (Ind. 1998).

If appellate counsel wants to pursue such a claim and needs to develop additional evidentiary support, "the proper procedure is to request that the appeal be suspended or terminated so that a more thorough record may be compiled through the pursuit of post-conviction proceedings." Slusher v. State, 823 N.E.2d 1219, 1222 (Ind. Ct. App. 2005). This is often called a Davis or Davis/Hatton petition. Id. (citing Hatton v. State, 626 N.E.2d 442 (Ind. 1993); Davis v. State, 267 Ind. 152, 368 N.E.2d 1149, 1151 (Ind. 1997)). When such a request is filed with the appellate court, the court of appeals must make a preliminary determination that the motion has sufficient merit. Id. If it does, the entire case is remanded to the trial court for consideration of the petition for post-conviction relief. If the PCR is denied, the appeal can be reinstated, and issues related to the direct appeal and PCR may be raised in what will become a consolidated appeal. Id.

This is a dangerous strategy that should only be invoked when development of an issue in the trial court is likely to lead to relief. The Supreme Court observed in Woods that a Davis petition should not be used as a routine matter but may be appropriate "where the claim asserted arguably requires a certain level of fact finding not suitable for an appellate court." Id. (quoting Lee v. State, 694 N.E.2d 719, 721 n.6 (Ind. 1998)). Appellate counsel often lacks knowledge of the nuances of post-conviction proceedings and will be burning the client's only ticket to post-conviction relief.

4. Belated Motion to Correct Error

As explained in Rule PC2 and Section I.B, a defendant may seek leave of the trial court to pursue a Belated Motion to Correct Error if the delay in filing the motion was not the fault of the defendant and the defendant has been diligent in pursuing it. Such requests, however, may be made only when jurisdiction remains in the trial court. After the notice of completion of the clerk's record has been filed, jurisdiction passes to the court of appeals. App. R. 8. Defendants who want to pursue a Belated Motion to Correct Error must seek remand to the trial court to pursue relief. See generally Prewitt v. State, 819 N.E.2d 393, 401 (Ind. Ct. App. 2004) (rejecting the State's argument that claims of newly discovered evidence should have been raised in a Motion to Correct Error immediately after sentencing and holding that a Rule 37 remand "for the purpose of conducting further investigation, discovery, and presentation of argument and evidence to the trial court" on the claim was appropriate).

For example, when this author received a voicemail from the alleged victim about significant evidence in a case, remand was sought and granted by the Court of Appeals. Trial Rule 60(B)(2) allows a trial court to grant relief from a judgment based on "any ground for a motion to correct error, including without limitation newly discovered evidence, which by due diligence could not have been discovered in time to move for a motion to correct error[] under Rule 59." A motion to correct error must be filed within 30 days of entry of final judgment under Trial Rule 59(C), but a Trial Rule 60(B)(2) motion may be filed within a year of judgment. In granting remand, the Court of Appeals ordered the case remanded to the trial court to pursue Trial Rule 60(B) proceedings. Jones v. State, 73A04-1604-CR-00748.

D. Responding to State's Motion for Remand

Although not common, the State might file a motion to remand, usually in response to an issue raised in the Appellant's Brief. If remand is appropriate and likely to help—or at least not hurt—the defendant, appellate counsel may decide not to contest the remand. More likely, however, the State is seeking remand because it knows it is likely to lose on the available record. Therefore, the better strategy is to file a response opposing the State's Motion or Remand, explaining why requiring the trial court to hold a hearing or do something else would not promote judicial economy but rather would frustrate it and would needlessly delay the appeal.

E. Effect of Remand

If the court of appeals grants a motion for remand, it may either (1) dismiss the appeal without prejudice or (2) remand the case while retaining jurisdiction. A motion for remand should specifically request one or the other, although the court will do what it prefers. The court will usually stay the appeal and retain jurisdiction if the issue is one that is unlikely to prove dispositive (for example, a Davis petition or modification of sentence, in which other appellate issues will remain and need to be resolved). The court is likely to dismiss the appeal without prejudice, however, if the claim is one that is likely to make the appeal unnecessary.

E. MOTION TO STAY/APPEAL BONDS

I. The Rule

Rule 39. Motion to Stay

A. Effect of Appeal. An appeal does not stay the effect or enforceability of a judgment or order of a trial court or Administrative Agency unless the trial court, Administrative Agency or Court on Appeal otherwise orders.

B. Motion in Trial Court or Administrative Agency. A motion for stay pending appeal may not be filed in the Court on Appeal unless a motion for stay was filed and denied by the trial court or by the administrative agency if it has authority to grant a stay. If the administrative agency does not have such authority, application for stay may be made directly to the Court on Appeal.

C. Motion in Court on Appeal. A motion for a stay pending appeal in the Court on Appeal shall contain certified or verified copies of the following:

(1) the judgment or order to be stayed;

(2) the order denying the motion for stay;

(3) other parts of the Clerk's Record or Transcript that are relevant;

(4) an attorney certificate evidencing the date, time, place and method of service made upon all other parties; and

(5) an attorney certificate setting forth in detail why all other parties should not be heard prior to the granting of said stay.

D. Emergency Stays. If an emergency stay without notice is requested, the moving party shall submit:

(1) an affidavit setting forth specific facts clearly establishing that immediate and irreparable injury, loss, or damage will result to the moving party before all other parties can be heard in opposition;

(2) a certificate from the attorney for the moving party setting forth in detail the efforts, if any, which have been made to give notice to the other parties and the reasons supporting his claim that notice should not be required; and

(3) a proposed order setting forth the remedy being requested.

E. Bond. If a stay is granted, the Court on Appeal may fix bond in accordance with Rule 18.

F. Length of Stay. Unless otherwise ordered, a stay shall remain in effect until the appeal is disposed of in the Court on Appeal. Any party may move for relief from the stay at any time.

II. Practical Considerations

If a defendant is sentenced to prison, jail, or a community corrections program, the trial court will almost always order that the defendant begin serving that sentence immediately. Beyond incarceration, other public defender clients may also face the immediate loss of liberty through a requirement that they register as a sex offender or their involuntary commitment to a psychiatric facility. Because an appeal will usually take several months, if not a year or longer, a stay of the trial court's order is often desirable.

Surprisingly, staff attorneys at the Indiana Court of Appeals report that few defendants seek a stay or appeal bond. Although stays and appeal bonds require a rather substantial showing, they have been granted in appropriate cases.

A. Stay or Appeal Bond?

Rule 39 simply addresses stays, and ultimately that is what counsel seeks in a criminal case. Counsel should ask the court to stay the sentence until the appeal has been completed. As mentioned in Rule 39(E), however, the appellate court "may fix bond" if a stay is granted. In criminal cases, a statute specifically addresses appeal bonds. A court is unlikely to grant a stay without imposing some sort of appeal bond. In non-criminal cases, however, such as contempt or civil commitment cases, counsel may simply request a stay.

B. Must File a Motion in the Trial Court

Whether captioned a request for a stay or a request for an appeal bond, the motion must begin in the trial court. App. R. 39(B). This is true even if the clerk has filed the notice of completion, passing jurisdiction to the court of appeals. App. R. 8. If the request is not first made in the trial court, the court of appeals will deny it.

1. Stay Factors

The trial court and appellate court will consider four factors, the same as those that apply to requests for preliminary injunctions, in deciding whether to grant a stay: "(1) irreparable harm, (2) likelihood of success on merits, (3) balance of harms, and (4) public interest." Doe v. O'Connor, 781 N.E.2d 672, 674 (Ind. 2003).

2. Appeal Bond Criteria

Indiana Code sections 35-33-9-1 and -3 explain the procedures for seeking an appeal bond in a criminal case. Class A felonies and non-suspendable offense are not eligible for an appeal bond. In all other cases, courts will consider three factors: (1) the probability of reversible error at trial, (2) the risk of flight, and (3) the potential dangerousness of the defendant. Tyson v. State, 593 N.E.2d 175, 178 (Ind. 1992).

C. Motion in Court of Appeals

If the motion for a stay or appeal bond is denied in the trial court, the claim may be appealed to the Indiana Court of Appeals. The motion must include certified or verified copies of the following:

- the judgment or order to be stayed
- the order denying the motion for stay

- any relevant parts of the Clerk's Record or Transcript that are available
- an attorney certificate
    - evidencing the time, date, place, and method or service on opposing counsel
    - explaining in detail why other parties should not be heard before the granting of a stay

D. Emergency Stays

Motions filed with the court of appeals will generally not be ruled upon until the fifteen (15) day period for a response has passed. App. R. 34(C). Although the court will sometimes request an earlier response in cases involving stays or appeal bonds, an emergency motion is the best way to secure an expedited decision from the court. According to Rule 34(D), a motion for emergency stay should include the following additional information:

- an affidavit establishing that immediate and irreparable injury will result to the moving party before the other party can be heard in opposition
- an attorney certificate detailing the efforts to give notice to the other parties
- a proposed order setting forth the remedy requested

When filing an emergency motion, counsel may want to call a staff attorney at the court of appeals to apprise them of the filing, which will allow the staff attorney an opportunity to arrange for a panel of judges to review the motion on an expedited basis.

E. Successful Cases

A stay or appeal bond is not likely to be granted in most cases in which a public defender is appointed. First, most cases do not present a high likelihood of reversible error. If counsel does not have a strong argument for reversible error, a stay or appeal bond should not be sought. Second, even in cases where reversal seems likely, counsel will have difficulty establishing that the defendant is not dangerous or that a stay is in the "public interest" if the defendant has a lengthy criminal history. Appeal bonds and stays have been successful primarily for first-time offenders.

Finally, a motion is more likely to be successful when it is reasonable. For example, if the defendant has been convicted of child solicitation on the Internet, counsel should propose, as a condition of the appeal bond, that the defendant has no Internet access and perhaps be required to report weekly to the probation office. See, e.g., Laughner v. State, 82A01-0104-CR-141 (ordering $50,000 appeal bond to defendant with no criminal history with special conditions restricting Internet access and requiring reporting to probation); but see Monteleone v. State, 21A-CR-1226 (ordering trial court to "immediately release Appellant on her own recognizance with no bond or surety").

Other examples of successful requests for stays or appeal bonds include the following:

Doe v. O'Connor, 781 N.E.2d 672 (Ind. 2003) (stay of new statute requiring publication of home addresses and photographs of sex offenders)

Boss v. State, 49A05-1106-CR-00320 (ordering $10,000 appeal bond for defendant convicted of misdemeanors who had no criminal history)

G.B. v. State, 49A02-0004-JV-251 (stay of order for juvenile to register as sex offender)

Turney v. State, 27A02-0010-CR-644 (ordering $20,000 appeal bond for defendant convicted of sexual misconduct with a minor who had no criminal history and including and attached a letter from the prosecutor suggesting that a Brady violation had occurred)

Isom v. State, 06A04-0610-CR-607 (granting $500 appeal bond for defendant with no criminal convictions who was convicted of A misdemeanor public indecency and sentenced to 120 days in jail)

In re A.L.P., 49A02-0402-JV-127 (contempt finding and 48-hour jail sentence stayed on emergency motion the same day of contempt finding).

F. MOTION FOR EXPEDITED APPEAL

I. The Rule

Rule 21. Order in Which Appeals are Considered

A. Expedited Appeals. The court shall give expedited consideration to interlocutory appeals and appeals involving 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. Motion for Expedited Consideration. By motion of any party, other appeals that involve the constitutionality of any law, the public revenue, public health, or are otherwise of general public concern or for other good cause, may be expedited by order of the court.

II. Practical Considerations

Cases involving children, including CHINS and TPR cases, are automatically expedited under Rule 21(A). Oddly, the rule does not apply to juvenile delinquency cases, even those in which the child is in the "custody" of the Department of Correction. In such cases and even some criminal cases, counsel may consider filing a motion for expedited consideration under Rule 21(B).

A. Timing of the Motion

Rule 21(B) does not specify a deadline for filing a Motion for Expedited Consideration. Ideally, counsel will file the motion early in the appellate process, especially if seeking an expedited schedule for preparation of the transcript and shortened deadlines for briefing. Rule 14, which governs interlocutory appeals, specifically mentions the possibility of shortening deadlines and requires such a request to be filed "within ten (10) days of the filing of either the Notice of Appeal with the trial court clerk or the motion to the Court of Appeals requesting permission to file an interlocutory appeal." App. R. 14(F)(2).

B. Grounds for Expediting Appeals

As regards criminal appeals, Rule 21(B) specifically mentions two particular grounds that might justify an expedited appeal.

1. Constitutionality of a Statute

First, if the case involves the "constitutionality of any law," especially a newly enacted one of broad applicability in the state, counsel might seek an expedited appeal. Such cases are likely strong candidates for emergency transfer to the Indiana Supreme Court under Rule 56(A).

2. General Public Concern

Second, more routine criminal cases may qualify for expedited review if counsel can convince the court that they involve "the public revenue" (incarceration is not cheap) or "are of general public concern" (such as a serious error has occurred, and the conviction is likely to be reversed). Counsel may want to file a Motion for Appeal Bond and Motion for Expedited Review at the same time, hoping to persuade the court that at least one is appropriate.

a. Denial of Bail

An appeal of the denial of bail is likely the strongest candidate for expedited consideration. See generally Bradley v. State, 649 N.E.2d 100, 106 (Ind. 1995) (holding that the denial of bail is a final judgment that may be appealed). If deadlines are not shortened, the appeal is likely to take nine months or longer, by which time the issue will likely be moot.

b. Short Sentence

Another type of case that might secure expedited review is a case involving a relatively short sentence that will likely be served before the appeal can be completed. The court of appeals will generally not shorten deadlines or promise expedited consideration in such cases, but it has directed that the State will not be given an extension of time to file its brief. Cf. Haggard v. State, 810 N.E.2d 751 (Ind. Ct. App. 2004) (court expedited consideration of excessive sentence when reversal would require release within weeks).

c. Juvenile Delinquency Cases (when the child is incarcerated)

A compelling argument can be made for expediting consideration of juvenile delinquency cases in which the child is incarcerated at the Department of Correction. Rule 21(A) automatically expedites most cases involving children, including child support cases.

Finally, as explained in the Interlocutory Appeal section, beginning in 2009, the Department of Child Services may pursue an expedited appeal when a juvenile court does not follow its recommendation for services. This is purely an appeal about money and litigated on severely shortened deadlines under Rule 14.1. If an issue of money is entitled to expedited review, why should the child's liberty interest not be considered under the same deadlines? Counsel should consider requesting that the DCS appeal be consolidated with the underlying case and litigated under the same expedited deadlines. Counsel must be ready to file briefs and responses in only five days, however.

d. Other Possibilities

This list should not be seen as exhaustive. For example, expedited appeals have been granted in a civil commitment case, although one of those cases was not resolved by the Indiana Supreme Court for almost a year and a half. In re Civil Commitment of T.K. v. Dep't of Veterans Affairs, 49A02-1310-MH-878.

G. MOTION TO STRIKE

I. The Rule

Rule 42. Motion to Strike

Upon motion made by a party within the time to respond to a document, or if there is no response permitted, within thirty (30) days after the service of the document upon it, or at any time upon the court's own motion, the court may order stricken from any document any redundant, immaterial, impertinent, scandalous or other inappropriate matter.

II. Practical Considerations

It is easy to be indignant when the other side says something inappropriate in a motion or brief. Nevertheless, motions to strike should be used sparingly and not "focus on picky, non-important issues that could be resolved during arguments." Michael W. Hoskins, Striking Motions to Strike, Ind. Lawyer, at 8 (May 30, 2007) (quoting former staff attorney at the Indiana Court of Appeals). Most experienced appellate practitioners rarely file motions to strike, opting instead to respond to the issue in a reply brief. Id. That said, a motion to strike can be an opportunity to file a final reply to an argument for which the rules do not otherwise permit a response. For example, the Court of Appeals granted a motion to strike the State's Notice of Additional Authority that included a lengthy discussion that failed "to properly explain" the new case and left the defendant "without a procedural basis for responding to the implications made in the notice without leave of this Court." Ashaque v. State, 49A02-1404-CR-286 (January 5, 2015, Motion to Strike). See also Bluitt v. State, 19A-CR-01386 (February 27, 2020, order granting motion to strike State's references to information from probable cause affidavit not admitted into evidence at trial).

A. Appropriate Uses

1. Irrelevant Information or Information Unsupported by the Record

A motion to strike is most appropriate when opposing counsel includes irrelevant information in a motion or brief. See, e.g., Thornton-Tomasetti Eng'rs v. Indianapolis-Marion County Pub. Library, 851 N.E.2d 1269, 1280 n.3 (Ind. Ct. App. 2006) (striking matters that were "irrelevant and impertinent to [the court's] disposition of the issues in this appeal"); Carter-McMahon v. McMahon, 815 N.E.2d 170, 173 (Ind. Ct. App. 2004) (striking statements in brief that were "unsupported by citations to the transcript/appendix and/or are irrelevant factual assertions"). This is particularly true when the information is included in a reply brief, and there would otherwise be no opportunity to respond. See, e.g., Bowlers Country Club, Inc. v. Royal Links USA, Inc., 846 N.E.2d 732, 733 n.1 (Ind. Ct. App. 2006) (striking portion of reply brief that included false assertion).

2. Inflammatory/Accusatory Language

Courts have also stricken portions of briefs or motions that use inflammatory language toward the court or opposing counsel. See, e.g., In re Wilkins, 777 N.E.2d 714, 716 (Ind. 2002) (disciplining appellate lawyer who included the following sentence in a petition to transfer: "Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision)."), sanction reduced to public reprimand at 782 N.E.2d 985 (Ind. 2003); State v. Hoovler, 673 N.E.2d 767, 768 (Ind. 1997) (granting a motion to strike a petition for rehearing in which counsel "assault[ed] by name the members of the Court who voted to

reverse as being in 'dereliction of his sworn duty to uphold the Constitution,' as 'equally culpable,' and as assuming power to 'repeal' the Constitution. Counsel elaborates on these assaults with liberal use of terms like 'absurd' and 'fabricated.'"); see also Indiana Dep't of Envtl. Mgmt. v. Med. Disposal Servs., 729 N.E.2d 577, 581 n.10 (Ind. 2000) (striking accusatory and hyperbolic language for its inappropriate tone and lack of respect toward opposing party).

3. Don't Be on the Receiving End

As a final point, counsel should avoid crossing lines that are likely to generate a motion to strike from the other side. In short, make a persuasive argument supported by the facts and law. Do not resort to attacks on opposing counsel or, worse yet, the trial court or appellate judges.

MOTION TO RECONSIDER

Rule 34(B) notes that "any part may file a motion to reconsider a decision on a motion described in this Section within ten (10) days after the Court's ruling on the motion." If good cause exists, counsel may request the court of appeals to reconsider its ruling on any motion. According to a former staff attorney at the court of appeals, "[d]espite the wording of Rule 34(B), the Court does in fact reconsider rulings on motions outside Title VI, such as motions to compel the filing of the notice of completion of the clerk's record, and even motions not listed in the appellate rules, such as motions for *pro hac vice* admission." See Kent Zepick, Rule 34(B) & Motions to Reconsider, The Appellate Advocate, at 3 (Winter 2005).

B. Deadline

The Rule requires that motions to reconsider be filed within ten (10) days of the court's ruling. Ten days means just that; the period is not extended to allow for mailing of the court's order and an extension of time may not be requested.

C. Ground for Reconsideration

Neither the rule nor case law shed much light on what considerations will weigh in a decision to reconsider. Although a Petition for Rehearing is in many ways a motion to reconsider, counsel can point to specific shortcomings in the court's opinion that should be corrected in a Petition for Rehearing. Most motions, however, are denied by order without any reasons stated, which makes it difficult to argue specific points of error.

New developments are likely the best ground for filing a motion to reconsider. As noted in Section II, the court of appeals has sometimes granted a motion to reconsider the denial of a motion for interlocutory appeal. In the case discussed there, the county prosecutor and Attorney General both agreed—or at least had no objection—after the original denial of an interlocutory appeal.

Although counsel should make the best case possible in the initial motion, sometimes counsel holds back, believing a motion is routine and will be granted. This is particularly true with Motions for Extension of Time, which used to be routinely granted. The appropriate response to the denial of a motion when strong grounds for it exist is a motion to reconsider that acknowledges the original motion's shortcomings and further includes an explanation of the additional grounds and a statement that counsel will not make the same mistake in the future. If less than thirty days is needed, a request for fewer days will likely go a long way in enhancing the chances that the motion to reconsider will be granted.

D. Seldom Ask

Although you may believe that every motion you file should be granted, the court is not likely to agree. Routinely requesting reconsideration of the denial of motions will likely earn you a reputation with the court—a reputation that you do not want. Ask for reconsideration sparingly—in those cases or on those issues where it is truly appropriate.

H. OTHER MOTIONS

I. The Rule

Rule 1. Scope

These Rules shall govern the practice and procedure for appeals to the Supreme Court and the Court of Appeals. The Court may, upon the motion of a party or the Court's own motion, permit deviation from these Rules.

II. Practical Considerations

As Rule 1 explains, appellate courts may "permit deviations from these Rules" in any case—either on its own or on motion from a party. This rule should not be invoked willy-nilly in any case in which appellate counsel wants something not provided for by the Rules. The Rules were carefully crafted after a long process and are regularly amended after a careful process. That said, the Rules cannot cover every possible situation or nuance. The key question to ask when counsel is considering filing a unique motion not specifically addressed by the Rules is whether the request is reasonable and supportable. If you are confused about how to proceed in a given situation and cannot find the answer in the rules, you may consider filing a "Motion for Guidance" or "Motion Seeking Clarification," which clearly sets out the concerns and asks for direction from the court.

The appellate courts have the power to do just about anything they wish, if they are adequately persuaded. For example, after hearing oral argument in a challenge to the revocation of probation, the court issued an order later the same day, ordering the defendant's immediate release. The opinion acknowledged that Appellate Rule 65(E) generally requires certification of an opinion before the trial court may act but concluded "courts have inherent authority to require immediate compliance with their orders and decrees in order to give effective relief." Ripps v. State, 15A01-1109-CR-436 (Ind. Ct. App. May 4, 2012) (unpublished order).