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Advanced Appellate Practice

Indiana Continuing Legal Education Forum (ICLEF)

Advanced Appellate Practice
July 14-15, 2022
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ADVANCED APPELLATE PRACTICE

July 14-15, 2022

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ADVANCED APPELLATE PRACTICE

Agenda

July 14, 2022

1:30 P.M. Registration

2:00 P.M. Starting the Appellate Journey

Maggie L. Smith, Discussion Leader

- Finality issues (especially 54B/56C entry of partial final judgment)
- Impact of remaining attorney fee hearings on finality
- Stays/appeal bonds
- Rule 37 Remands
- Trial court jurisdiction during appeal

3:30 P.M. Refreshment Break

3:45 P.M. 14(B) Interlocutory appeals

Cara S. Wieneke, Discussion Leader

- Strategy for trial court
- Strategy for appellate court
- Process at appellate court
- Deemed denied/belated certification process

5:15 P.M. Adjourn Day One

5:30 P.M. Hosted Reception

July 15, 2022

8:30 A.M. Continental Breakfast

9:00 A.M. Brief Writing

Brian J. Paul, Discussion Leader

- Statement of Issues- deep issue versus one liners
- Statement of Facts- good, better, and best practices
- Argument- best practices; addressing alternative arguments; cross appeals (when proper and when not)
- Substantive difference between COA Briefs, Transfer Briefs, and Amicus Briefs
- Electronic formatting tips (fonts, spacing, headers, etc.)

ADVANCED APPELLATE PRACTICE

Agenda Continued

10:30 A.M. Coffee Break

10:45 A.M. "One-on-One with Judges Molter & Weissmann"

Featuring the Hon. Derek R. Molter and the Hon. Leanna K. Weissmann

- An amazing opportunity to pick the brains of two Court of Appeals judges who also were leading appellate practitioners before they were appointed to the bench. Here you will get the chance to ask anything you've really wanted to know about the appellate process, but were too afraid to ask.

12:15 P.M. Adjourn

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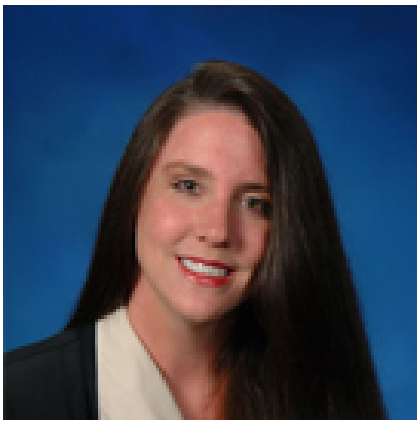

Maggie Smith is recognized as one of the top appellate attorneys in the country. In addition to being named by *Super Lawyers*® as one the top 25 Women Attorneys in the state of Indiana, Maggie has been selected as one of *TheBest Lawyers in America*® in the field of appellate practice, identified an *Indiana Super Lawyers*® appellate attorney, listed as a *Chambers USA*® *Top Tier* Appellate Litigator, and recently was celebrated for fifteen years as a Martindale Hubbell AV Preeminent Rated Lawyer with the "Highest Possible Peer Review Rating in Legal Ability & Ethical Standards."

Maggie has been involved in hundreds of appeals, and has represented businesses, individuals, and groups in all types of appellate proceeding at every level of the state and federal appellate courts. She also has significant experience representing *amicus curiae* parties before Indiana's appellate courts.

Her clients say that her appellate "writing skills are great" and she also has "fantastic" oral advocacy skills arguing before appellate courts—a combination that makes Maggie "the complete package."

In addition to representing parties on appeal, Maggie has been actively involved in drafting the Indiana Appellate Rules, is a leader in the state and national appellate practice communities, and is a regular presenter and author on appellate topics.

Prior to entering private practice, she served as a judicial law clerk with the Indiana Supreme Court and was an Adjunct Professor of Law at Indiana University, teaching legal writing and reasoning and appellate advocacy.

The Indiana Supreme Court appointed Maggie to an eight-year term on its Committee on Rules of Practice and Procedure in 2009, and in this capacity, she was engaged in the continuous study of all the Indiana Rules of Procedure (Trial Rules, Evidence Rules, Jury Rules, Appellate Rules, Professional Conduct Rules, etc.). Maggie was actively involved in the e-fling projects, Administrative Rule 9(G) overhaul, and the appellate rules.

Hon. Derek R. Molter, Judge, Indiana Court of Appeals

Hon. Derek R. Molter was appointed to the Court of Appeals by Governor Eric Holcomb and began his service on October 1, 2021. He is originally from Newton County.

Judge Molter received his B.A., with High Distinction, from Indiana University in 2004. While at I.U. he was elected to Phi Beta Kappa and was active in student government. He earned his J.D., magna cum laude, from Indiana University Maurer School of Law in 2007. While in law school, he was the Executive Notes & Comments Editor for the Indiana Law Journal and a member of the Order of the Coif.

Before joining the Court of Appeals, Judge Molter was a partner in the Litigation Practice Group at Ice Miller in Indianapolis. He led the appellate practice and handled appeals in state and federal courts throughout the United States. He was a member of the National Center for State Courts Lawyers Committee, the Council for Appellate Lawyers, the Indiana State Bar Association's Appellate Practice Section Council, the Indianapolis Bar Association, and he served a term as the Newton County Bar Association president. He also represented pro bono clients defending criminal charges and pursuing discrimination, civil rights, employment, and housing claims.

Prior to joining Ice Miller, he was an attorney in Washington, D.C., at Arnold & Porter LLP. He was also a law clerk for the Honorable Theresa Springmann with the United States District Court for the Northern District of Indiana, and during law school, he worked as a legal intern for the U.S. House of Representatives Committee on the Judiciary.

Judge Molter serves on the Board of Directors for the Indianapolis Legal Aid Society and is a member of the Indiana University College Alumni Board.

Hon. Leanna K. Weissmann, Judge, Indiana Court of Appeals

Hon. Leanna K. Weissmann was appointed to the Court of Appeals by Governor Eric Holcomb and began her service on September 14, 2020. She is a cum laude graduate of both Indiana University and its Robert H. McKinney School of Law, earning undergraduate degrees in Journalism and English in 1991 and her law degree in 1994. She is an active member of the Indiana Judges Association, the Indiana State Bar Association, the Indianapolis Bar Association, the American Bar Association, the National Counsel of Law Disciplinary Boards, the National Organization of Bar Counsel, and the Dearborn/Ohio County Bar Association.

Before joining the Court, Judge Weissmann maintained a solo law practice in Lawrenceburg, Indiana for more than 20 years representing indigent clients in an array of criminal, juvenile, and family law matters. Additionally, she has served as a commissioner on the Supreme Court Disciplinary Commission since 2013.

A proponent of civics education, Judge Weissmann created a constitutional program for elementary school students in 2001. Recently, she researched and authored Redefining Justice for Emerging Adults: How Specialty Courts Can Provide Life Changing Intervention, 55 IND. L. REV. (forthcoming 2022).

Brian J. Paul, Faegre Baker Daniels LLP, Indianapolis

Brian J. Paul is an experienced and accomplished appellate lawyer. He helps clients navigate the complexity of appellate courts, having briefed and argued everything from weighty abstract constitutional issues to concrete dollars-and-cents commercial issues and any number of issues in-between. His name appears on more than 100 decisions, and he has had a direct hand in scores of others.

Clients He Serves:

- Fortune 500 companies
- Family-owned businesses and individual shareholders
- State and local governmental entities
- Electric and gas utilities
- Nonprofit organizations
- Trustees, guardians, and estate representatives
- Employee benefit plans, plan sponsors, and third-party administrators
- Hospitals and medical practices
- Doctors and lawyers
- Trade associations
- Criminal defendants

Beyond Appellate Law, Brian is also experienced in ERISA and employee benefits litigation, insurance coverage litigation, and complex tort and commercial litigation in state and federal courts.

Cara L. Wieneke, Wieneke Law Office, LLC, Brooklyn

Cara Wieneke has focused her entire career on criminal defense. As an undergraduate student at Indiana University, Cara majored in Criminal Justice. As a graduate student, Cara studied Criminology before deciding to attend law school. At the Indiana University School of Law — Indianapolis, Cara was a member of the Indiana Law Review, was named to the Order of Barristers in the school's moot court competition, received an award for her dedication to pro bono service, and was president of the Law Students Against Capital Punishment. She graduated summa cum laude.

As an attorney, Cara served as a judicial law clerk for the Honorable Margret G. Robb on the Court of Appeals of Indiana. A brief stint at a family law firm prepared Cara for handling CHINS/TPR cases at the appellate level. As a deputy state public defender, she focused exclusively on representing clients during the post-conviction process. In 2007, Cara opened her own firm.

Cara is admitted to practice law in the State of Indiana, the Northern and Southern Districts of Indiana, and the Supreme Court of the United States. She is a life member of the National Association of Criminal Defense Lawyers and Scribes - The American Society of Legal Writers.

Cara currently resides in Morgan County, Indiana, with her husband and partner in law, Joel; and their two children.

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Section One

Advanced Appellate Practice
A Masters Level Discussion
Indiana Continuing Legal Education Foundation
July 14, 2022

Appealable Orders and Final Judgments:

When can I appeal, when must I appeal, what if I realize there is an issue with finality after an appeal has started, and what role does creativity play in all this?

Maggie L. Smith,
Member, Frost Brown Todd LLC

Section One

Appealable Orders and Final Judgments.....Maggie L. Smith

I. Appeal from a Final Judgment or Order

A. In General

A judgment is considered a "final judgment" for purposes of appeal when:

(1) it disposes of all claims as to all parties;

(2) the trial court in writing expressly determines under Trial Rule 54(B) or Trial Rule 56(C) that there is no just reason for delay and in writing expressly directs the entry of judgment (i) under Trial Rule 54(B) as to fewer than all the claims or parties, or (ii) under Trial Rule 56(C) as to fewer than all the issues, claims or parties;

(3) it is deemed final under Trial Rule 60(C);

(4) it is a ruling on either a mandatory or permissive Motion to Correct Error which was timely filed under Trial Rule 59 or Criminal Rule 16; or

(5) it is otherwise deemed final by law.

Ind. Appellate Rule 2(H).

B. "Disposes of <u>all</u> claims as to <u>all</u> parties"

1. The order must end the entire case and leaving nothing for future determination.

"To fall under Appellate Rule 2(H)(1), an order must dispose of all issues as to all parties, ending the particular case and leaving nothing for future determination." <u>McGee v. Kennedy</u>, 62 N.E.3d 467, 471 (Ind.Ct.App. 2016).

If there are still remaining parties or claims, merely labeling something as "final" is not sufficient. *See*, *e.g.*, <u>Goodrich Quality Theaters, Inc. v. Fostcorp Heating & Cooling, Inc.</u>, 16 N.E.3d 426, 434 (Ind. Ct. App. 2014) ("Despite the trial court's statement in the July 18 Order that the May 1 Order was final, simply referring to it as such later … is not enough to make it so."), *aff'd in part, rvs'd in part on other grounds*, 39 N.E.3d 660 (Ind. 2015).

2. <u>Berry v. Huffman</u>, 643 N.E.2d 327 (Ind. 1994)

When researching finality case law, it is critical for the appellate attorney to be aware that earlier case law might be impacted by the Supreme Court decision in <u>Berry v. Huffman</u>, 643 N.E.2d 327 (Ind. 1994), which overruled the previous "distinct and definite branch doctrine" that older cases often relied on to deem something "final" for purposes

of appeal. This common law doctrine provided that an order or judgment would be final and appealable even if it did not dispose of all the issues as to all the parties, so long as it disposed of "a distinct and definite branch of the litigation." Id. at 328.

Because of the uncertainty created by this doctrine and the risk that an order may be deemed final by operation of common law without a party recognizing it, the Supreme Court abrogated that law "in an effort to provide greater certainty to the parties and to strike an appropriate balance between the interest in the speedy review of certain judgments and the inefficiencies of piecemeal appeals." Id. at 329.

Accordingly, many earlier cases—which are then cited by later cases—have been abrogated by Berry, even though the cases themselves aren't "red-flagged" because they were not mentioned by name in the Berry decision.

3. Effect of outstanding Attorney Fee award on finality

Case law exists declaring that, when a trial court resolves the issue of underlying merits but reserves the issue of attorneys' fees for resolution at a later date, the order as to underlying merits does not become final until the attorneys' fees have also been resolved. *See* Ebersol v. Mishler, 775 N.E.2d 373, 376 n.1 (Ind.Ct.App. 2002) ("[T]he trial court's [October 26, 2001] order granting summary judgment in favor of the Mishlers was not a final, appealable order until December 17, 2001, when the court entered its order awarding the Mishlers $13,581.50 in attorney's fees."); Davidson v. Boone County, 745 N.E.2d 895, 898 (Ind. Ct. App. 2001) ("The Davidsons initiated an appeal of the judgment on August 25, 1998. The appeal, however, was dismissed . . . as untimely because the trial court had yet to enter final judgment on the amount of attorney fees."); Burkhart v. Burkhart, 349 N.E.2d 707, 713 (Ind.Ct.App. 1976) ("[T]he trial court's judgment was not final since it reserved a further question (i.e., the proper amount of attorneys' fees) for future determination."); Reese v. Reese, 696 N.E.2d 460, 464 (Ind. Ct. App. 1998) ("Although Theodore requests interest from the date the dissolution decree was entered, June 29, 1994, the decree specifically deferred consideration of attorney fees and litigation expenses pending further evidence and argument. The provisional order was not a final judgment.").

BUT case law also exists suggesting otherwise. *See* H & G Ortho, Inc. v. Neodontics Intern., Inc., 823 N.E.2d 718 (Ind. Ct. App. 2005) (appeal from underlying merits order initiated on January 1, 2004, even though issue of attorneys' fees was reserved for hearing set on March 12, 2004); Paulson v. Centier Bank, 704 N.E.2d 482 (Ind. Ct. App. 1998) (judgment on merits was final for purposes of appeal although trial court reserved ruling on recoverable fees for subsequent proceedings); Daurer v. Mallon, 597 N.E.2d 334 (Ind. Ct. App. 1992) (defendant forfeited appeal from grant of summary judgment when it waited to appeal that grant until trial court had separately addressed the issue of attorneys' fees requested by defendant in his motion for summary judgment); City of Evansville v. Miller, 412 N.E.2d 281 (Ind. Ct. App. 1980) (refusing to address appellate claims as to underlying merits order because the defendant waited to appeal that order until after the hearing on attorneys' fees).

PRACTICE NOTE: To avoid any possible claims of forfeiture or waiver, counsel may consider filing a Notice of Appeal from the merits decision, then filing a second Notice of Appeal from the attorneys' fees decision, and then moving to consolidate. *See, e.g.*, Witt v. Jay Petroleum, Inc., 964 N.E.2d 198 (Ind. 2012) (docket shows that after trial court expressly reserved the issue of attorneys' fees for a later hearing, an appeal was perfected from the initial order determining liability (38A02-0912-CV-01290) and then a second appeal was initiated from the order on attorney fees (38A04-1004-MI-00227) and both appeals were then consolidated by the Court of Appeals into the first appeal from the merits decision).

C. 54(B) Entry of Partial Final Judgment.

Trial Rule 54(B) provides: "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment…. A judgment as to one or more but fewer than all of the claims or parties is final when the court in writing expressly determines that there is no just reason for delay, and in writing expressly directs entry of judgment, and an appeal may be taken upon this or other issues resolved by the judgment; but in other cases a judgment, decision or order as to less than all the claims and parties is not final." IND. TR. RULE 54(B).

1. "Magic language"

A 54(B) order must contain what courts have called the "magic language" that "there is no just reason for delay, and in writing expressly directs entry of judgment."

"Trial Rule 54(B) certification of an order that disposes of less than the entire case must contain the magic language of the rule. This is intended to provide a bright line so there is no mistaking whether an interim order is or is not appealable." Georgos v. Jackson, 790 N.E.2d 448, 452 (Ind. 2003).

Without that magic language, the order will be insufficient, even if it tries to effectuate the same thing. *See* Cincinnati Ins. Co. v. Davis, 860 N.E.2d 915, 920 (Ind. Ct. App. 2007) (trial court's statement that "[a]s there remain no pending issues, this shall be considered a final, appealable order" was insufficient where there were pending issues and where the orders "[did] not contain the 'magic language' of Trial Rule 54(B)").

But see Coleman v. Vukovich, 825 N.E.2d 397, 402-03 (Ind. Ct. App. 2005) ("The trial court's order neither decides all claims as to all parties nor recites the language mandated by Trial Rule 56(C) that there is "no just reason for delay" and directing entry of judgment. Nevertheless, the record reflects that the trial court clerk has entered judgment on Nos. 64D02–0207–PL–5726 and 64D02–0207–PL–5727, effectively ending the consolidation of these matters with No. 64D01–0206–PL–5119. Appellant's App. p. 34. The judgments in these two matters thus are appropriate for this court's review under Indiana Appellate Rules 2(H)(1) and 5(A), even though there has not yet been disposition

of all claims as to all parties.").

2. Order to be declared final must dispose of at least a single substantive claim.

Not all orders can be declared final under Trial Rule 54(B). Rather, to be declared final under Trial Rule 54, the order must "dispose of at least a single substantive claim." Hoesman v. Sheffler, 886 N.E.2d 622, 634–35 (Ind.App.,2008) ("orders denying the Hoesmans' motions to amend and to consolidate are not the type of orders contemplated under Trial Rule 54").

"To be properly certifiable under [Trial Rule 54(B)], a trial court order must possess the requisite degree of finality, and must dispose of at least a single substantive claim. Under Trial Rule 8(A), a claim consists of two elements: 1) a showing of entitlement to relief, and 2) the relief." Ramco Industries, Inc. v. C & E Corp., 773 N.E.2d 284, 288 (Ind.Ct.App.,2002).

In Ramco, the plaintiff obtained a ruling that the defendant had breached provisions of the Contract and was liable for any damages resulting from the breach, but the trial court left for trial the issues of what relief was available and what damages were incurred from the breach. The Court held, "The possibility of a breach without damages or a breach subject to set off raises the specter of piecemeal litigation that the requirements of Indiana Trial Rule [54(B) was] meant to avoid. The order simply does not possess the requisite degree of finality to completely dispose of a single substantive claim in order to be properly certifiable." Id.

D. 56(C) Entry of Partial Final Summary Judgment.

The summary judgment provisions of Trial Rule 56(C) provide, "A summary judgment may be rendered upon less than all the issues or claims, including without limitation the issue of liability or damages alone although there is a genuine issue as to damages or liability as the case may be. A summary judgment upon less than all the issues involved in a claim or with respect to less than all the claims or parties shall be interlocutory unless the court in writing expressly determines that there is no just reason for delay and in writing expressly directs entry of judgment as to less than all the issues, claims or parties." IND. TR. RULE 56(C).

The same "magic language" is required in Rule 56(C) entries: "If a trial court's summary judgment order is not final as to all issues, claims, and parties, the order must include the 'magic language' set forth in Trial Rule 56(C) to be considered final." *See* Indy Auto Man, LLC v. Keown & Kratz, LLC, 84 N.E.3d 718, 721 (Ind.App., 2017).

Likewise, "to be a final judgment under … T.R. 56(C), a judgment must possess the requisite degree of finality and must dispose of at least a single substantive claim." Cardiology Assoc. v. Collins, 804 N.E.2d 151, 154 (Ind.Ct.App. 2004) (order denying motion for partial summary judgment could not, by definition, "dispose of at least a single substantive claim.").

PRACTICE NOTE: This Author recognizes that Indiana law applies the "dispose of at least a single substantive claim" requirement to 56(C) partial summary judgment.

Respectfully, this Author believes this is wrong. Unlike Trial Rule 54(B) which only allows the court to "direct the entry of a final judgment as to one or more but fewer than all of the claims or parties," Trial Rule 56(C) expressly allows entry of summary judgment "upon less than all the **issues** or claims … or parties."

The first case to address the matter, however, was Legg v. O'Connor, 557 N.E.2d 675 (Ind.Ct.App. 1990), which based its decision on how the federal courts treat this issue under the federal rules which did not include "issues," but when enacting Rule 56(C), the Supreme Court intentionally differed from the federal approach. In his Treatise on Indiana Rule 56, Professor Harvey opined that Legg, Ramco and Cardiology Associates were wrongly decided, but transfer was never sought in Legg, Ramco or Cardiology Associates so the Supreme Court never weighed in on the issue.

This Author tried to raise this issue in 2011 (Motion attached), but it was never addressed by the Court of Appeals.

In reality, since this case law has sat on the books for this long, the chance of getting it overruled is likely slim to none, which is sad because this was not the Supreme Court's intent when Rule 56(C) was adopted.

E. Trial Rule 60(C)

Trial Rule 60(C) provides, "A ruling or order of the court denying or granting relief, in whole or in part, by motion under subdivision (B) of this rule[1] shall be deemed a final

[1] Trial Rule 60(B) provides, "On motion and upon such terms as are just the court may relieve a party or his legal representative from a judgment, including a judgment by default, for the following reasons:

(1) mistake, surprise, or excusable neglect;
(2) 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 errors under Rule 59;
(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
(4) entry of default or judgment by default was entered against such party who was served only by publication and who was without actual knowledge of the action and judgment, order or proceedings;
(5) except in the case of a divorce decree, the record fails to show that such party was represented by a guardian or other representative, and if the motion asserts and such party proves that
    (a) at the time of the action he was an infant or incompetent person, and
    (b) he was not in fact represented by a guardian or other representative, and
    (c) the person against whom the judgment, order or proceeding is being avoided procured the judgment with notice of such infancy or incompetency, and, as against a successor of such person, that such successor acquired his rights therein with notice that the judgment was procured against an infant or incompetent, and

judgment, and an appeal may be taken therefrom as in the case of a judgment." IND. TRIAL RULE 60(C).

An interesting issue has arisen in the past few years. When Trial Rule 60(C) was enacted, Rule 60(B) contained the prerequisite allowed a trial court to grant relief "from an entry of default, final order, or final judgment, including a judgment by default." IND. TRIAL RULE 60(B). Case law thus made clear that Rule 60(B) could only be invoked after a final order or judgment: "Indiana Trial Rule 60(B) does not apply to interlocutory orders, and a party may seek relief only from a final judgment or order that determines the entire controversy or decides the case on the merits." Allstate Insurance Co. v. Fields, 842 N.E.2d 804, 808 (Ind.2006). Accordingly, Rule 60(C) did not transform an appeal from a non-final order into a final order.

But effective 2009, Trial Rule 60(B) was amended to delete the word "final" from the Rule. "Thus, the express language of [Rule 60(B)] no longer limits relief only from a 'final' judgment" and a party can now seek Trial Rule 60(B) relief from an interlocutory order. Mitchell v. 10th and The Bypass, LLC, 3 N.E.3d 967, 973–74 (Ind.2014) (finding party may use Rule 60(B) to challenge interlocutory partial summary judgment order).

There was no change to Trial Rule 60(C) in 2009, and therefore (although no court has directly addressed the issue) the current state of the law would allow a party to use Trial Rule 60(C) to take an interlocutory order and transform it into a final order without having to meet the above requirements of 54(B) or 56(C).

F. Ruling on a Motion to Correct Error

A ruling on a Motion to Correct Error "is a final judgment under Indiana Rule of Appellate Procedure 2(H)(4), which states a judgment is a final judgment if "it is a ruling on either a mandatory or permissive Motion to Correct Error which was timely filed under Trial Rule 59 [or Criminal Rule 16]." Walters v. Lima Elevator Company, Inc., 84 N.E.3d 1218, 1220 (Ind.App., 2017).

BUT and an interlocutory order cannot be transformed into a final order for appeal by filing a Motion to Correct Error and receiving a trial court ruling on that Motion. *See* Pond v. McNellis, 845 N.E.2d 1043, 1054-55 (Ind. Ct. App. 2006) ("The filing of or ruling on a motion to correct error cannot transform an interlocutory matter into a final judgment

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(d) no appeal or other remedies allowed under this subdivision have been taken or made by or on behalf of the infant or incompetent person, and
(e) the motion was made within ninety [90] days after the disability was removed or a guardian was appointed over his estate, and
(f) the motion alleges a valid defense or claim;

(6) the judgment is void;
(7) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
(8) any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4)."

for purposes of appeal.").

This is because Motion to Correct Errors only applies to final judgments, not interlocutory orders. Forman v. Penn, 938 N.E.2d 287, 289 (Ind.Ct.App. 2010) (dismissing appeal taken by party who filed a Motion to Correct Error before trial court entered final judgment); In re Estate of Hammar, 847 N.E.2d 960, 963 (Ind. 2006) ("Because the request before the trial court did not pertain to a final judgment or appealable final order, Indiana Trial Rule 59, applicable to a motion to correct error, was inappropriate for this case."); D.A. v. State, 967 N.E.2d 59, 64 (Ind. Ct. App. 2012) (because "there is no final judgment … D.A. had no grounds to file a motion to correct error"); Keck v. Walker, 922 N.E.2d 94, 98 (Ind.Ct.App. 2010) ("Because the trial court's order was not a final order, Keck and Russell should not have filed a motion to correct error").

Thus, even if styled a "motion to correct error," a motion filed after an non-final judgment will be considered a motion to reconsider. *See* Severance v. Pleasant View Homeowners Association, Inc., 94 N.E.3d 345, 349 (Ind.App., 2018) ("because there was no final judgment, the HOA's self-styled motion was in fact a motion to reconsider and, contrary to the trial court's conclusion here, its subsequent ruling on that motion could not itself be considered a final judgment pursuant to Indiana Appellate Rule 2(H)(4).').

G. "Otherwise deemed final by law"

A judgment is considered a "final judgment" for purposes of appeal when "it is otherwise deemed final by law." Ind. Appellate Rule 2(H)(5). As seen below, case law and statutes sometimes declare something as final when it would not otherwise be final.

> **PRACTICE TIP:** If it is case law that declares something final, make sure to identify the reasoning used by the court as to why it was declared final, and keep in mind that in the Supreme Court in Berry v. Huffman, 643 N.E.2d 327 (Ind. 1994), overruled the previous "distinct and definite branch doctrine" that older cases often relied on to deem something "final" for purposes of appeal.

1. Declaratory Judgments as Final Judgments

"Pursuant to the Uniform Declaratory Judgment Act, declaratory orders, judgments, and decrees have the force and effect of final judgments and are reviewed as any other order, judgment, or decree." Indiana Farmers Mut. Ins. Co. v. Ellison, 679 N.E.2d 1378, 1380 (Ind. Ct. App. 1997); IND. CODE § 34-14-1-1 ("The declaration has the force and effect of a final judgment or decree."). *See also* 10 IND. LAW ENCYC. *Declaratory Judgments* §25 ("Declaratory orders, judgments, and decrees have the force and effect of final judgments," noting that "A declaratory judgment is a final judgment not only in form but also in effect."); 22A IND. PRAC., *Civil Trial Practice* §36.14 (2d ed.); Stump v. St. Joseph Cty. Treasurer, 33 N.E.3d 360, 362 (Ind.Ct.App.2015); Johnson v. Johnson, 920 N.E.2d 253, 255 (Ind. 2010); Ingram v. City of Indianapolis, 759 N.E.2d 1144, 1146 (Ind.Ct.App.2001); Ember v. Ember, 720 N.E.2d 436, 438 (Ind.Ct.App.1999); Indiana

Farmers Mut. Ins. Co. v. Ellison, 679 N.E.2d 1378, 1380 (Ind.Ct.App.1997); Wendy's of Ft. Wayne, Inc. v. Fagan, 644 N.E.2d 159, 161 (Ind.Ct.App.1994); Am. Econ. Ins. Co. v. Motorists Mut. Ins., 593 N.E.2d 1242, 1244 (Ind. Ct. App. 1992), *summarily affirmed on this point*, 605 N.E.2d 162 (Ind. 1992).

This "deemed final" rule applies even when counts and claims are still pending in the trial court. *See* Tramill v. Anonymous Healthcare Provider, 37 N.E.3d 553 (Ind.Ct.App. 2015); Founders Ins. Co. v. Olivares, 894 N.E.2d 586 (Ind.Ct.App. 2008); Schmidt v. Schmidt, 812 N.E.2d 1074 (Ind.Ct.App. 2004); United of Omaha v. Hieber, 653 N.E.2d 83 (Ind.Ct.App. 1995); Bd. of Comm'rs of Hendricks Cty. v. Town of Plainfield, 909 N.E.2d 480 (Ind.Ct.App. 2009).

2. CHINS proceedings

"Within the CHINS context, a court's finding of CHINS status is a mere preliminary step to final disposition of the matter. Standing alone, the CHINS finding does not constitute a final, appealable judgment. Even after making a CHINS determination, the court is still required to hold a dispositional hearing to determine next steps in the child's placement, care, treatment, or rehabilitation and the nature and extent of the parent's, custodian's, or guardian's role in fulfilling those steps. The court must then issue written findings and conclusions in a dispositional decree. To the extent our case law leaves any doubt, we make explicit that a CHINS determination, by itself, is not a final judgment." In re D.J. v. Indiana Department of Child Services, 68 N.E.3d 574, 578 (Ind. 2017).

"The no reasonable efforts order, in addition to finding that DCS was not required to make reasonable efforts to reunify Mother and R.H., suspended Mother's visitation with R.H. The permanency order changed the permanency plan from reunification to adoption. In short, whether or not there is an order denominated a "dispositional decree" in the record, the juvenile court's orders as a whole serve the purpose of a dispositional decree and further, effectively end the relationship between Mother and R.H. and allow DCS to move forward with termination proceedings…. Thus, whether or not the court's orders are technically a final judgment, they operate as one, and consequently, we will consider Mother's argument." In re R.H., 55 N.E.3d 304, 308 (Ind.App.,2016).

"The CHINS case is still open, and will remain open until the Child turns eighteen and is no longer a ward of the State. This order is not a dispositional decree, nor does it modify the dispositional decree already in place. Finally, this order was not entered following a permanency hearing; Child's permanency plan had already been changed to APPLA. Therefore, it seems that this is not a final judgment. When one takes a step back to look at the effect of this order, however, a different picture emerges…. In this case, DCS asked that Child's permanency plan be changed to adoption, with the intention of filing a petition to terminate the parent-child relationship with respect to both of Child's parents. The juvenile court denied that request, instead determining that a plan of APPLA was in Child's best interests. The practical effect of a change of plan to APPLA is that Child will remain a ward of the State until she reaches the age of majority. She will either remain in foster care or live in a facility or group home, and she will continue to receive the treatment and services she needs. Her CHINS case will remain open until she turns

eighteen. By ordering that all contact between Mother and Child cease, the trial court is effectively ending that relationship until Child is a legal adult, at which time it will be her choice to resume contact with Mother. Child will turn eighteen in July 2016—over two years away from the date on which the juvenile court ordered contact between Child and Mother to cease. Whether or not this is technically a final judgment, it certainly operates as one." In re E.W., 26 N.E.3d 1006, 1008–09 (Ind.App.2015).

3. Guardianship proceedings

Guardianships can remain open and docketed for years. When a trial court resolves a singular issue and no other issues are raised, resolution of that issue will be a final judgment even those the case is no disposed of. *See* In re Guardianship of Phillips, 926 N.E.2d 1103, 1106 (Ind.Ct.App. 2010) ("The trial court's order denying [Guardian's] petition to revoke the Joint Trust disposed of the issue of whether the Joint Trust would remain in effect…. no other issues were raised in the pleadings that are part of the record in this case. Thus, it is immaterial that the guardianship remained open … The trial court's denial of [Guardian's] petition … is a final judgment appealable as of right").

4. Probate Final Accounting as Final Judgment

The same considerations often arise in probate proceedings. For example, "The probate court's approval of the final accounting has the force of final judgment . . . . the approval of a final accounting, settlement, and closure of an estate is a final judgment on the claims against the estate and may not be attacked collaterally." Trinkle v. Leeney, 650 N.E.2d 749, 752 (Ind. Ct. App. 1995); see also IND. CODE § 29-1-17-2(d) ("The decree of final distribution shall be a conclusive determination of the persons who are the successors in interest to the estate of the decedent and of the extent and character of their interest therein, subject only to the right of appeal and the right to reopen the decree. It shall operate as the final adjudication of the transfer of the right, title and interest of the decedent to the distributees therein designated; but no transfer before or after the decedent's death by an heir or devisee shall affect the decree, nor shall the decree affect any rights so acquired by grantees from the heirs or devisees.").

5. Orders Compelling Arbitration Sometimes Considered Final Judgments

The Indiana Arbitration Act provides:

(a) An appeal may be taken from:

(1) an order denying an application to compel arbitration made under section 3 of this chapter (or IC 34-4-2-3 before its repeal);

(2) an order granting an application to stay arbitration made under section 3(b) of this chapter (or IC 34-4-2-3(b) before its repeal);

(3) an order confirming or denying confirmation of an award;

(4) an order modifying or correcting an award;

(5) an order vacating an award without directing a rehearing; or

(6) a judgment or decree entered pursuant to the provisions of this chapter (or IC 34-4-2 before its repeal).

(b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

IND. CODE § 34-57-2-19.

Indiana courts have generally treated this statute as creating an interlocutory appeal as of right. *See* Williams v. Orentlicher, 939 N.E.2d 663, 665 (Ind.App.,2010) ("This interlocutory appeal is authorized by statute. See Ind.Code § 34–57–2–19(a)(1); see also Ind. Appellate Rule 14(D) (authorizing interlocutory appeals as provided by statute)).

The court in Northern Indiana Commuter Transp. Dist. v. Chicago Southshore and South Bend R.R., 793 N.E.2d 1133 (Ind.App.,2003), however, held that "an order compelling arbitration is an appealable final order in an action solely for that purpose because such an order has fully decided the issue before the court." Id. at 1135. Although this case was decided years after Berry v. Huffman, the case law it relied upon was from the "distinct and definite branch doctrine." Id. (citing Evansville–Vanderburgh Sch. Corp. v. Evansville Teachers Ass'n, 494 N.E.2d 321, 323–24 (Ind.Ct.App.1986) and Angell Enters., Inc. v. Abram & Hawkins Excavating Co., 643 N.E.2d 362, 364 (Ind.Ct.App.1994).

In this author's opinion, Northern Indiana Commuter Transp. Dist. is not good law. *Cf* Brockmann v. Brockmann, 938 N.E.2d 831, 833–34 (Ind.App.,2010) ("In Mother's response to our rule to show cause why her appeal should not be dismissed, she directed this court to Evansville–Vanderburgh School Corporation v. Evansville Teachers Association, 494 N.E.2d 321 (Ind.Ct.App.1986). In that case, we addressed whether an order compelling arbitration was a final appealable order. After considering opposing points of view from other jurisdictions, we held, "[a]n order compelling arbitration is an appealable final order in an action solely for that purpose because such an order has fully decided the issue before the court." Id. at 323–24. The Evansville case has never been overruled, and in fact has been cited with approval on several later occasions.").

6. Ruling on Motion to Compel Former Counsel to Surrender Case File May be Final Judgment

A ruling on a party's motion to compel former counsel to turn over the case file to the client may be a final judgment. *Compare* Smith v. State, 426 N.E.2d 402, 404 (Ind. 1981), and Johnson v. State, 762 N.E.2d 222 n.1 (Ind. Ct. App. 2002), with Johnson v. State, 756 N.E.2d 965, 966 (Ind. 2001).

7. Petition for Judicial Review of a Chemical Breath Test Refusal Determination

"[W]e note that a trial court's denial of a defendant's petition for judicial review of a chemical breath test refusal determination is a final appealable judgment." Timmons v. State, 723 N.E.2d 916, 922 (Ind.Ct.App. 2000), vacated in part on other grounds on rehearing, 734 N.E.2d 1038 (Ind.Ct.App. 2000); IND.CODE ¶ 9-30-6-10-(g) ("The court's order is a final judgment appealable in the manner of civil actions by either party.").

8. Denial of Bail as Final Judgment

"The denial of bail is deemed a final judgment appealable immediately, without waiting for the final judgment following trial. This is so because it is 'entirely independent of the issues to be tried.'" Bradley v. State, 649 N.E.2d 100, 106 (Ind. 1995). "The rationale supporting an immediate appeal from the denial of bail simultaneously authorizes the trial court to proceed with trial during the pendency of such appeal. Such proceeding does not constitute intermeddling with the bail appeal. We decline to hold that an appeal from the denial of bail impinges the jurisdiction of the trial court to proceed." Id.

9. Proceedings Supplemental Order Requiring Money to be Applied in Satisfaction of Creditor's Judgment as Final Judgment

"An order issued as a result of proceedings supplemental, requiring money to be applied in satisfaction of the creditor's judgment, is a final judgment." Park Jefferson Apartments v. Storage Rentals, 738 N.E.2d 685, 688 (Ind. Ct. App. 2000).

10. Order for New Trial as Final Judgment

"A ruling or order of the court granting a motion for a new trial shall be treated as a final judgment. An appeal may be taken on the ruling or order." IND. CODE § 34-56-1-3.

11. Some Utility Orders, Including Those That Set Rates, as Final Orders

Administrative orders that set utility rates have been deemed to be sufficiently "final" to be immediately appealed. "If an order of the Commission constitutes an unequivocal assertion of power of its jurisdiction and authority over a party before it, so that there is an initial and integral step of a regulatory scheme, and if a party is adversely affected by the order, and the verbiage is such that it can only be construed as a final declaration of the Commission, it will be sufficient to present to this court jurisdiction . . . ." Twin City Realty Corp. v. Clay Utilities, Inc., 257 N.E.2d 686, 689 (Ind.Ct.App. 1970).

II. When Does the Clock Start to file the Notice of Appeal?

The time to file a Notice of Appeal from a final judgment under Appellate Rule 9(A) runs from the time "the entry of a Final Judgment is noted in the Chronological Case Summary." IND. APPELLATE RULE 9(A).

It is unclear whether the general exception under the old rule (which ran from entry in the RJO) recognized in Smith v. Deem, 834 N.E.2d 1100, 1109-10 (Ind. Ct. App. 2005) and Estate of Hester v. Hester, 780 N.E.2d 848, 849 (Ind. Ct. App. 2002), remains a recognized exception.

A. Dismissal under Trial Rule 12(B)(6)

Trial Rule 12(B)(6) provides, "When a motion to dismiss is sustained for failure to state a claim under subsection (B)(6) of this rule the pleading may be amended once as of right pursuant to Rule 15(A) within ten (10) days after service of notice of the court's order sustaining the motion and thereafter with permission of the court pursuant to such rule."

"A trial court's entry sustaining a motion to dismiss without actually entering judgment thereon is insufficient to constitute a final judgment." Arflack v. Town of Chandler, 27 N.E.3d 297, 301 (Ind.App.,2015) Thus, "the court should grant the motion, await the expiration of the ten-day period … and then adjudge the dismissal for the failure of the party to plead over. In the alternative, the party against whom the motion is granted may advise the court of his election not to plead over and thus authorize entry of judgment." Id.

B. Trial Rule 58

Trial Rule 58 provides, "upon a decision of the court, the court shall promptly prepare and sign the judgment, and the clerk shall thereupon enter the judgment in the Record of Judgments and Orders and note the entry of the judgment in the Chronological Case Summary and Judgment Docket. A judgment shall be set forth on a separate document, except that a judgment may appear upon the same document upon which appears the court's findings, conclusions, or opinion upon the issues." IND.RULE TRIAL PROC. 58(A).

Indiana courts have held that the failure of a trial court to comply with these mandates does not affect the finality of a judgment if "the order disposed of all of the issues as to all of the parties and put an end to the case" and, therefore, the lack of the entry of final judgment does not affect deadlines flowing from a final order. *See* Montgomery, Zukerman, Davis, Inc. v. Chubb Grp. of Ins. Companies, 698 N.E.2d 1251, 1253, (Ind.Ct.App. 1998); Paulson v. Centier Bank, 704 N.E.2d 482, 488 (Ind.Ct.App. 1998).

Nonetheless, while failure to comply with Rule 58 may not be grounds for a dismissal due to lack of finality, it has been grounds for the appellate court to interrupt

appellate proceedings and remand the case back to the trial court to require compliance with Rule 58. *See* Paulson, 704 N.E.2d at 488 ("because the judgment herein does not meet those [Trial Rule 58] requirements, we remand for the trial court to prepare, sign and enter its judgment in accordance with the rule."); Henderson v. Sneath Oil Co., 638 N.E.2d 798, 804 (Ind.Ct.App. 1994) ("reversal is not warranted here. However, because T.R.58(B) requires specific elements be contained in a judgment, and because that requirement clearly comports with the need for certain information to be maintained for future reference, we remand for the trial court to prepare, sign and enter its judgment consistent with the rule."); Sowders v. Clyde Overdorf Motors, Inc., 289 N.E.2d 332, 335 (Ind.Ct.App 1972) (finding that trial court's order stating, "This matter having been under advisement the court now finds that the plaintiff take nothing by his amended complaint; the court further finds that defendant Clyde Overdorf Motors, Inc. is entitled to recover the sum of $879.21 from plaintiffs, and each of them. Costs taxed to the plaintiff" is "merely a 'finding'" and not a judgment and therefore "the trial court is directed to enter judgment accordingly.").

III. How do you cure finality issues on appeal?

A. Appellate Rule 37 Remand

When a party realizes that finality is lacking, but it can be cured relatively easily via Trial Rule 54(B), 56(C), or some other Order, the best tool is Appellate Rule 37, which provides:

> 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.

IND.APP. R. 37.

For example, a magistrate does not have the ability to enter a "final, appealable judgment"; that must be done by the sitting judge. *See* IND.CODE §33-23-5-8 ("a magistrate … may not enter a final appealable order unless sitting as a judge pro tempore or a special judge."); §33-23-5-9(a) ("a magistrate shall report … a jury's verdict to the

court. The court shall enter the final order.").

"When a court official who is not a duly elected or appointed judge of the court purports to make a final order or judgment, *that decision* is a nullity." Floyd v. State, 650 N.E.2d 28,30-32 (Ind.1994). A party attempting to appeal that decision brings a premature appeal there had not yet been a final judgment when Plaintiff appealed. Id. at 32.

Previously, the lack of a final judgment in this context required dismissal of the appeal until a final judgment could be entered, which would then be followed by the re-initiation of the appeal all over again once the trial court signed off on the magistrate's entry. Floyd, 650 N.E.2d at 32. But Appellate Rule 37 (adopted in 2000) allows the Court of Appeals to exercise its discretion not to dismiss an appeal for prematurity and instead order a limited remand for the purpose of requiring the trial court judge to enter the final appealable order. *See* H.M. v. State, 892 N.E.2d 679,681 (Ind.Ct.App.2008) ("When this case initially reached this Court on appeal, the juvenile court's dispositional orders lacked a signature from the juvenile court judge. We therefore remanded the cause to the juvenile court for the required signatures, retaining jurisdiction over the appeal pending action by the juvenile court.").

> **PRACTICE NOTE:** You cannot request an Appellate Rule 37 remand solely in your Merits Brief; you must also file a separate Verified Motion. *See* Kuchaes v. Public Storage, Inc., 2015 WL 3495822, at *3 (Ind.App.,2015) ("Public Storage requests that, pursuant to Indiana Appellate Rule 37(A), our court temporarily stay the appeal while the trial court conducts a hearing and issues a new order. This we cannot do. Appellate Rule 37(A) requires the party to file a verified motion … No such motion was filed here, and we decline to retain jurisdiction or otherwise limit the trial court's authority on remand.") (Unpublished).

B. Appellate Rule 66(B)

Appellate Rule 66(B) provides, "No appeal shall be dismissed as of right because the case was not finally disposed of in the trial court or Administrative Agency as to all issues and parties, but upon suggestion or discovery of such a situation, the Court may, in its discretion, suspend consideration until disposition is made of such issues, or it may pass upon such adjudicated issues as are severable without prejudice to parties who may be aggrieved by subsequent proceedings in the trial court or Administrative Agency." IND.APP. R. 66(B).

Prior to 2005, the appellate courts routinely used this Rule to address the merits of an appeal even where finality was lacking. Daimler Chrysler Corp. v. Yaeger, 838 N.E.2d 449 (Ind.2005) and Allstate Ins. Co. v. Fields, 842 N.E.2d 804 (Ind. 2006), ended that practice.

Since that time, only one decision has applied Rule 66(B) in the absence of a final disposition:

> In addition, we are mindful that Indiana Appellate Rule 66(B) provides that appeals should not be dismissed as a matter of right merely because the case was not finally disposed of in the court below. We may dismiss such an appeal, or in our discretion, we may suspend consideration until the necessary final disposition is made by the trial court, or we may decide the issues which have been adjudicated so long as they are properly severable. See Ind. Appellate Rule 66(B).
>
> In this case, we could remand to the trial court with instructions to afford Arflack the opportunity to amend and then enter an appropriate judgment. Under the issues the parties seek to litigate and after being presented with fully briefed arguments, it appears that a remand would merely provide delay for the amount of time necessary to secure a procedurally correct entry. We hold that delay to be unnecessary, and that Arflack has waived the error arising from his failure to await the entry of the judgment of dismissal. Therefore, we deny Chandler's request to dismiss this appeal for lack of jurisdiction, and we will address the merits of Arflack's appeal.

Arflack v. Town of Chandler, 27 N.E.3d 297, 301–02 (Ind.App.,2015)

C. Premature appeal

Finally, the Indiana Supreme Court in In re D.J. v. Indiana Department of Child Services, 68 N.E.3d 574 (Ind. 2017), has recently opined as to appellate options if the Notice of Appeal is filed prematurely before a final judgment has been entered:

> **Parents' premature notices of appeal were not fatal to appellate jurisdiction.**
>
> …
>
> Here, the notices of appeal indicated, erroneously, that Parents were pursuing an expedited appeal from a final judgment. In fact, Parents filed their respective notices before the trial court had entered a final judgment. By filing notices of appeal from a non-final CHINS determination—and not a final CHINS judgment—Parents forfeited their rights to appeal….
>
> Indiana's rules and precedent give reviewing courts authority "to deviate from the exact strictures" of the appellate rules when justice requires. In re Howell, 9 N.E.3d 145, 145 (Ind. 2014). "Although our procedural rules are extremely important ... they are merely a means for achieving the ultimate end of

> orderly and speedy justice." American States Ins. Co. v. State ex rel. Jennings, 258 Ind. 637, 640, 283 N.E.2d 529, 531 (1972). See also App. R. 1 ("The Court may, upon the motion of a party or the Court's own motion, permit deviation from these Rules."). This discretionary authority over the appellate rules allows us to achieve our preference for "decid[ing] cases on their merits rather than dismissing them on procedural grounds." Adoption of O.R., 16 N.E.3d at 972 (citation omitted)….
>
> Given the purpose of our appellate rules, our preference for deciding cases on their merits, our Court of Appeals precedent, and the important parental interest at stake, we choose to disregard Parents' forfeiture and reach the merits.

Id., at 578–81.

IV. Addendum (Motion addressing 56(C) Legg, Ramco, Cardiology Assoc issue.

IN THE
INDIANA COURT OF APPEALS
CAUSE NO. 49A02-1112-PL-01120

FLAHERTY & COLLINS, INC.,	)	Interlocutory Appeal from the
	)	Marion Superior Court No. 3
Appellant (Defendant Below),	)	
	)	Cause No. 49D03-0204-PL-715
v.	)	
	)	
BBR-VISION I, L.P. and NEW CASTLE REALTY, LLC,	)	The Honorable Patrick L. McCarty
	)	Judge
	)	
Appellees (Plaintiffs Below).	)	

RESPONSE TO FLAHERTY & COLLINS, INC.'S MOTION FOR LEAVE TO BRING PERMISSIVE INTERLOCUTORY APPEAL

The trial court entered final judgment against Appellant-Defendant Flaherty & Collins, Inc. ("Defendant"), concluding Defendant had committed fraud against Appellees-Plaintiffs BBR-Vision I, LP and New Castle Realty, LLC ("Plaintiffs"); had breached its contract with Plaintiffs; had caused Plaintiffs to suffer damages; and must indemnify Plaintiffs for the attorneys' fees, costs, and expenses incurred with rectifying the problems caused by Defendant's fraudulent and wrongful conduct. Plaintiffs maintain that Defendant is entitled to an immediate appeal of the entry of final partial summary judgment against it on these issues. It does not ultimately matter to Plaintiffs whether this Court allows Defendant to effectuate that appeal via Appellate Rules 9(A)(1), 14(A)(1, 3), or 14(B).

Because Defendant has an immediate right to appeal the October 3, 2011 entry of judgment against it, Plaintiffs agree that interests of judicial economy justify this Court also accepting jurisdiction over the Order denying Defendant's cross-motion for summary judgment and motion to dismiss that was entered on the same day.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was hired to manage Autumn Oaks Apartments, a federally-regulated low-income apartment complex owned by Plaintiffs, and ensure that the complex was in compliance with all federal and state regulations relating to the Tax Credits. (Appellate Rule 34(F) Materials ("Materials") at 2-3.) Plaintiffs thereafter learned that Defendant had failed to perform these duties, had altered and destroyed documents relating to certification of tenant income levels, and sought to cover up its wrongful conduct by failing to bring violations of the qualifying income regulations to the attention of Plaintiffs or the Indiana Housing Finance Authority, even after being expressly told to do so. (Materials at 2-4.)

Plaintiffs sued Defendant and sought partial summary judgment in favor of Plaintiffs on three of the five counts in its Complaint. (Materials at 79-105.) On October 3, 2011, the trial court granted partial summary judgment in favor of Plaintiffs, concluding that:

1. Defendant breached its contract with Plaintiffs, and that this breach caused Plaintiffs to suffer damages (Count I);

2. Defendant committed fraud against Plaintiffs, and that its fraudulent conduct caused Plaintiffs to suffer damages (Count IV); and

3. Defendant must indemnify Plaintiffs for, among other things, Plaintiffs attorneys' fees and the costs and expenses incurred as a result of rectifying the problems caused by the above (Count III).

(Materials at 106-110.)

After determining that Plaintiffs were entitled to recover damages against Defendants as a matter of law, the trial court found that the actual amount of those damages would be tried separately. (Id.) Pursuant to Indiana Trial Rule 56(C), the trial court also declared, "There is no just reason for delay of entry of judgment against [Defendant] according to the terms of this order. Therefore, this order is a final, appealable judgment." (Materials at 110.) The trial court also required Defendant to immediately "post security in an amount sufficient to relieve

[Plaintiffs] of its obligation to maintain an escrow fund associated with any period when units at the Autumn Oaks Apartments were not in compliance with federal and state law, rules and regulations regarding tax credits for low income properties." (Id.)

On that same date, the trial court denied Defendant's cross-motion for summary judgment, finding that Plaintiffs "are entitled to recover damages pursuant to Indiana Code Section 34-24-3-1," which is the Indiana Crime Victims Statute, because "[t]he undisputed evidence establishes that [Defendant's] conduct violates Ind. Code § 35-43-5-2 (forgery and counterfeiting); I.C. 35-43-5-3(a) (deception); and I.C. 35-43-4-2 (theft)." (Materials at 111-12.) The trial court also denied Defendant's motion to dismiss Plaintiff New Castle Realty, LLC because the trial court concluded it had standing to assert its claims as a third-party beneficiary to the contract. (Id.)

Defendant filed a Notice of Appeal as to the order entering final judgment. Defendant also sought Appellate Rule 14(B) certification of this Order and the Order denying Defendant's motion for summary judgment and motion to dismiss.

ARGUMENT

As explained below, Defendant is entitled to an immediate appeal of the entry of final partial summary judgment against it pursuant to Appellate Rules 9(A)(1) or 14(A)(1, 3). In addition, as long as Defendant is permitted to immediately appeal the October 3, 2011 order, Plaintiffs have no objection to this Court instead providing Defendant with this right to appeal using Appellate Rule 14(B). Plaintiffs likewise agree that interests of judicial economy justify this Court also accepting jurisdiction over the Order denying Defendant's cross-motion for summary judgment and motion to dismiss that was also entered on October 3, 2011.

I. Defendants have an immediate right to appeal the October 3, 2011 entry of partial summary judgment against it.

A. The trial court properly directed entry of final judgment as to the issues raised in Plaintiffs' motion for partial summary judgment, and Defendant has a right to appeal that entry pursuant to Appellate Rule 9(A)(1).

After determining that Defendants engaged in fraud and breached their contract with Plaintiffs and that Plaintiffs were entitled to recover damages against Defendants as a matter of law, the trial court found that the actual amount of those damages would be tried separately. Pursuant to Indiana Trial Rule 56(C), the trial court then declared, "There is no just reason for delay of entry of judgment against [Defendant] according to the terms of this order. Therefore, this order is a final, appealable judgment." (Materials at 110.)

In its Motion, Defendant contends that existing case law calls into question whether the trial court had authority to enter final judgment as to less than all of the issues. As explained below, the line of cases cited by Defendant begins with Legg v. O'Connor, 557 N.E.2d 675 (Ind.Ct.App. 1990), which based its decision on how the *federal* courts treat this issue under the Federal Rules of Civil Procedure. The problem with Legg's approach is that when the Indiana Supreme Court enacted Indiana Trial Rule 56(C), it intentionally chose to vary Indiana's Rule 56(C) from its federal counterpart and Legg was wrongfully decided to the extent that it purported to vary the standard set forth in the explicit language of Indiana Trial Rule 56(C).

The two most recent cases on this issue—Cardiology Associates of Northwest Indiana, P.C. v. Collins, 804 N.E.2d 151 (Ind.Ct.App. 2004) and Ramco Indus., Inc. v. C&E Corp., 773 N.E.2d 284 (Ind.Ct.App. 2002)—simply applied the wrongfully-decided law as set forth in Legg. The errors in this line of cases, however, have never been presented to this Court by the parties in those cases, nor have they been presented to the Supreme Court because transfer was never sought in any of the cases.

1. *Indiana Trial Rule 56(C) expressly allows summary judgment to be declared final as to less than all of the "issues"; Federal Rule 56(c) does not.*

As the chart below shows, Indiana Trial Rule 56(C) expressly allows summary judgment to be declared final as to less than all of the "issues," but there is no counterpart as to entry of final judgment on "less than all the issues" in Federal Rule 56:

Indiana Trial Rule 56(C)	**Federal Rule of Civil Procedure 56(c)**
Motion and proceedings thereon. The motion and any supporting affidavits shall be served in accordance with the provisions of Rule 5. An adverse party shall have thirty (30) days after service of the motion to serve a response and any opposing affidavits. The court may conduct a hearing on the motion. However, upon motion of any party made no later than ten (10) days after the response was filed or was due, the court shall conduct a hearing on the motion which shall be held not less than ten (10) days after the time for filing the response. At the time of filing the motion or response, a party shall designate to the court all parts of pleadings, depositions, answers to interrogatories, admissions, matters of judicial notice, and any other matters on which it relies for purposes of the motion. A party opposing the motion shall also designate to the court each material issue of fact which that party asserts precludes entry of summary judgment and the evidence relevant thereto. The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. ***A summary judgment may be rendered upon less than all the issues or claims, including without limitation the issue of liability or damages alone although there is a genuine issue as to damages or liability as the case may be. A summary judgment upon less than all the issues involved in a claim or with respect to less than all the claims or parties shall be interlocutory unless the court in writing expressly determines that there is no just reason for delay and in writing expressly directs entry of judgment as to less than all the issues, claims or parties.*** The court shall designate the issues or claims upon which it finds no genuine issue as to any material facts. Summary judgment shall not be granted as of course because the opposing party fails to offer opposing affidavits or evidence, but the court shall make its determination from the evidentiary matter designated to the court.	**Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. ***A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.*** ** When Federal Rule 56 was extensively revised in 2010, this language referring to interlocutory judgments on liability was eliminated entirely from Rule 56 and no longer appears in the current version of Federal Rule 56.

In 1994, the Supreme Court in Berry v. Huffman, 643 N.E.2d 327 (Ind. 1994), overruled what had been known as the "distinct and definite branch of the litigation" doctrine. This common law doctrine provided that an order or judgment would be final and appealable even if it did not dispose of all the issues as to all the parties, so long as it disposed of "a distinct and definite branch of the litigation." Id. at 328. Because of the uncertainty created by this doctrine and the risk that an order may be deemed final by operation of common law without a party recognizing it, the Supreme Court enacted a bright line approach in Indiana Trial Rules 54(B) and 56(C) "in an effort to provide greater certainty to the parties and to strike an appropriate balance between the interest in the speedy review of certain judgments and the inefficiencies of piecemeal appeals." Id. at 329.

In explaining Indiana Rule 56(C), Chief Justice Shepherd (writing for a unanimous court) held, "T.R. 56(C) states that partial summary judgments are interlocutory unless the trial judge expressly determines in writing that there is not just reason for delay and expressly directs entry of judgment ***as to less than all the issues***, claims, or parties." Id. (emphasis added). The Court concluded, "We hold today that the certification requirements of Trial Rule . . . 56(C) supersede the distinct and definite branch doctrine. Judgments or orders ***as to less than all of the issues***, claims, or parties remain interlocutory until expressly certified as final by the trial judge." Id. (noting that Rule 56(C) provides "useful certainty to the parties and place the discretion with the person in the best position to determine the finality of a trial court's order or judgment—the trial judge.").

The Supreme Court has thus expressly recognized that, when it enacted Indiana Trial Rule 56(C), it intended to allow a trial court to certify as final an order resolving less than all the issues. In his Treatise on the Indiana Trial Rules, Professor Harvey—who was one of the

original drafters of Indiana Rule 56(C)—likewise explains Indiana's conscious decision to be different from the Federal Rules: "In the 1970 Rules, [Indiana] Rule 56(C) contained a provision not found in the 1965 Indiana Summary Judgment Act, and not found in the Federal Rule either. It permits the court to make a partial summary judgment, or other interlocutory order entered under Rule 56, final and appealable as such." WILLIAM F. HARVEY, 3A IND. PRAC., *Rules Of Procedure Annotated R* 56 (explaining that if an interim order that 'disposes of less than the entire case' contains the Trial Rule 54(B) or Trial Rule 56(C) 'magic language' of the rule then it can be appealed as a final judgment—again, *even if there are other issues between the parties in the trial court that await a decision*, or final judgment. This gives clear understanding to the definition of finality and to the certification under Trial Rule 54(B) and 56(C)[.]").

As seen in the chart above, Federal Rule 56(C) contains *no* provision allowing for entry of final judgment at all. Instead, any entry of partial final judgment in the summary judgment context must occur via Federal Rule 54(b), which—like Indiana's Rule 54(B)[1]—only allows partial final judgment only as to claims or parties, *not* issues. Given the express language in Federal Rule 54(b) applying only to claims and not issues, the federal courts have expressly declared that final judgment may *not* be entered under Federal Rule 54(b) as to less than all of the issues, but to be final an order "must dispose of at least a single substantive claim." Acha v. Beame, 570 F.2d 57, 62 (2nd Cir. 1978) ("To be certifiable under the terms of Rule 54(b) a judgment must possess the requisite degree of finality, and must dispose of at least a single

[1] IND. TRIAL RULE 54(B) ("When more than one [1] claim for relief is presented in an action ... the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. . . . A judgment as to one or more but fewer than all of the claims or parties is final when the court in writing expressly determines that there is no just reason for delay, and in writing expressly directs entry of judgment, and an appeal may be taken upon this or other issues resolved by the judgment; but in other cases a judgment, decision or order as to less than all the claims and parties is not final.").

substantive claim. Thus a partial or interlocutory adjudication of a claim cannot properly be certified, even if this is attempted by means of a 'partial summary judgment' and even if the requisite 'express determination' has been made.").[2]

The distinction between the text of Indiana's Rule 56(C)—which expressly *does* allow for entry of final judgment as to less than all the issues—and the text of Federal Rules 54(b) and 56(c)—which do *not* allow for entry of final judgment as to less than all the issues—is critical in understanding where the Legg court went wrong.

2. *The Legg court improperly based its decision on the Federal Rules without taking into account the material and dispositive differences in Indiana Rule 56(C).*

The plaintiff in Legg brought a negligence action against her physicians. The trial court granted the physicians' partial summary judgment on all issues related to the negligence claim, except the issue of whether the plaintiff had been informed of the risk that her colon could be perforated in the surgery. The trial court declared that there was not just reason for delay, entered partial final judgment, and reserved for trial the issue of informed consent. On appeal, the plaintiff alleged that the entry of final judgment was improper. In response, the physicians argued that, "because T.R. 56(C) permits the trial court to enter summary judgment on fewer than all the issues, and the court certified its order according to the rule, the judgment is properly before us on appeal." Legg, 557 N.E.2d at 676.

Addressing this argument on appeal, the Legg court did not discuss the significant

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[2] *Accord* WRIGHT & MILLER, 10 Fed. Prac. & Proc. Civ. § 2656 (3d ed.) ("Despite its apparently broad scope, Rule 54(b) may be invoked only in a relatively select group of cases and applied to an even more limited category of decisions. . . . [To invoke Federal Rule 54(b),] at least one claim . . . must be finally decided. . . . Therefore, a partial summary judgment that decides some of the issues pertinent to a single claim is interlocutory and not within the scope of the rule, but a summary judgment that completely disposes of one of several claims will be final and appealable if a Rule 54(b) certificate is made.").

differences between Indiana Rule 56(C) and Federal Rules 56(c) and 54(b). Instead, it simply declared "the certification language of T.R. 54(B) and the related cases apply with equal force to T.R. 56(C) and partial summary judgments" and then applied *federal Rule 54(b)* law to the *Indiana* Rule 56(C) issue: "To be certifiable under Rule 54(b) of the Federal Rules of Civil Procedure, a judgment must possess the requisite degree of finality, and must dispose of at least a single substantive claim." Id.[3] The court then concluded that trial court's entry of partial summary judgment "on all the issues except informed consent did not dispose of a claim separate from Legg's negligence claim. . . . The trial court's order was interlocutory despite the certification[.]" Id. at 677.

The Legg court erred in concluding that Rule 54(b) cases—both federal and state—governed whether a final judgment as to less than all of the issues was permitted under Indiana Rule 56(C). The material differences between Indiana Rule 56(C) and Federal Rules 56(c) and 54(b) are dispositive, and Indiana Rule 56(C) expressly allows "summary judgment upon less than all the issues involved in a claim" and allows the court to "expressly determine[ ] that there is no just reason for delay and in writing expressly directs entry of judgment as to less than all the issues." IND. TRIAL RULE 56(C).

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[3] The Legg Court relied on Creech v. Southeastern Indiana REMC, 469 N.E.2d 1237 (Ind.Ct.App. 1984), as support for its reliance on Rule 54(b). Creech, however, did not address whether a final judgment as to less than all of the issues was permitted under Indiana Rule 56(C). Rather, the issue in Creech was whether the trial court was required to make specific findings explaining its reasons for certifying its order as final under Trial Rule 56(C). In deciding this issue, the Court of Appeals noted that "We have no quarrel with the idea that T.R. 56(C) and T.R. 54(B) are interrelated" because "[a]bsent a 'certification' by the trial court, a partial judgment pursuant to T.R. 54(B) is an interlocutory order and is not appealable unless it falls within the parameters for certification of an interlocutory appeal. This requirement also applies to T.R. 56(C) and partial summary judgments." Creech, 469 N.E.2d at 1240. The Creech court then relied on federal law interpreting Federal Rule 54(b) and concluded that the trial court was *not* required to make specific findings explaining its reasons for certifying its order as final under Rule 56(C).

To the extent that it conflicts with the clear language of Trial Rule 26(C), Legg was wrongly decided. Because the decisions in Cardiology Associates and Ramco, are based on the law as decided in Legg, these decisions incorrect as well. This is the same conclusion reached by Professor Harvey in his Treatise on Indiana Rule 56, opining that the decisions in Legg, Ramco, and Cardiology Associates "cause real concern" because the decisions:

> (a) do not follow the Indiana Supreme Court in Berry v. Huffman, and in Georgos v. Jackson;
> (b) they do not acknowledge that Trial Rules 54(B) and 56(C) turn an interlocutory order into a final order when their "words of magic" are followed;
> (c) they do not recognize the definitions of "finality" in Appellate Rule 2(H) and the strength given to them in Georgos; and
> (d) they do not recognize the definition of finality in a Trial Rule 54(B) and Rule 56(C) order that is established in Appellate Rule 2(H).

WILLIAM F. HARVEY, 3A IND. PRAC., *Rules Of Procedure Annotated R* 56.

The Treatise also explains that the "concern about 'piecemeal litigation'" expressed in Ramco and Cardiology Associates is misplaced because Trial Rule 56(C) was expressly "written to effectuate these results, even if 'at first blush' they might seem to encourage 'piecemeal' litigation and appeals." Id. Instead, Rule 56(C) recognizes that "in notice-pleading litigation, and especially with the Discovery rules, there are 'pieces' of a case that are so important to the parties that a decision on that 'piece,' once made, might end or conclude the entire case." Id.

Given the Supreme Court's adoption of Rule 56 and its description of this Rule in its existing jurisprudence, Plaintiffs are confident that the admonitions and concerns about this line of cases will be well-received when this issue is addressed by this Court or the Supreme Court on transfer, and that either court will agree that the trial court properly declared entry of final judgment as to less than all of the issues.

B. Defendant also has a right to appeal the October 3, 2011 entry of judgment as an interlocutory appeal of right pursuant to Appellate Rule 14(A)(1, 3).

The trial court's October 3, 2011 order required Defendant to immediately "post security in an amount sufficient to relieve [Plaintiffs] of its obligation to maintain an escrow fund associated with any period when units at the Autumn Oaks Apartments were not in compliance with federal and state law, rules and regulations regarding tax credits for low income properties." (Materials at 110.)

Because of this mandate, Defendant is allowed to immediately appeal the October 3, 2001 order as a matter of right under Appellate Rule 14(A), which allows for an interlocutory appeal as of right from any order "For the payment of money" or "To compel the delivery or assignment of any securities, evidence of debt, documents or things in action." IND.APPELLATE RULE 14(A)(1, 3); John Wendt & Sons v. Edward C. Levy Co., 685 N.E.2d 183, 187 (Ind.Ct.App. 1997). This Rule thus provides an independent basis upon which to base an appeal as of right.

C. Plaintiffs have no objection to this Court providing Defendant with its right to appeal pursuant to Appellate Rule 14(B).

Due to the status of existing law related to the entry of final judgment on less than all of the issues discussed in Section I(A), above, Defendant also asked this Court to accept jurisdiction over this appeal via Appellate Rule 14(B). Plaintiffs agree that the issues raised in the trial court's October 3, 2011 grant of judgment against Defendant meet the criteria found in Appellate Rule 14(B) and would justify a discretionary appeal under that Rule if an immediate appeal is not permitted via Appellate Rules 9(A)(1) or 14(A)(1,3).

So long as Defendant is permitted to immediately appeal the October 3, 2011 order, Plaintiffs have no objection to this Court deciding not to address the issues presented by the

above-discussed, wrongfully decided case law involving Trial Rule 56(C) and to instead provide Defendant with its right to appeal pursuant to Appellate Rule 14(B).

II. This Court should accept jurisdiction over the trial court's October 3, 2011 denial of Defendant's motion for partial summary judgment.

Given that the October 3, 2011 is appealable via multiple Rules, Plaintiffs agree that interests of judicial economy justify this Court accepting jurisdiction over the Order denying Defendant's cross-motion for summary judgment and motion to dismiss that was also entered on October 3, 2011.

FROST BROWN TODD LLC

By: _____

Thomas F. Bedsole, #15980-49
Maggie L. Smith, #19572-53
Attorneys for Appellees BBR-Vision I, L.P.
and New Castle Realty, LLC

VERIFIED STATEMENT OF WORD COUNT

The undersigned verifies that Appellees' Response to Flaherty & Collins, Inc.'s Motion for Leave to Bring Permissive Interlocutory Appeal contains 4,018 words, as counted by the word processing system used to prepare the Response, MS Word 2007.

Maggie L. Smith, #19572-53
Attorney for Appellees BBR-Vision I, L.P.
and New Castle Realty, LLC

CERTIFICATE OF SERVICE

Service of the foregoing was made by placing a copy of the same into the United States Mail, first class postage prepaid, this 28-29 day of December, 2011, addressed to:

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John B. Drummy
Crystal G. Rowe
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1079706v1

Section Two

14(B) Interlocutory Appeals

Cara L. Schaefer Wieneke
Wieneke Law Office, LLC
Brooklyn, Indiana

Section Two

14(B) Interlocutory Appeals…….….. Cara L. Schaefer Wieneke

2021 Statistics for Interlocutory Appeals

Total petitions filed in 2021: 247

Civil petitions
Filed: 108 (44%)
Granted: 43 (40% of civil petitions filed; 17% of all petitions filed)

Criminal petitions
Filed: 139 (56%)
Granted: 50 (36% of criminal petitions filed; 20% of all petitions filed)

Suggested Topics for Discussion

I. Strategies for obtaining certification in the trial court

A. Mostly/completely dispositive of the case

- Motions to dismiss, particularly where grant was/would be largely dispositive of entire case
    - *Butler Motors, Inc. v. Benosky et al.*, 181 N.E.3d 304 (Ind. Ct. App. 2021), *trans. denied* (MTD denial of auto dealers; granting of MTD would have resolved lawsuit)
    - *The Residences at Ivy Quad Unit Owners Association, Inc. v. Ivy Quad Development, LLC*, 179 N.E.3d 977 (Ind. 2022) (dismissal of some defendants from lawsuit at 12(b)(6) stage)
    - *But see Trustees of IU v. Spiegel*, 186 N.E.3d 1151 (Ind. Ct. App. 2022) (partly granting, partly denying dismissal of claims against university for pandemic-related restrictions)

- Summary judgment motions, often where facts are primarily settled and dispute is over legal issue

    - *Coplan v. Miller*, 179 N.E.3d 1006 (Ind. Ct. App. 2021), *trans. denied* (denial of summary judgment motion of mental health providers in lawsuit brought by widow where family member treated by providers killed widow's husband)

    - *BoJak's Bar and Grille v. Henry*, 170 N.E.3d 264 (Ind. Ct. App. 2021) (denial of SJ on issue of duty of care owed by bar when one patron attacked another)

- "Major" discovery disputes

    - *Duncan v. Barton's Discounts, LLC*, 178 N.E.3d 810 (Ind. Ct. App. 2021) (discovery dispute/motion to compel/protective order sought/5th Amend invocation – discovery sought was big part of plaintiff's case and could resolve litigation, based on what it revealed)

    - *State v. Lyons*, 2022 WL 1482573 (Ind. Ct. App. 2022) (discovery sanction against State, which prohibited admission of polygraph in child molesting case)

- Indiana Criminal Rule 4/speedy trial issues and evidence suppression issues

    - *Blake v. State*, 176 N.E.3d 989 (Ind. Ct. App. 2021) (denial of motion for discharge under Indiana Criminal Rule 4)

    - *Priest v. State*, 181 N.E.3d 1046 (Ind. Ct. App. 2022) (denial of motion to suppress breath test results in criminal case where breath test results were element of offense)

B. Miscellaneous

- *State v. Neukam*, ___ N.E.3d ___ (Ind. Jun. 23, 2022) (denial of State's request to add criminal charges on jurisdictional grounds)

- *I-65 Plaza, LLC v. Indiana Grocery Group, LLC*, 167 N.E.3d 1161 (Ind. Ct. App. 2021) (order allowing lessor to take immediate possession of property from lessee)

II. Strategies for obtaining permission from the appellate court

- Remember Appellate Rule 14(B)(C) grounds for granting petition
- Some jurisdictions frame the consideration as whether the issue is a "controlling question of law" in the case, and whether resolution of that question of law will "materially advance the litigation."
- The Court of Appeals does not want to do "piecemeal" appeals
- The more desirable the legal issue, the more likely the Court will want to hear it.

III. Process in the appellate court

IV. "Deemed denied"/belated certification

- *NCAA v. Finnerty*, 170 N.E.3d 1111 (Ind. Ct. App. 2021), *trans. granted*
- Can Indiana Appellate Rule 66(B) provide any help?
    - Generally cannot all involve cases where no trial court certification was first obtained (*Daimler Chrysler Corp. v. Yaeger*, 838 N.E.2d 449 (Ind. 2005))
    - *Arflack v. Town of Chandler, Indiana*, 27 N.E.3d 297 (Ind. Ct. App. 2015) (addressed merits of appeal from grant of motion to dismiss, even though grant was not yet "final" because appellant had opportunity to amend complaint)

STATE OF INDIANA) IN THE LAWRENCE SUPERIOR COURT I
) SS:
COUNTY OF LAWRENCE) CAUSE NO. 47D01-1707-F1-000973

STATE OF INDIANA

VS

BRYAN LYONS

MOTION TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL

Comes now the State of Indiana, by its Chief Deputy Prosecuting Attorney for the 81st Judicial District, Allison M. Chopra, and respectfully moves the Court to certify for interlocutory appeal the Court's Order issued on September 9th, 2021. In support of this motion, the State shows the Court the following:

1. On October 3, 2017, the State filed an information charging the Defendant, Bryan Lyons, with Child Molesting as a Level 1 Felony.
2. On September 4, 2018, the state filed it notice of intent to seek Repeat Sexual Offender Enhancement.
3. On March 11, 2020, Defendant filed Motion to Suppress.
4. On August 11, 2020, the Court held the suppression hearing.
5. On August 25, 2020, the Court issued an Order denying the Defendant's Motion to Suppress.
6. On July 19, 2021 the Defendant filed a Motion to Continue the trial, which the Court granted.
7. On August 12, 2021, the Court held a hearing on the issues raised by the Defendant on July 19, 2021.
8. On September 9, 2021, the Court ordered evidence excluded, including the Defendant's confession during a post-polygraph interview, due to late discovery under Indiana Trial Rule 37(b)(2).
9. The State seeks that the Order entered on September 9, 2021, be certified for interlocutory appeal.
10. The concise issues to be addressed in the interlocutory appeal are the following:

a. Whether the Court abused its discretion by sanctioning the State for late discovery under Indiana Trial Rule 37(B)(2) by excluding the Defendant's statements

11. An interlocutory appeal on this issue should be granted, as (1) the issue involves a substantial question of law, the early determination of which will promote a more orderly disposition of the case, and (2) the remedy by appeal is inadequate for the State as the State has no remedy should a trial proceed without the excluded evidence and the Defendant is acquitted.

WHEREFORE, the State of Indiana, prays that this motion be granted and that this Court certify its Order of September 9, 2021, for purposes of Interlocutory Appeal, and for all other relief just and proper in the premises.

Respectfully submitted,

/s/ Allison M. Chopra

_____

Allison M. Chopra
Chief Deputy Prosecuting Attorney
Attorney #35186-53

Certificate of Service

The undersigned hereby certifies that a copy of the foregoing Motion was duly served upon David Shircliff, Attorney for the Defendant, pursuant to Trial Rule 86.

/s/ Allison M. Chopra

_____

Allison M. Chopra

Filed: 5/20/2020 1:15 PM
20A-CT-01069

IN THE
INDIANA COURT OF APPEALS

Case No. _____

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant/Appellant, v. JENNIFER FINNERTY, Individually, and as Personal Representative of the ESTATE OF CULLEN FINNERTY, Plaintiff/Appellee;	Appeal from the Marion Superior Court No. 1 Trial Court Cause Nos.: 49D01-1808-CT-033896, 49D01-1901-CT-002954, and 49D01-1905-CT-021770
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant/Appellant, v. CAROL ANDERSON, Individually, and as Personal Representative of the ESTATE OF NEAL ANDERSON, Plaintiff/Appellee;	The Honorable Heather Welch, Judge
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant/Appellant, v. MAURA SOLONOSKI, Individually, and as Attorney-in-Fact for ANDREW SOLONOSKI JR., Plaintiff/Appellee.	

DEFENDANT-APPELLANT
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION'S
MOTION TO ACCEPT INTERLOCUTORY JURISDICTION

This request for interlocutory review concerns three cases that involve alleged head injuries from college football. The cases will turn in critical part on fact-specific inquiries: did the plaintiffs suffer head injuries while playing college football, what

medical condition did each player experience, what caused that condition, and was the NCAA responsible? Plaintiffs contend that to answer these questions, they must depose three of the NCAA's most senior executives: its President (its highest officer), its Chief Operating Officer (its second-in-command), and its Chief Medical Officer. Yet, it is undisputed that none of these officials have firsthand knowledge of the events at issue; indeed, they did not even start working for the NCAA until years after the alleged injuries. Nonetheless, the trial court permitted the depositions on nothing more than an assertion that these officials have general knowledge bearing on head injuries in sports and notwithstanding the fact that plaintiffs have already conducted multiple depositions of lower-level NCAA personnel on the relevant topics. This case thus presents an ideal opportunity to resolve an issue that has long been percolating, but never addressed, in the Indiana appellate courts: whether to adopt the apex-deposition doctrine.

The apex-deposition doctrine holds that deposing a top executive is unreasonably burdensome unless the executive has unique, personal knowledge of the case—that is, knowledge that's not available from documents or other witnesses—that arises from the executive's firsthand involvement in the events giving rise to the suit. Courts across the country, including federal courts in this State, have embraced the doctrine. But our appellate courts have yet to address the issue, likely because it invariably evades review as the injury at issue—sitting for the depositions—cannot be effectively

remedied on appeal after final judgment. As this case comes to the Court in an interlocutory posture, it presents a unique opportunity to finally decide the matter, and hopefully adopt the doctrine as other courts have.

But even if this Court ultimately declines to adopt the apex-deposition doctrine, the depositions are unwarranted, as deposing executives who lack any personal knowledge cannot possibly offer any benefit that would outweigh the potentially staggering burden entailed by their depositions. The NCAA is a defendant in hundreds of head-injury lawsuits. If its top officials could be deposed in every one of them, based only on their general job responsibilities, they could quickly become full-time deponents, crippling their ability to oversee collegiate athletics. Like burdens could be visited on other Indiana organizations caught up in large-scale litigation.

For these reasons, the Court should grant this motion and accept interlocutory jurisdiction to decide this novel and important question of law.

ISSUES PRESENTED

1. Many States have adopted the "apex-deposition doctrine," which holds that deposing an organization's top executives is unreasonably burdensome unless the executive has unique, personal knowledge of the events giving rise to the suit. Indiana's appellate courts have not considered whether Indiana should adopt this rule. Should it?

2. When a trial court weighs the benefits and burdens of deposing an organization's top executives, should the court consider the aggregate burden that would result if the logic of its ruling would also allow depositions of the executives in other similar cases when other individuals with actual knowledge have already been deposed?

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are suing about alleged injuries to three former college football players—two of which occurred half a century ago: Neal Anderson, who played from 1960 to 1964; Andrew Solonoski Jr., who played from 1966 to 1970; and Cullen Finnerty, who played between 2001-2006. (*See* Compls.) Plaintiffs claim the NCAA should have done more to prevent and treat football-related head injuries. (*Id.*) The three cases have been consolidated for discovery. (7/29/19 Consolidation Order.)

Since filing suit, plaintiffs have conducted three 30(B)(6) and two individual depositions of NCAA personnel, as well as document discovery, and are in the process of scheduling a deposition of the NCAA's former Director of Health and Safety. They also want to depose the NCAA's top executives. (8/6/19 Dep. Notices for Emmert, Remy, and Hainline.) President Mark Emmert is the NCAA's highest-ranking officer. Donald Remy, the COO, is the "second-in-command behind the President."[1] He and Dr. Brian Hainline, the NCAA's Chief Medical Officer, are on

[1] *NCAA Leadership Team*, http://www.ncaa.org/about/who-we-are/office-president/ncaa-leadership-team (last visited May 20, 2020).

the NCAA's Senior Management Team, which "is the group of closest advisors at the national office to President Mark Emmert."[2]

Plaintiffs have made only generalized allegations as to what the executives know about these cases. All three executives joined the NCAA between 2010 and 2013, so they had no personal involvement with the policies that were in place when Finnerty, Anderson, and Solonoski were playing college football. Instead, the plaintiffs have noted that, as Chief Medical Officer, Dr. Hainline deals generally with concussion-related issues. (Pls.' Tr. Ct. Apex Dep. Br. at 3.) As to Mr. Remy, plaintiffs admitted that there is "limited evidence on the specifics of [his] concussion dealings," but argued that he "consults with" Dr. Hainline on such matters. (*Id.* at 7.) As to President Emmert, plaintiffs point to certain general public statements he made about student-athlete health and safety in 2014. (*Id.* at 5.)

In the trial court, all three executives submitted declarations stating they have no firsthand knowledge about these cases. Specifically, the executives stated they have no firsthand knowledge of (a) Finnerty, Anderson, or Solonoski, or their participation in collegiate athletics; (b) NCAA documents or information on the causes or long-term effects of traumatic brain injuries during their college careers; (c) the NCAA's actions regarding prevention and treatment of traumatic brain injuries during these time periods; or (d) communications between the NCAA and the institutions at which

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[2] *Id.*

plaintiffs played regarding plaintiffs or any other topic at the time they played. (*See* Emmert Aff. ¶ 7 (attached as Ex. A); Remy Aff. ¶ 7 (attached as Ex. B); Hainline Aff. ¶ 8 (attached as Ex. C).)

The plaintiffs first noticed the executives' depositions before taking almost any other discovery. (*See* 8/6/19 Dep. Notices.) Noting plaintiffs' unreasonable request to go right to the top, the NCAA sought but was denied, a protective order.[3] Soon thereafter, plaintiffs deposed slightly lower-level NCAA employees. In particular, the plaintiffs held a two-day 30(B)(6) deposition of John Parsons, an athletic trainer who is the managing director of the NCAA's Sports Science Institute; as well as a full-day deposition of Terri Steeb Gronau, the Vice President of the NCAA's Division II, the NCAA's Interim Vice President of Inclusion and Human Resources, and one of the 17 members of the NCAA President's Cabinet. (*See* Parsons Dep. Vols. I & II; Gronau Fact Dep.) (Unlike any of the top executives, Ms. Gronau *did* work for the NCAA during the time that Finnerty played college football.)

These witnesses answered the same questions plaintiffs say they want to ask the top executives—questions about the relationship between head impacts and brain dis-

[3] The trial court later issued an order purporting to certify that first denial for interlocutory appeal. But this attempted certification came too late because more than 30 days had passed after the motion and no hearing had been set so certification had already been "deemed denied." Ind. R. App. P. 14(b)(1)(E). This current motion to accept appellate jurisdiction pertains to the trial court's denial of the NCAA's later motion for a protective order. As described below, the trial court timely certified *that* order for interlocutory appeal.

eases, about the NCAA's understanding of that issue and its relevant policies and practices, and about the NCAA's rulemaking authority and its current and historical health-and-safety policies, operations, and duties. Both depositions were contentious, with plaintiffs' counsel choosing to use long stretches of time to argue with the witnesses rather than ask substantive questions. (*See* Second Mot. for Protective Order at 15-17.)

After these depositions, on April 16, 2020, the NCAA again moved for a protective order against deposing the top executives, explaining the depositions were unnecessary in light of the lower-level depositions and unduly burdensome under any standard, especially applying the apex-deposition doctrine. (Second Mot. for Protective Order.) To that motion the NCAA attached fresh declarations from the would-be apex deponents. (*See* Second Emmert Aff. ¶ 7 (attached as Ex. D); Second Remy Aff. ¶ 7 (attached as Ex. E); Second Hainline Aff. ¶ 8 (attached as Ex. F).) In the alternative, the NCAA requested that the trial court certify its order for interlocutory appeal. On May 12, 2020, the trial court denied the protective order but granted the request to appeal. (5/12/2020 Order (attached as Ex. G).)

ARGUMENT

"The discretionary grant of jurisdiction is typically reserved for extraordinary cases raising important and novel legal issues, not for garden-variety challenges to a trial court's factual findings that are appealable after final judgment." INDIANA PRAC-

TICE, APPELLATE PROCEDURE § 5.7 (3d ed.) (citation omitted). A trial-court decision on "an important issue of discovery" is one of the primary "circumstances [that] may merit an interlocutory appeal." 21 INDIANA PRACTICE, CIVIL TRIAL PRACTICE § 1.16 (2d ed.). The order at issue here easily meets all of these criteria.

I. The Court Should Grant Review to Consider Adopting The Apex-Deposition Doctrine.

Many jurisdictions facing the problem of constant demands to depose corporate executives have addressed the matter by adopting what's known as the apex-deposition doctrine. This doctrine holds that depositions of top executives are unreasonably burdensome unless the executive has unique, personal knowledge of the events giving rise to the suit. Indiana's Trial Rule 26 is nearly identical to the rule in the jurisdictions that have adopted the apex-deposition doctrine, but Indiana appellate courts have not yet had the opportunity to consider whether they should adopt the doctrine or not. Interlocutory appeal is the most practical vehicle to take up this question, since once a deposition occurs, the burden has been incurred and can't be undone. Thus, although the depositions here should be quashed under any legal standard, this case presents the Court with a perfect—and rather urgent—opportunity to consider once and for all whether Indiana should follow the apex-deposition doctrine.

A. Application of The Apex-Deposition Doctrine Under Rule 26 Permits Depositions of Top Officials Only on a Showing of Unique, Personal Knowledge.

Trial Rule 26 "was adopted from the Federal Rules of Civil Procedure," *Beckerman v. Surtani*, 26 N.E.3d 630, 633 (Ind. Ct. App. 2015) ("federal authorities are relevant to our interpretation"), and so is very similar to the discovery rules in most States, *see Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 29 (1984) ("Most States … have adopted discovery provisions modeled on Rules 26 through 37 of the Federal Rules of Civil Procedure."). Rule 26 bars discovery that "is unreasonably cumulative or duplicative," that "is obtainable from some other source that is more convenient, less burdensome or less expensive," or that would impose a "burden or expense" that would "outweigh[] its likely benefit."

As adopted by many State and federal courts, the apex deposition doctrine applies these principles to a recurring factual situation: demands to depose high-level officers of a large organization. "Virtually every court that has addressed deposition notices directed at an official at the highest level or 'apex' of corporate management has observed that such discovery creates a tremendous potential for abuse or harassment." *Celerity, Inc. v. Ultra Clean Holding, Inc.*, 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007). This is for three main reasons:

1. Allowing top officers to be deposed based on a "generalized claim that [they have] ultimate responsibility for all corporate decisions or ha[ve] knowledge of corporate policy"[4] would expose the officers to depositions in "[v]ast numbers" of suits.[5]

2. Since top officers supervise many other employees, "it is more likely that others—closer to the action—will have the information relevant to most lawsuits,"[6] so any knowledge an officer might have about a case usually can be obtained with less burden from "depositions of lower level employees, the deposition of the corporation itself, and interrogatories and requests for production of documents directed to the corporation."[7]

3. Because apex deponents are "singularly unique and important" to their employers, they are especially "vulnerab[le]" to having their schedules disrupted by tactical depositions,[8] which present a high "likelihood of harassment and business disruption."[9]

The apex-deposition doctrine applies Rule 26 in a manner that recognizes these realities. The doctrine holds that, if an organization shows that a requested deponent

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[4] *In re El Paso Healthcare Sys.,* 969 S.W.2d 68, 74 (Tex. App. 1998).

[5] *Liberty Mut. Ins. Co. v. Super. Ct.,* 13 Cal. Rptr. 2d 363, 366 (Cal. Ct. App. 1992).

[6] *Smith v. City of Stockton,* 2017 WL 11435161, at *2 (E.D. Cal. Mar. 27, 2017).

[7] *See Crown Cent. Petroleum Corp. v. Garcia,* 904 S.W.2d 125, 128 (Tex. 1995).

[8] *Mulvey v. Chrysler Corp.*, 106 F.R.D. 364, 366 (D.R.I. 1985).

[9] *Six W. Retail Acquisition v. Sony Theatre Mgmt. Corp.*, 203 F.R.D. 98, 102 (S.D.N.Y. 2001).

is one of its apex officials, then the deposition is unreasonably burdensome *unless* the official has unique, personal knowledge of relevant information—that is, knowledge arising from the official's first-hand participation in events that gave rise to the suit, *and* that cannot be discovered by other means such as documents, interrogatories, 30(B)(6) depositions, or depositions of lower-level employees. *E.g., Crown Cent. Petrol. Corp. v. Garcia,* 904 S.W.2d 125, 128 (Tex. 1995); *Liberty Mut. Ins. Co. v. Super. Ct.*, 13 Cal. Rptr. 2d 363, 367 (Cal. Ct. App. 1992).

The apex-deposition doctrine is followed by federal district courts in Indiana,[10] by the Seventh Circuit Court of Appeals,[11] and by federal courts nationwide. (For a review of the caselaw, see 86 A.L.R.6TH 519 (2013 ed.).) Many other States' appellate courts also have adopted the doctrine—including the Court of Appeals of neighboring Michigan.[12] And even for those appellate courts that have not fully adopted the apex-deposition doctrine, they have incorporated its factors into their caselaw.[13]

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[10] *Gumwood HP Shopping Partners v. Simon Prop. Grp.,* 2015 WL 13664418, at *4 (N.D. Ind. July 7, 2015) (barring apex deposition); *In re Cook Med., Inc. IVC Filters Mktg., Sales Practices & Prods. Liab. Litig.*, 2017 WL 9251213, at *1–2 (S.D. Ind. June 30, 2017) (finding criteria met to allow one).

[11] *Patterson v. Avery Dennison Corp.,* 281 F.3d 676, 681–82 (7th Cir. 2002).

[12] *E.g., State ex rel. Massachusetts Mut. Life Ins. Co. v. Sanders,* 724 S.E.2d 353, 364 (W.Va. 2012); *Alberto v. Toyota Motor Corp.,* 796 N.W.2d 490, 494–96 (Mich. Ct. App. 2010); *Crown Cent. Pet. Corp.,* 904 S.W.2d at 128 (Texas); *Liberty Mut. Ins. Co.*, 13 Cal. Rptr. 2d at 366 (California).

[13] *E.g., State ex rel. Ford Motor Co. v. Messina,* 71 S.W.3d 602, 607 (Mo. 2002); *Citigroup Inc. v. Holtsberg*, 915 So. 2d 1265, 1269–70 (Fla. Dist. Ct. App. 2005); *Crest Infiniti, II, LP v. Swinton,* 174 P.3d 996, 1003–04, *as corrected* (Okla. Oct. 10, 2007).

This Court should likewise consider adopting this legal doctrine. For one, it is consistent with the Indiana Supreme Court's goal of fostering "a … predictable court system" that provides "a consistent climate for doing business in Indiana."[14] As this case illustrates, the current practice creates, at best, an atmosphere of chronic uncertainty: Indiana organizations cannot predict how often their top executives will be called away to testify. This in turn generates burdensome litigation costs and inefficiency. Here, for example, the ruling below would make it likely that future plaintiffs, the NCAA (a nonprofit organization), and the Indiana trial courts would have to spend substantial time and effort battling out repeated apex-deposition demands. Worse yet, as described above, the result in this case shows how current Indiana practice makes it extremely difficult to set any meaningful limit on apex depositions.

These are exactly the kinds of recurring problems that appellate courts can address through clear and predictable rules of law. In this context, that means adopting the apex-deposition doctrine.

B. The Apex-Deposition Doctrine Can Most Meaningfully be Considered on Interlocutory Review, and this Case Presents an Ideal Opportunity to Do So.

The apex-deposition doctrine will rarely come up on post-judgment appeal; for once an apex deposition has happened, the burden from the deposition cannot be

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[14] Rush, C.J., *State of the Judiciary Addresses* for 2019, 2015, https://www.in.gov/judiciary/supreme/2587.htm (2019); https://www.in.gov/judiciary/supreme/2502.htm (2015).

ameliorated. That does not mean that the *problem* is moot: the apex official may rightly fear an avalanche of deposition notices in future cases. But the courts in the first case would have no power to prevent those future depositions, and so any post-judgment appeal on the apex-deposition issue would likely raise mootness concerns.

For that reason, the best way for the appellate courts to consider the apex-deposition doctrine is on interlocutory review, *before* an apex deposition goes forward. The same is true here. Once the apex depositions are taken, a later appeal could offer no meaningful remedy. Nor will the ultimate outcome on the merits of this litigation make any difference to the burden that the apex depositions would impose. But, as explained above, allowing the apex depositions here *would* risk opening the floodgates to similar demands in many other cases. To our knowledge, every State appellate court that has considered the apex-deposition doctrine has done so on an interlocutory basis, either through an extraordinary writ application[15] or on a discretionary or other immediate appeal.[16]

Furthermore, the Court would do so without the need to search an extensive trial court record or consider the application of legal principles to the facts of these

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[15] *E.g., Crown Cent. Petrol. Corp.,* 904 S.W.2d at 126; *Citigroup Inc.,* 915 So. 2d at 1268; *Crest Infiniti, II, LP*, 174 P.3d at 998; *Massachusetts Mut. Life Ins. Co.,* 724 S.E.2d at 356; *Ford Motor Co.,* 71 S.W.3d at 605; *Liberty Mut. Ins. Co.,* 13 Cal. Rptr. 2d at 363.

[16] *E.g.*, *Alberto,* 796 N.W.2d at 492; *Rosen v. Smith Barney, Inc.,* 2004 WL 6400515, at *1 (N.J. Super. Ct. App. Div. Feb. 10, 2004).

cases. The lack of the executives' firsthand knowledge of the events in these cases is undisputed, and they are unquestionably top-level executives within the NCAA.

In sum: Indiana's courts should have the same opportunity to consider the apex-deposition rule that many other States' courts have had. Their experience shows that such consideration must come on interlocutory review, just as here.

II. The Court Should Grant Review to Assess The Potentially Staggering Impact of Continual Depositions in This and Other Mass Litigation.

The principles behind the trial court's ruling are a recipe for disaster. Under its logic, virtually every lawsuit involving a business or organization will include depositions of its top executives on the theory that, because they are top executives, they surely know something relevant. The problem is that the trial court appears to have considered only the burden from such depositions in this single case, and not the exponentially greater burden from allowing similar depositions across the broad sweep of litigation. Trial Rule 26 bars discovery that "is unreasonably cumulative or duplicative," or that "is obtainable from some other source that is more convenient, less burdensome or less expensive," or that would impose a "burden or expense" that would "outweigh[] its likely benefit." Ind. R. Tr. P. 26(B)(1). Here, when the modest potential benefit of these depositions is compared with the crushing burden of similar depositions in other cases, it becomes clear they are not warranted.

First of all, the litigation benefit from deposing the executives will be minimal, if not entirely nil. Plaintiffs have never contended that President Emmert, Mr. Remy,

or Dr. Hainline have any firsthand knowledge about the facts underlying these cases. All three executives joined the NCAA between 2010 and 2013, so they had no personal involvement with the NCAA's policies or actions four-to-seven years before, when Finnerty was playing college football—let alone forty-to-fifty years before Anderson and Solonoski played. And each of the executives attested in the trial court—without dispute from plaintiffs—that he has no personal knowledge about Finnerty, Anderson, or Solonoski, or about other topics that are potentially relevant to these cases.

As a result, by far the most effective and efficient ways for plaintiffs to learn about these topics are requesting documents from the NCAA, conducting a 30(B)(6) deposition of the NCAA itself, and deposing lower-level NCAA executives who were actually present for some of the relevant time periods. And in fact, to the extent plaintiffs have used those options in this case, they have already addressed many of the topics that they want to take up with the top executives. Plaintiffs have never explained what additional facts they hope to learn from the top executives that have not been, or could not be, discovered by these less-burdensome methods.

Instead, plaintiffs have demanded depositions by pointing to the executives' general job responsibilities. Since President Emmert has general responsibility for the NCAA's operations, plaintiffs note that he has made some public comments related to head injuries and the NCAA's efforts to address them. (Pls.' Tr. Ct. Apex Dep. Br.

at 3.) As to Mr. Remy, plaintiffs allege only that he also has general responsibility for the NCAA's policies and "consults" regarding head-injury policies. (*Id.* at 7.) And the plaintiffs note that Dr. Hainline is in charge of monitoring medical developments for the NCAA, which includes concussion-related matters.[17] (*Id.* at 3.) Based on these generalities, plaintiffs suggest that the top executives simply *must* know something pertaining to these cases.

On the other hand, the potential burden is enormous. If high-ranking executives could be deposed anytime their job responsibilities or public statements have some general relationship to an ongoing lawsuit, then every wave of litigation against a company would result in innumerable deposition demands. This case perfectly illustrates the problem. These are individual lawsuits on a topic that is generating a large volume of litigation—sports-related head injuries. Plaintiffs want to depose the very top executives of one of Indiana's most prominent organizations. And they seek to do so based on general facts about the executives—public comments about the NCAA's relationship with student-athletes as a whole, or general job responsibilities regarding

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[17] The trial court appears to have allowed Dr. Hainline's deposition on the ground that medical knowledge about head injuries is relevant to this case, and Dr. Hainline has such knowledge. To be clear, the NCAA has cooperated with a 30(B)(6) deposition and other discovery regarding the NCAA's own organizational knowledge on this scientific issue. Not satisfied with that, plaintiffs want to depose Dr. Hainline personally to see if he can add any additional medical insight. Thus, in effect the trial court has allowed plaintiffs to call an employee of a party-opponent as an expert witness. Putting aside the question of whether that can ever be acceptable, for the reasons explained in this motion, it is deeply problematic when the witness is one of the party-opponent's top executives.

NCAA policies or medical knowledge—that could be invoked in every suit involving a concussion, and probably in every suit involving any sports injury. Finally, because the NCAA is headquartered in Indiana, almost any plaintiff can sue it here and take advantage of this broad ruling.

The result is foreboding. The NCAA faces hundreds of similar lawsuits about alleged sports head injuries, including hundreds of putative class actions that are currently pending in federal multi-district litigation in Illinois, many of which will likely be returned to Indiana courts at some point in the future. *See In Re: National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation*, No. 1:13-cv-09116 (N.D. Ill.).

The number of future suits on the same subject is unknown but potentially large. The ultimate venue for most of these claims remains to be decided, but most could eventually be filed in Indiana state court; indeed, two more cases have only recently been filed in Marion County. As a result, if the plaintiffs here can depose the NCAA's top officials, then countless other litigants likely will make the same demand—since, in each case, the cost of taking a few more depositions would pale in comparison to the settlement pressure that tying up the top of the NCAA's hierarchy could generate. And if the ruling below stands, that same result would be duplicated anytime an Indiana based organization is caught up in mass litigation. The litigation

would immediately threaten to turn the organization's top executives into full-time deponents, crippling their ability to run the organization itself.

The trial court does not appear to have considered this aggregate burden. It weighed the benefits and burdens that a deposition would pose in these *individual set of* cases and treated the executives like any other employee of an organization—ruling, essentially, that they can be deposed whenever their job responsibilities pertain to the dispute. As just described, that is not tenable. This Court, with its broader perspective, is well-situated to clarify that, when a party seeks to depose a high-ranking official of an organization, the trial courts should consider the *combined* burden that such discovery would generate across all other similar litigation. To that end, this Court should grant review in this case.

CONCLUSION

The Court should grant this motion and accept appellate jurisdiction.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this motion contains no more than 4,200 words.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 20th day of May, 2020, the foregoing was filed with the Clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court.

I also certify that on this 20th day of May, 2020, the foregoing was served upon the following counsel of record via the Indiana E-Filing System:

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Section Three

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Section Three

Persuasive Writing

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Introduction

- **The ability to persuade with the written word is vital**
    - Two things lawyers strive to do consistently:
        1. Speak persuasively; and
        2. Write persuasively.
    - Important for all lawyers, not just litigators
        - Negotiating deals
        - Communicating with clients
- **Must treat writing as you would any substantive area of the law**
    - Study it
    - Work at it
    - Strive constantly to improve your knowledge

Adopt the mindset of a professional writer

- **Read widely**
    - Lawyers tend to be bad writers, so don't just read the law
        - Read well-written magazines
            - *National Review*
            - *Atlantic*
            - *New Yorker*
            - *Economist*
            - *City Journal*
        - Read books about legal writing
            - Anything by Bryan Garner
                - THE ELEMENTS OF LEGAL STYLE
                - MAKING YOUR CASE
                - THE WINNING BRIEF
        - Read the opinions of judges who write well
            - Roberts
            - Kagan
            - Easterbrook

- **Always read for technique**
    - Read attentively
    - Things to notice
        - The sequencing of ideas
        - The transitions from paragraph to paragraph
        - The means of achieving flow from sentence to sentence
        - The variety of sentence and paragraph lengths
        - The niceties of punctuation
        - The pacing of ideas
        - The number of sentences beginning with conjunctions (especially *And* and *But*)
- **Understand your readers**
    - Be considerate
        - What are their time constraints?
            - E.g., Typical argument day at the Seventh Circuit: 6 cases; roughly 75 pages of briefing per case = 450 pages of briefing per day. This doesn't include record, case law, bench memos, etc.
        - Why does your audience need to read what you've written? Tailor your product accordingly.
            - To decide a case?
            - To make a recommendation to a client?

- Understand likes and dislikes

    - Partners'/judges' likes

        - Clarity
        - Brevity
        - Simplicity
        - Logical flow
        - Accuracy

    - Partners'/judges' dislikes

        - Verbosity
        - Disorganization
        - Lack of synthesis
        - Inattention to detail

- **Cultivate a knack for plain English**

    - Good writing is defined by plain English, whether it's a magazine article, a book, or a legal document.

    - Ask yourself: If I were writing this for an intelligent, educated ***non-lawyer***, is this how I would word it?

    - Sometimes you can't avoid using legal terms and jargon—e.g., *res ipsa loquitur*—but often you can:

        - Change *instant* to *this*: e.g., "The instant case should be dismissed for three reasons."

        - Change *said* to *the*, *that*, *this*, or anything else: e.g., "Said dog then bit said plaintiff causing said injury."

Research deeply

- *Generally*
    - A good written product often starts with good research.
- **Start with treatises and similar sources**
    - Understand a little bit about the general area of law before diving in—read "around" the issue.
    - Be intellectually curious
    - E.gs., Wright & Miller, Am.Jur., C.J.S., I.L.E.
- **Read cases in chronological order**
    - Don't stop with the first case you find on point.
        - Courts are not always consistent. One case may appear to give you what you want, but another may qualify the result.
        - The common law is not made up of one case, but a body of law.
    - Get a sense of the development of the law
        - Has it changed over time?
        - Has the rule become stricter or has it liberalized?
        - Are there certain formulations of the rule that are more favorable than others, and how do I deal with the less favorable formulations?

- **Trace legislative history**
    - Helpful in interpreting difficult clauses or provisions
    - Some judges are not interested in legislative history, but some —maybe most—are, and so you have to appeal to them as well.
- **Understand the purpose of the law**
    - Don't just learn the rule. Learn the reasons for the rule.
    - Demonstrating how your preferred result is consistent with the purpose of the rule makes for a more persuasive argument.
- **Watch for potential counterarguments**
    - Know your weaknesses so you can deal with them preemptively.
- **Note the holding of each case**
    - Cite cases that actually go your way; don't just cite a case because it has good language.
    - E.g., If you want the court to grant your motion to dismiss, look for cases where the appellate court affirmed the dismissal of the case. A case decided on summary judgment may not work.

Outline methodically

- *Benefits of outlining*
    - Forces you to organize your thoughts
    - Forces you to think critically about the flow of ideas
    - Heads off repetition
    - Quickens the writing process
- **Start with a nonlinear outline**
    - Free associate; write what comes to mind
    - Don't get bogged down in organization just yet
- **Then make a short, organized outline**
    - Organize and group ideas
    - Get a bird's eye view of your argument
- **Finally, make a longer, thorough outline**
    - Draft provisional headings
    - Fill in with research and facts

Write a draft straight through

- **Get it on the page//Don't sweat the small stuff at first**
    - Don't let the perfect be the enemy of the good—just write
        - It may not be good at first, but that is what editing is for
        - Ignore proper citation form
    - Start at the beginning and work forward to the end; don't bounce around.
        - Improves logic and flow
        - Avoids repetition
- **Save the introduction/summary for later**

Strive for simplicity and clarity above all else

- ***Generally***
    - Don't worry about style. Learn first to communicate your ideas simply and clearly. Your style will reveal itself over time.
- **Break up long, complex sentences**
    - Good rule of thumb: ***average*** sentence length should be 20 words.
    - Don't make all of your sentences short or your prose will be choppy. Vary your sentence length.
- **Use the active voice**
    - Learn the difference between active voice and passive voice. In the passive, the subject of the clause doesn't perform the action of the verb.
        - E.g.,
            - *Before*: **"**The deadline **was missed** by defense counsel."
            - *After*: "Defense counsel missed the deadline."
        - 2d E.g.,
            - *Before*: "The case **was dismissed** because it **was not prosecuted**."
            - *After*: "The court dismissed the case because the plaintiff failed to pursue it."

- Benefits of the active voice
    - Shortens sentences
    - Eases comprehension by (1) stating squarely who has done what and (2) meeting the reader's expectation of an actor-verb-object order

- **Start each paragraph with a new topic sentence**
    - A good topic sentence announces what the paragraph is about, and the other sentences play a supporting role.
    - Don't end the preceding paragraph with what should be the next paragraph's topic sentence.

- **Manage the length of your paragraphs**
    - If it's a page, it's probably too long.
    - Think about how your work appears on the page.
        - A large wall of text is daunting; the reader needs to see that relief is in sight.

- **Eliminate jargon and legalese**
    - E.gs.,
        - *Change* hereinabove *to* above
        - *Change* heretofore *to* previously
        - *Change* cease and desist *to* stop

- Introductions

    - Eliminate this kind of jargon: "Comes now Defendant, X Corp., by counsel, and files its Motion to Dismiss Plaintiff Y Corp.'s Complaint for Failure to State a Claim Upon Which Relief Can be Granted, and in support of said Motion, X Corp. states as follows: . . ."

    - Just dive right into the substance

- Conclusions

    - *Before*: "For the foregoing reasons, Defendant X Corp. respectfully requests that this honorable Court dismiss Plaintiff Y Corp.'s Complaint, and for all other just and proper relief."

    - *After*: "The plaintiff's complaint should be dismissed."

Write with muscle

- **Replace *be*-verbs with actions verbs**
    - Is, be, are, was, were
    - E.g.,
        - *Before*: "There **is** no savings clause in the statute."
        - *After*: "The statute lacks a savings clause."
- Cut filler phrases such as *there is* and *there are*
    - E.g.,
        - *Before*: "**There are** three reasons why the Court should overrule that case."
        - "The court should overrule that case for three reasons."
- Use short sentences for impact
    - E.g., "Plaintiff assumes this is an ordinary contract subject to the ordinary rules of contract construction. **It is not**."
- End your sentences with punch
    - The end is for emphasis
    - E.g.,
        - *Before*: "The car was being operated with the permission of its owner at all relevant times."

        - *After*: "At the time of the accident, Miller was driving the car **with the owner's permission**."

- Minimize adjectives and adverbs
    - Strive for distinctive nouns and verbs instead.
    - E.g., *change* quickly left the scene *to* fled the scene
    - E.g., *change* he is a rude person *to* he's a boor

Show, don't tell

- Don't say something is unfair; show why it is, and let the reader conclude that it is.

- Don't say the law ***clearly*** requires the court to rule in your favor; explain your case so well that the court concludes for itself that it must rule in your favor.

- Don't call an argument absurd or disingenuous; show that it is.

    - Give an example
    - Use an analogy
    - Pose a hypothetical

- You've got to make the reader see for him or herself why you win.

Smooth out the bumps

- **Eliminate (or at least limit) footnotes**
    - Footnotes distract and interrupt the flow.
    - You can usually find a way to work the information into the text, and if you can't, reconsider its importance to the brief.
- **Cut the block quotes where possible**
    - Block quotes encourage skimming.
    - Paraphrase and integrate key sections into your text.
        - Make the quote your own.
        - Show the reader you took the time to determine what the reader really needs to know.
- **Be sensible with short forms**
    - Unique/distinctive names
        - E.g., If there's only one Smith in the case, there's no need to note the short form of his name: "Smith."
    - Plaintiff/Defendant—these should be self-evident.
        - No need to say "Plaintiff" or "Defendant" in parentheses.
    - Avoid alphabet soup; use descriptive terms instead
        - E.g., "Marion General" for Marion General Hospital, *not* "MGH"

- **Avoid over-particularlization**
    - Dates
        - Is the day of an event important?
            - Might you just say "November 2011" instead of "Thursday, November 3, 2011"?
    - Locations/addresses
        - Does anyone care that the house in question is on 1321 Elm Street, Indianapolis, Indiana 46282-0200? Might just "Indianapolis" be enough?
    - Always ask yourself: What does the reader really need to know?

Cut to the chase

- **Skip the empty formalisms**
    - E.g., "It is important to note that . . . ."
    - E.g., "It must be borne in mind that . . . ."
    - This is the equivalent of throat clearing. Just say what is important or what must be kept in mind.
- **Say something important out of the box**
    - E.g., Facts section
        - *Not*: "On June 1, 2011, Plaintiff filed her complaint for discrimination."
        - *But this*: "This case concerns the right of an employer to terminate an at-will employee who missed work three days in a row without ever offering either an excuse or an apology."
- **Make it interesting, but avoid sensationalism**
    - You cannot expect the reader to pay attention; you must ***earn*** the reader's attention. So try to say things in an interesting way.
        - But, again, always strive for clarity and simplicity first.
    - Also, omit the hyperbole.
        - E.g., "Plaintiff's argument is disingenuous. Counsel knows the *Lofton* case doesn't stand for that proposition, and the Court should not tolerate such shenanigans."

Make your result palatable

- *Generally*
    - The law is more than logic; it's about people, about commerce, about right and wrong, good and bad.
    - Logic is important, but you often can't stop there.
- **Humanize your client**
    - Make your side likeable and sympathetic.
- **Explain why your recommendation makes sense in the real world//Demonstrate your preferred result furthers the purpose of the rule//Show how your rule is consistent with sound policy**
    - Debatable questions require a showing that your proposed answer is sound—that it makes sense.
    - Your underlying message should be: "Ruling my way not only follows from precedent, but it's a good idea."

Grasp the nettles

- **Deal with obvious counterarguments//Discuss the unpleasant law and facts honestly, but on your terms**
    - Ignoring the difficulties of your case:
        - Gives your opponent the opportunity to exploit your weaknesses
        - Suggests you're not being forthright with the court
    - On the other hand, dealing with the difficulties of your case:
        - Reduces the sting of a bad fact or bad law
        - Enhances your credibility
- **Do so in the middle of your argument**
    - First and foremost argue ***your*** case; keep the focus on your best points.
    - Raise and then quickly dispose of the key counterarguments.
    - Finally, return to ***your*** argument.

Break up the page visually

- **Bullet points**
    - Good for lists
    - But don't over use
- **Timelines and chronologies**
    - Reinforces important events and crystallizes facts
    - Shows how often (or how infrequently) an event occurred
        - E.g., Absences from work
- **Pictures, charts, graphs, and other visual aids**
    - E.gs., maps, key text, critical photos

Append the key documents

- **Include an appendix of important statutes, discovery requests, or contract provisions**
    - E.g., contract disputes
    - Appendix (everything) v. addendum (selective)
- **Attach the critical cases**
- **Append the pivotal document**
    - Or a portion of it
    - E.gs., contract, insurance policy, employee handbook

Revise, revise, revise

- **Let it cool**
- **Have someone else read it**
- **Try to shorten it by 25%**
- **Print and proof**
- **Try not to be too easily wounded by criticism of your work product**

April 25, 2022

Brevity: The Call for Clearer Thinking

Author: Jonathan W. Dettmann

On August 9, 1940, Winston Churchill sent a memo to his War Cabinet called "Brevity," on how to write an official report. That he would offer writing advice at such a point is remarkable. He was three months into his prime ministership, the blitzkrieg had just overwhelmed the Allied armies in France, and the Luftwaffe was now turning its attention to Britain's own cities and citizens. And here he was, chiding away against the use of "woolly phrases" and "officialese jargon." What possible difference would a few extra words make in helping the nation defend its very existence?

But Churchill was after much more than concise diction. He was after "clearer thinking." And it's hard to imagine a time that demanded more of it. Written reports were central to the Cabinet's inner communication. It kept the members informed and formed the basis for their decisions and actions. Reports that could be readily understood helped optimize the team's ability to prosecute the war, at a time when every decision and action mattered. It was akin to maximizing the productivity of the aircraft production lines at a time when every Spitfire in the air mattered.

Churchill did not mean for reports to sacrifice complexity for the sake of being short. An author's options were not limited to the page. Deeper analysis could be appended. Thornier problems could be discussed. If readers needed a better understanding, then the author provided a means to get it. This was far better than forcing each team member to wind through a maze of analysis in search of clues about the important points. It was the author's responsibility to write in a way that would benefit the readers — who, after all, were colleagues engaged in a common purpose. A report should provide lift, not weight, to the team.

Some might find a call for brevity a bit rich coming from Churchill, who was notoriously long-winded. On December 7, 1940, for example, he wrote President Roosevelt imploring for U.S. aid in the war effort. His letter — which could have comprised one word: HELP! — was 15 pages, dense with facts about merchant shipping and other issues. (Churchill's account of the war spans six volumes and well over 4,000 pages.) But here again, context is important. Churchill was not just asking for help; he was arguing for it, and he was equipping Roosevelt on how to convince an isolationist-leaning nation that lending a hand was in its own best interest. By contrast, the reports internal to his Cabinet played a different role. They were the grist for executing its strategic goals — like garnering U.S. aid, which if effective, could change the outcome of the war.

Most litigators will claim they already well know how to write an effective memo. Yet amazingly, many of us still fail to heed Churchill's advice. The modern version of this, enabled by email, comes from both directions. From one comes the spit-ballers, who offer a rambling, foggy view of the source material, satisfied with volume as the tell-tale that an answer must be in there somewhere. From the other comes the forwarders, who proudly declare their own command of the source material with the dreaded message: "See attached." Both may think they are being helpful. But they are only offloading their own laziness or I'm-too-busy-ness onto others, burdening the team with more work and muddy thinking.

What makes for a good report is, to some extent, up to the beholder, but in my eye it is this:

It illustrates. Lawyers are storytellers. They should look for ways to integrate narratives into even mundane topics — not just to make the writing engaging, but to make it effective. Consider this: “In *Palsgraf*, the court held that the defendant was not liable for unforeseeable harm.” That is both correct and concise. But it is not that helpful. Now consider: “In *Palsgraf*, a railroad employee was helping a passenger board a train when the passenger dropped a package, which then exploded, causing a nearby scale to hit and injure the plaintiff. The court held that the railroad was not liable because….” That’s a mouthful, but that’s the point. The reader can now visualize the case, and seeing the convolution of facts, understand why the court ruled the way it did. Even more, that brief story becomes a mnemonic for the case itself. It draws a picture that is hard to forget.

It explores. Lawyers are problem-solvers. After exploring the inner rooms of the source material, authors need to step outside, venture up a nearby hill, scan back over the landscape and ask themselves, so what does it all mean? And while analysis must be candid and dispassionate, it need not be neutral. Your client has a position, your team has a strategy, and you have a point of view. How does the research affect your case? How can it best be adopted or avoided? A skillful summary is useful, but a thoughtful analysis is valuable. And if solutions prove elusive, then the author should describe the problem and propose a plan — a live meeting, or more research, or a change of course — to deal with it.

It endures. A good report does not just offer answers. It becomes a resource, one that the team can consult for correspondence, argument, or negotiation. It doesn’t need to look perfect. But it does need to be written leanly, in crisp sentences and short paragraphs. It should quote any salient rules, laws, or evidence. Ideally it should print onto a single page, front and back. And it should attach key source material, highlighted for easy review. Such reports will not be forgotten. They will be used again and again as the case evolves and issues crystallize.

I focus on litigation, but this guidance can be adapted to any team that relies on written communication to advance its objectives — namely, most teams in business or law. And again, the point here is not to write one good report, any more than it matters to build one good plane. It is to create and foster a culture of such writing within the team, to construct an

efficient, well-oiled, and dependable production line of good reporting, one that fuels collective understanding and empowers nimble decisions and autonomous action.

Just for a moment, put yourself in Churchill's slippers at No. 10 Downing Street in August 1940 — an office you earned because you refused to concede — and ask yourself, what would you expect of the reports landing on your desk if the enemy's planes were headed towards your cities? Far from remarkable, a call for clearer thinking might just seem essential.

Notes:

- Erik Larson's *The Splendid and the Vile* (2020) provides a vivid account of Churchill's first year as prime minister. This was my initial source for Churchill's memo and letter.
- The standard guide for good writing remains, in my opinion, Strunk and White's *The Elements of Style* (4th ed., 1999). There are certainly others.

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TOWARD A MORE IMPURE WRITING STYLE:

The Opinions *of Judge Posner and Chief Judge Easterbrook*

and What the Bar Can Learn from Them

By Brian J. Paul [1]

Lawyers tend to be wretched writers, which is odd given that the written word is their stock in trade. Perhaps the problem comes from reading principally the work of other lawyers.

— Interview of Hon. Frank Easterbrook, Chief Judge of the U.S. Court of Appeals for the Seventh Circuit, How Appealing, http://howappealing.law.com/20q.

There is more truth to this statement than many of us would care to admit. The problem isn't so much that we don't care about our writing; in a sense it is that we care too much about our writing. For ours (I'm speaking in generalities here of course) is a style premised on meticulous imitation. We begin our motions more or less the same way every time: "Party so and so, by counsel, respectfully requests . . . ." We tend to end them the same way every time, too: "For the foregoing reasons . . . ." We are fond of using the same high-sounding legalisms: there are the hoary classics, such as "instant" (as in "the instant case") and "said" (as in "said agreement"); there are also the hedgers ("on or about" is popular); the redundancies ("true and correct" and "any and all" are common); and the worn-out intensifiers ("clearly" may just be the single most overused word in legal writing today). We quote liberally from case law, instead of paraphrasing; block quotes blot our briefs. We take great pains to detail propositions of law that judges know by heart. We observe certain rules of grammar to a fault, even if it results in awkward-sounding sentences—the sort of English up with which Winston Churchill would not put. Alas, the typical brief is formulaic, prissy, and detached—in a word, tedious.

There is a better way. I want to suggest just one modeled after the writing styles of two prominent federal judges who currently sit on the Seventh Circuit: Judge Richard Posner and Chief Judge Frank Easterbrook. But first let's talk a little bit more generally about style and why it matters.

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The Opinions *of Judge Posner and Chief Judge Easterbrook*

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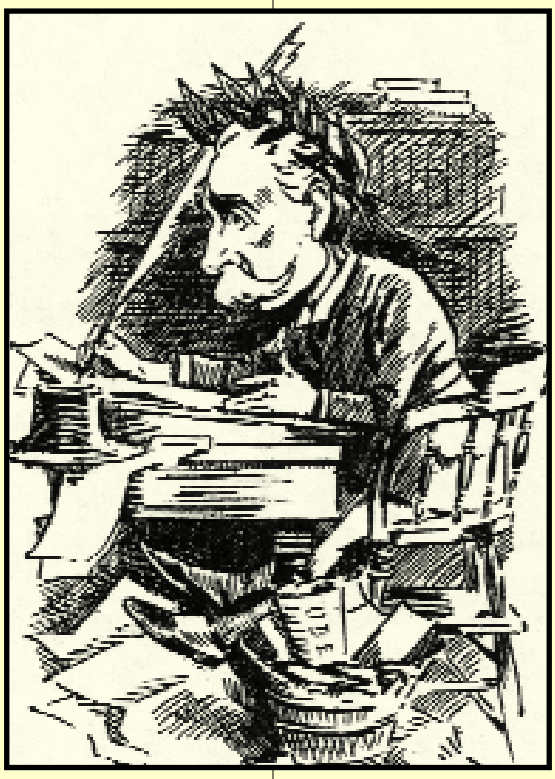
Style Matters

Lawyers are fond of telling each other that style is so much fluff, especially when editing each other's work. Emails accompanying redline drafts usually distance the editor from his stylistic revisions. "You can ignore these changes if you like—they're just stylistic," a typical email will read. We include disclaimers like this for various reasons. One is that editing for style is viewed by many lawyers to be a waste of time; what really matters is what's said, not how it's said, the reasoning goes. Another is that style is considered to be strictly personal, and lawyers don't want to be in the business of spilling red ink all over a colleague's ego. The third is that lawyers are comfortable with the predominant style; it's what we were taught in law school, it's familiar, and above all it's safe.



There is something to all of this. Substance is a common denominator: a unanimous Supreme Court opinion could be written by any one of nine justices and the syllabus is likely to describe the holding in more or less the same terms. Style, moreover, *is* personal: Justice Souter's writing style (detailed and cautious) is poles apart from that of Justice Scalia's (sweeping and impassioned), and this difference seems to reflect their individual judicial philosophies. And there *is* something to be said for hewing to tradition; we're less likely to invite criticism if we do.

But these truths mask important realities. We all know (if only intuitively) that the way something is communicated is often every bit as important as what is communicated, particularly so in persuasive writing. We'd be out of a job if it weren't—as would diplomats, presidential speech writers, public relations consultants, and any other number of professionals who regularly use the written word to persuade. Most of the opinions written by Holmes and Hand are irrelevant to modern legal questions, but the reason we still read them has as much to do with the genius of how they said things as with what they had to say.

Just because style is personal, furthermore, doesn't mean we shouldn't edit for it. If we are willing to accept the proposition that certain styles are easier to read than others, and I hazard to guess that most of us are, then we should be willing to accept the further proposition that certain styles are better than others. This is not to say that clarity necessarily translates into superiority: Grisham goes down like a milkshake compared to Faulkner, but few literary critics would say A PAINTED HOUSE is "better" than ABSALOM, ABSALOM!. In legal writing, however, clarity counts for a lot. Judges are too busy to re-read briefs that should be clear on the first pass. Instantaneous comprehension has to be our goal. So if editing for clarity means editing for style, so be it; for as Bryan Garner has written, "[t]he chief aim of style is clarity." BRYAN A. GARNER, THE ELEMENTS OF LEGAL STYLE 4 (2d ed. 2002) (emphasis added).

The need to change our ways may be the bitterest pill of all to swallow. Most of us see no need to change; some might even say the predominant style is how lawyers *should* write. It predominates for a reason, right? I leave it to others to debate why we write like we do. I suspect though that it is more a relic of an antiquated guild mentality—the felt need to set ourselves apart from other professionals—than it is an instance of the cream rising to the top. What I know for certain, however, is that writing styles among American business professionals in general have been drifting (critics would say "sliding") toward a more relaxed, "oral" style in recent years. *See* Lecture by Brenda Danet, *The Language of Email* 23-24 (2002), http://pluto.mscc.huji.ac.il/~msdanet/papers/email.pdf (last visited Sept. 17, 2007). The proliferation of email communication has accelerated the trend. It's at least worth pausing to consider, then, whether a plainer, more informal style of legal writing might be a more effective way of communicating in this day and age.

So style matters. But what style might we emulate? And what exactly does "a plainer, more informal" style look like?

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The Opinions *of Judge Posner and Chief Judge Easterbrook*

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The Impure Style

Some years ago Judge Posner wrote an article in which he distinguished between the two basic types of judicial writing styles. *See* Richard A. Posner, *Judges' Writing Styles (And Do They Matter?),* 62 U. CHI. L. REV. 1421 (1995). The one that I have been referring to as the "predominant" style he called the "pure" style. *See id.* at 1428. The pure style, wrote Posner, is "lofty, formal, imperious, impersonal, 'refined,' ostentatiously 'correct' (including 'politically correct'), even hieratic . . . ." *Id.* at 1426. It is marked by detailed factual narratives, extended discussions of background propositions of law, rote recitations of undisputed legal principles, deliberate use of refined terms in place of their commoner cousins ("employ" instead of "use," to give just one example), as well as frequent use of substantive (as opposed to citational) footnotes. *See id.* at 1426-27, 1430. It is "solemn, highly polished and artifactual—far removed from the tone of conversation . . ."; indeed, purists are careful to underscore the difference between their diction and the diction of ordinary speech. *Id.* at 1429.

Then there is the "impure" style. Impure stylists "tend to be more direct, forthright, 'man to man,' colloquial, informal, frank, even racy, even demotic." *Id.* at 1426. The impure style is more exploratory than it is declaratory. *Id.* at 1427. Impure stylists are apt to be concrete in their writing, *id.* at 1430, and thus make more frequent use of analogies, examples, hypotheticals, and illustrations, so as to bring abstract concepts home. Heeding Holmes' admonition to "strike the jugular and let the rest go," OLIVER WENDELL HOLMES, JR., SPEECHES 77 (1934), impure stylists tend to eschew unimportant details, Posner, *supra,* at 1430. They also tend to elevate their personal voice; instead of quoting from prior authority, for example, "they speak with their own tongue." *Id.* Theirs is a conversational tone. *Id.* They write for the ear, not the eye. *Id.* Impure stylists mind the cadence of their sentences, even if it means disregarding the rules of grammar. *See id.* at 1424. This approach to legal writing is bolder than the pure style, if only because it runs counter to the expectations of its audience. *See id.* at 1431.

This is a study in extremes, as Posner himself acknowledged; few legal writers dwell squarely in one camp or another. *Id.* at 1431-32. Judge Henry Friendly is a notable example. *Id.* at 1432. And it is not as though there are no purists worth emulating. Cardozo, Brandeis, Frankfurter, Brennan, and the second Harlan, pure stylists all according to Posner, *id.*, were some of the finest legal writers of the last century. It's just that, as Garner has put it, those of us less talented than a Cardozo, Brandeis, Frankfurter, Brennan, or Harlan are more likely to "stumble—or plunge—when we try it." GARNER, *supra,* at 11.

So then let's take a look at a few specific examples of the impure style. At the risk of being parochial, and as I mentioned earlier, I'm going to use excerpts from the opinions of Judge Posner and Chief Judge Easterbrook. I use their opinions largely because I happen to practice in the Seventh Circuit (Indiana) and therefore am more familiar with their work than that of judges in other circuits. But to be sure there are other first-rate impure stylists sitting on courts located elsewhere; Judge Alex Kozinski of the Ninth Circuit Court of Appeals comes immediately to mind.

My focus is on three concepts: what I'll refer to here as concreteness, plain talk, and cadence.

Concreteness

Posner and Easterbrook put abstract concepts into concrete terms. This is a remarkably persuasive writing technique that adherents of the predominant, purist style tend to underutilize.

A paragraph from Posner's opinion in *Ty, Inc. v. Publications International Ltd.,* 292 F.3d 512 (7th Cir. 2002), will illustrate. The basic issue in that case was whether Publications International had been properly enjoined from selling books containing pictures of Beanie Babies, pellet-stuffed plush toys manufactured by Ty. Publications International's main defense and argument on appeal was that its books were protected by the fair use doctrine.

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The Opinions *of Judge Posner and Chief Judge Easterbrook*

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Posner's discussion of the doctrine starts with an affirmation of its importance: "The defense of fair use, originally judge-made, now codified, plays an essential role in copyright law. Without it, any copying of copyrighted material would be a copyright infringement." *Id.* at 517. This is all well and good, we might say to ourselves at this point, but Posner is at such a high level of generalization that, if he were to stop there, we'd be unconvinced. Posner knows this, so to sharpen the point he provides an illustration: "A book reviewer could not quote from the book he was reviewing without a license from the publisher." *Id.* Ah, now he's getting somewhere! That seems extreme—having to get permission just to quote something. If that were the law, copyright holders could squelch written criticism of their work. But there's more to it than that, as Posner explains:

> Quite apart from the impairment of freedom of expression that would result from giving a copyright holder control over public criticism of his work, to deem such quotation an infringement would greatly reduce the credibility of book reviews, to the detriment of copyright owners as a group, though not to the owners of copyright on the worst books. Book reviews would no longer serve the reading public as a useful guide to which books to buy. Book reviews that quote from ("copy") the books being reviewed increase the demand for copyrighted works; to deem such copying infringement would therefore be perverse, and so the fair-use doctrine permits such copying. On the other hand, were a book reviewer to quote the entire book in his review, or so much of the book as to make the review a substitute for the book itself, he would be cutting into the publisher's market, and the defense of fair use would fail.
>
> Generalizing from this example in economic terminology that has become orthodox in fair-use case law, we may say that copying that is complementary to the copyrighted work (in the sense that nails are complements of hammers) is fair use, but copying that is a substitute for the copyrighted work (in the sense that nails are substitutes for pegs or screws), or for derivative works from the copyrighted work, is not fair use . . .

Id. (internal citations omitted). Even if we disagree with Posner's economic analysis, we'd probably concur with him when he suggests that a critic should have the freedom to quote select portions of a book without risking a federal lawsuit; at least that much rings true. Yet we'd also likely agree that someone can't just reprint a book under the guise of criticism; that, too, makes sense. So here, with this illustration, Posner has shown us the purpose of the fair use doctrine, and thus its importance. This in turn frames the discussion for the remainder of the opinion.

Notice again that Posner doesn't simply tell us that the fair use doctrine is important—he *shows* us its importance. Why might this be an effective persuasive-writing technique for lawyers to use? For at least a couple of reasons. First, critical readers are more apt to accept a conclusion if they come to it themselves. The fair use doctrine may indeed "play an essential role in copyright law," but if Posner had just stopped there, we'd have to take his word for it; that's telling, not showing. Putting the fair use doctrine to work in the context of a book review, however, allows even copyright neophytes to appreciate the doctrine's importance.

Second of all, illustrations aid in instantaneous comprehension. We might be confused if Posner had declared only that "copying that is complementary to the copyrighted work is fair use." Complementary how? we might wonder. As in similar? Related? Supplementary? It's not clear. But when Posner adds, "in the sense that nails are complements of hammers," we know exactly what he means.

Bryan Garner again: "Don't say that something is unfair; show why it is, and let the reader conclude that it is. * * * Don't say that somebody acted unprofessionally; explain what the person did, and let the reader decide. * * * Don't call an argument absurd; show why it is." Bryan A. Garner, The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts 398 (2d ed. 2003). In short, "[s]how, don't tell." *Id.* at 397.

Plain Talk

Most lawyers seem to be repulsed by the spoken word when it comes to putting pen to paper. Why? You wouldn't say, "This automobile has required recurrent maintenance from the date of purchase." So why write that way? You're more likely to say, and therefore you should consider writing, "This car has been in the shop ever since she bought it." Or just: "It's a lemon."

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The Opinions *of Judge Posner and Chief Judge Easterbrook*

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The writings of Posner and Easterbrook have an oral quality to them. Theirs is an easy, conversational style. They aren't afraid to use colloquialisms, for example. As a result their tone is unceremonious, informal, almost folksy:

Instead of writing this:	***They wrote this:***
He did not profess to be privy to knowledge only a few had.	"He did not pretend to have the inside dope." *Haynes v. Alfred A. Knopf, Inc.,* 8 F.3d 1222, 1227 (7th Cir. 1993) (Posner).
This is a recurrent misunderstanding that must be clarified.	"This is a recurrent misunderstanding and it is worth taking a moment to try to straighten the matter out." *Mucha v. King,* 792 F.2d 602, 604 (7th Cir. 1986) (Posner).
Plaintiff raises several additional issues. However, they are either frivolous or likely to be resolved at a second trial.	"Some other issues are raised, but they are either unimportant or likely to wash out at a new trial if one is held." *Ty Inc. v. Softbelly's, Inc.,* 353 F.3d 528, 537 (7th Cir. 2003) (Posner).
Canons of construction aid in ascertaining the meaning of an ambiguous statute.	"Canons are doubt-resolvers . . . ." *United States v. Marshall,* 908 F.2d 1312, 1318 (7th Cir. 1990) (Easterbrook).
Minimum sentences are designed for low-level offenders.	"Minimum sentences are designed for little fish, the ones judges would throw back if the legislature would let them." *Id.* at 1322.

And when they do use colloquialisms, they don't draw attention to it; they just treat them as a natural part of their writing:

They wrote this:	***Not this:***
Alarm bells went off when we read the jurisdictional statement of Fred Hart's brief: "Amount in controversy: $72,436.62 plus Plaintiff's attorney's fees, to be assessed by the court, should plaintiff prevail, pursuant to 705 ILCS § 225/1." Oops. *Hart v. Schering-Plough Corp.,* 253 F.3d 272, 273 (7th Cir. 2001) (Easterbrook).	"Alarm bells" went off when we read the jurisdictional statement of Fred Hart's brief . . . . "Oops."
Big fish then could receive paltry sentences or small fish draconian ones. *Marshall,* 908 F.2d at 1315 (Easterbrook).	"Big fish" then could receive paltry sentences or "small fish" draconian ones.
Jiri smelled a rat. *Mucha,* 792 F.2d at 612 (Posner).	Jiri "smelled a rat."

Impure statements like these are in the main punchier, more personal, more relaxed, more concrete (there's that word again), and livelier than the corresponding purist versions. We get the sense that the author actually enjoys writing, that he thinks the law is interesting. With the purist we get a different sense—that writing is a chore reducible to a formula. Issue, rule, application, conclusion; issue, rule, application, conclusion; repeat. Whose writing would you rather read?

Cadence

Impure stylists also pay attention to the rhythm and movement—the cadence—of their sentences and paragraphs. This means you usually won't see many substantive footnotes in their writing. Nor will you see many of those one-word transitions (invariably followed by a comma)—"However," "Moreover," "Therefore," "Thus," "Hence," "Accordingly," and so on—that lawyers like to use so much at the beginning of their sentences. Block quotes are also few and far between in their writing. Instead of long parentheticals following case citations, you're more apt to see just the cite with an explanation of its significance seamlessly woven into the adjoining text. And "but" and "and" are used to begin sentences.

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Two examples will give you a flavor of what I mean by "cadence." First is an excerpt from Easterbrook's opinion in *American Booksellers Association, Inc. v. Hudnut,* 771 F.2d 323, 330-31 (7th Cir. 1985), a case that challenged an Indianapolis pornography ordinance:

> Much of Indianapolis's argument [in defense of the ordinance] rests on the belief that when speech is "unanswerable," and the metaphor that there is a "marketplace of ideas" does not apply, the First Amendment does not apply either. The metaphor is honored; Milton's *Aeropagitica* and John Stewart Mill's *On Liberty* defend freedom of speech on the ground that the truth will prevail, and many of the most important cases under the First Amendment recite this position. The Framers undoubtedly believed it. As a general matter it is true. But the Constitution does not make the dominance of truth a necessary condition of freedom of speech. To say that it does would be to confuse an outcome of free speech with a necessary condition for the application of the amendment.
>
> A power to limit speech on the ground that truth has not yet prevailed and is not likely to prevail implies the power to declare truth. At some point the government must be able to say (as Indianapolis has said): "We know what the truth is, yet a free exchange of speech has not driven out falsity, so that we must now prohibit falsity." If the government may declare the truth, why wait for the failure of speech? Under the First Amendment, however, there is no such thing as a false idea, *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 339, 94 S.Ct. 2997, 3006, 41 L.Ed.2d 789 (1974), so the government may not restrict speech on the ground that in a free exchange truth is not yet dominant.
>
> At any time, some speech is ahead in the game; the more numerous speakers prevail. Supporters of minority candidates may be forever "excluded" from the political process because their candidates never win, because few people believe their positions. This does not mean that freedom of speech has failed.
>
> The Supreme Court has rejected the position that speech must be "effectively answerable" to be protected by the Constitution. For example, in *Buckley v. Valeo, supra,* 424 U.S. at 39-54, 96 S.Ct. at 644-51, the Court held unconstitutional limitations on expenditures that were neutral with regard to the speakers' opinions and designed to make it easier for one person to answer another's speech. See also *FEC v. National Conservative PAC,* 470 U.S. 480, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985). In *Mills v. Alabama,* 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966), the Court held unconstitutional a statute prohibiting editorials on election day—a statute the state had designed to prevent speech that came too late for answer. In cases from *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), through *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982), the Court has held that the First Amendment protects political stratagems—obtaining legislation through underhanded ploys and outright fraud in *Noerr,* obtaining political and economic ends through boycotts in *Clairborne Hardware*—that may be beyond effective correction through more speech.

Here we see several of the hallmarks of an impure stylist at work. Easterbrook's sentences tend to begin or end in important words. They vary in length, some long, some short; short sentences in particular are used for impact, longer ones for elaboration. Case law is discussed in such a way that it becomes part of the fabric of the opinion; cases are rarely discussed in separate paragraphs or parentheticals, and when they are, they're *short* paragraphs and parentheticals. One sentence in the first paragraph begins with "but," not "however," and where the word "however" does appear, it's pushed to the middle of the sentence. And finally, in the third paragraph, Easterbrook uses the colloquialism "ahead in the game," without quotation marks.

Now for an excerpt from one of Posner's opinions, *Peaceable Planet, Inc. v. Ty, Inc.* 362 F.3d 986, 988-89 (7th Cir. 2004) (internal citations omitted), yet another Beanie Baby case:

> In the spring of 1999, Peaceable Planet began selling a camel that it named "Niles." The name was chosen to evoke Egypt, which is largely desert except for the ribbon of land bracketing the Nile. The camel is a desert animal, and photos juxtaposing a camel with an Egyptian pyramid are common. The price tag fastened to Niles's ear contains information both about camels and about Egypt, and the Egyptian flag is stamped on the animal.

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The Opinions *of* *Judge Posner* *and* *Chief Judge Easterbrook*

Continued from page 15

A small company, Peaceable Planet sold only a few thousand of its camels in 1999. In March of the following year, Ty began selling a camel also named "Niles." It sold a huge number of its "Niles" camels—almost two million in one year—precipitating this suit. The district court ruled that "Niles," being a personal name, is a descriptive mark that the law does not protect unless and until it has acquired secondary meaning, that is, until there is proof that consumers associate the name with the plaintiff's brand. Peaceable Planet did not prove that consumers associate the name "Niles" with its camel.

The general principle that formed the starting point for the district court's analysis was unquestionably sound. A descriptive mark is not legally protected unless it has acquired secondary meaning. An example is "All Bran." The name describes the product. If the first firm to produce an all-bran cereal could obtain immediate trademark protection and thereby prevent all other producers of all-bran cereal from describing their product as all bran, it would be difficult for competitors to gain a foothold in the market. They would be as if speechless. Had Peaceable Planet named its camel "Camel," that would be a descriptive mark in a relevant sense, because it would make it very difficult for Ty to market its own camel—it wouldn't be satisfactory to have to call it "Dromedary" or "Bactrian."

Although cases and treatises commonly describe personal names as a subset of descriptive marks, it is apparent that the rationale for denying trademark protection to personal names without proof of secondary meaning can't be the same as the rationale just sketched for marks that are "descriptive" in the normal sense of the word. Names, as distinct from nicknames like "Red" or "Shorty," are rarely descriptive. "Niles" may evoke but it certainly does not describe a camel, any more than "Pluto" describes a dog, "Bambi" a fawn, "Garfield" a cat, or "Charlotte" a spider. (In the *Tom and Jerry* comics, "Tom," the name of the cat, could be thought descriptive, but "Jerry," the name of the mouse, could not be.) So anyone who wanted to market a toy camel, dog, fawn, cat, or spider would not be impeded in doing so by having to choose another name.

There are a few things to note about this excerpt. One is that it contains little factual detail. There are some additional facts, both before and after this part of the opinion, but not many. And many of the facts that the opinion does contain are approximations. Posner tells us that Peaceable Planet began selling its Niles camels "[i]n the spring of 1999," not on April 3, 1999; and that the company sold only "a few thousand," not 5,402. Not only would this additional level of detail have added nothing to the opinion, it would have interrupted the opinion's cadence. Further precision also would have distracted us from the details that are important, such as the camels' name, "Niles." Note also Posner's use of contractions ("wouldn't" and "can't"), and, to use his word, the "huge" number of illustrations. These qualities give the excerpt a flowing feel; you get the sense that Posner is spinning these scenarios out in his head and telling us about them as he does.

* * * * *

My point is not that lawyers should disregard all traditional stylistic conventions. It is rather that the impure style is an antidote to the most unproductive aspects of those conventions: abstraction, excessive formality, and a wooden, stilted prose. So be concrete. Use your speaking voice and write directly and plainly. And mind the cadence of your sentences. Your writing will improve by leaps and bounds if you do.

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Extract from Thomas Jefferson's Anecdotes of Benjamin Franklin

[4 Dec. 1818]

"I have made it a rule, said he, whenever in my power, to avoid becoming the draughtsman of papers to be reviewed by a public body. I took my lesson from an incident which I will relate to you. when I was a journeyman printer, one of my companions, an apprentice Hatter ... was about to open shop for himself—his first concern was to have a handsome sign-board, with a proper inscription. he composed it in these words 'John Thompson, Hatter, makes and sells hats—for ready money,' with a figure of a hat subjoined: but he thought he would submit it to his friends for their amendments. the first he shewed it to thought the word 'Hatter,' tautologous, because followed by the words 'makes hats' which shew he was a Hatter. it was struck out. the next observed that the word 'makes' might as well be omitted, because his customers would not care who made the hats. if good & to their mind, they would buy, by whomsoever made. he struck it out. a third said he thought the words 'for ready money,' were useless as it was not the custom of the place to sell on credit, every one who purchased expected to pay. they were parted with, and the inscription now stood 'John Thomson sells hats.' 'sells hats' says his next friend? why nobody will expect you to give them away. what then is the use of that word? it was stricken out, and 'hats' followed it, the rather, as there was one painted on the board. so his inscription was reduced ultimately to 'John Thomson' with the figure of a hat subjoined."

PoC (DLC).

AUTHOR

Thomas Jefferson

DATE RANGE

1810 - 1820

DATE

December 4, 1818

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Quotes by and about Thomas Jefferson

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Some thoughts on writing well

John Leo
May 21, 2007

At my local recycling center, the first bin is labeled "commingled containers." Whoever dreamed up this term could have taken the easy way out and just written "cans and bottles." But no, the author opted for words out of the bureaucrat's style book, and chose the raised-pinky elegance of a phrase distant from normal English. He also added poor spelling ("comingled," also a correct spelling, would have been clearer) and pointless redundancy (the concept of "co" is already embedded in the word "mingled"). How did they pack so many errors into two words of modern environmental prose?

At the beginning of his 1946 essay "Politics and the English Language," George Orwell made clear that he thought the language had become disheveled and decadent. Intending shock, Orwell offered five examples of subliterate prose by known writers. But these selections don't look as ghastly to us as they did to Orwell, because language is so much worse today. Consider some recent usages.

In plain English, what does it mean when students "achieve a deficiency" or reach a "suboptimal outcome?" It means they failed. A "suboptimal outcome" is even worse in a hospital. It means the patient died. The airline industry sometimes speaks of a "hull loss." What it means is that a plane just crashed. Here's more twisted language: your doorman is now known as an "access controller," and a receptionist is a "director of first impressions." Hospital bills can be filled with such language. How about a "thermal therapy unit"—an ice bag—or a "disposable mucus recovery unit," also known as a box of Kleenex?

But the institution that wins the coveted convoluted-language award is the government—any government, in any country. A U.S. document speaks of "ground-mounted confirmatory route markers." Translation: road signs. In Oxford, England, city officials decided to "examine the feasibility of creating a structure in Hinksey Park from indigenous vegetation." They were talking about planting a tree to get some shade. Joyce Kilmer's famously awful non-poem reads: "Poems are made by fools like me/But only God can make a tree." Today, Kilmer might have to write: "Versified and rhythmic non-prose verbal arrangements are fashioned by people of alternative intelligence such as myself, but only the divine entity, should he or she actually exist, can create a solar-shielding park structure from low-rise indigenous vegetative material."

The words of bureaucrats may twist tongues, but language on today's college campus can truly twist minds. Many prominent people, particularly academics, have invented new ways to torture the English language. My friend Denis Dutton, a philosophy professor who runs the Arts & Letters Daily website, launched a bad writing contest to honor these masters of gobbledygook. The grand prize winner was Judith Butler, a well-known professor at the University of California–Berkeley who wrote this impenetrable sentence: "The move from a structuralist account . . . marked a shift from a form of Althusserian theory that takes structural totalities as theoretical objects to one in which the insights into the contingent possibility of structure inaugurate a renewed conception of hegemony . . ." The sentence rattled on that way for 94 words. Another well-known professor, Martha Nussbaum, has said that Butler's prose "bullies the reader into granting that, since one cannot figure out what is going on, there must be something significant going on."

Other professors have defended Butler on the grounds that English specialists, like technical analysts, are entitled to use private language that's foreign to nonspecialists. Think about that: these professors are taking pride in prose that readers can't comprehend. Remember when NYU professor Alan Sokal submitted a nearly impenetrable article to the postmodern magazine *Social Text*, arguing that gravity was a social construct? The magazine printed it as a serious piece, so Sokal had to explain his hoax to the editors. If you think gravity isn't real, he said, I invite you to walk out my window and test the theory. I live on the 21st floor.

Several kinds of writing heresy are thriving in the universities. One is that the ability to write is so unimportant that it should be expected only in humanities departments, maybe just in English courses. Another is the romantic notion that rules, coherence, grammar, and punctuation are unimportant: what counts is the gushing of the writing

self. One adherent of this school of thought told me that we should no longer talk about misspellings, but personal spellings. The self decides what is right and wrong. Writing in *The Public Interest*, *City Journal* contributing editor Heather Mac Donald has reported that "students who have been told in their writing class to let their deepest selves loose on the page and not worry about syntax, logic, or form have trouble adjusting to their other classes—the ones in which evidence and analysis are more important than personal revelation or feelings."

Grammar and clear expression are under another kind of attack as well. Rules, good writing, and simple coherence are sometimes depicted as habits of the powerful and privileged. James Sledd, professor emeritus of English at the University of Texas, writes in the textbook *College English* that standard English is "essentially an instrument of domination." If proper English is oppressive, what could be more logical than setting out to undermine it? *English Leadership Quarterly* ran an article urging teachers to encourage intentional writing errors as "the only way to end its oppression of linguistic minorities and learning writers." The pro-error article, written by two professors at Indiana University of Pennsylvania, actually won an award from the quarterly, a publication of the National Council of Teachers of English. So you can now win awards for telling the young to write badly.

Some campuses have evolved a separate tongue, marked in large part by stretching the meaning of words to make speech sound like punishable action. Simple criticism, for example, emerges as "intellectual harassment," or perhaps "semantic violence." And if funding for mostly black schools is too low, that's "intellectual genocide." When Lani Guinier's controversial plan for proportional voting drew protests, she accused her critics of "non-traditional violence." "Non-traditional" is a common weasel word these days. "Non-traditional students" refers to older students. One feminist referred to a friend who was having an affair with a "non-traditional man." She meant that he was not a member of the chattering classes: he was a plumber.

Political speech is a mess as well, larded with euphemism and evasion. In 1990, I was startled to learn that GOPAC, the Republican political action committee controlled by Newt Gingrich, was shipping words to Republicans around the country so that the speeches of local politicians would sound like Newt. GOPAC supplied positive words to use when referring to the GOP: courage, moral, children, choice, and personal, for instance, and ugly words to pin on Democrats, including bizarre, collapse, red tape, sensationalists, and anti-flag. These words presumably could be combined in any order —"collapsing anti-flag sensationalists," for instance, or "morally courageous pro-flag

children." Out of curiosity I looked up Newt's last major speech, delivered to the Heritage Foundation, and found that it really wasn't a speech at all. It was a collection of 238 GOPAC buzzwords, lightly connected by a few ordinary nontoxic words.

One cause of bad language is the influx of intentional ambiguity from the world of advertising. What was the meaning of Nike's famous slogan, "Just Do It"? Did it mean, don't procrastinate, don't debate your options endlessly, just seize the moment and act? Or did it mean, forget about scruples and conscience, go get what you want?

This kind of ambiguity shows up in the prose of the right-to-die movement. Take the phrase "aid in dying." Does it mean moral support for a dying person, help in committing suicide, or putting a sick patient to death without consent? It means whatever you take it to mean. All around us is prose intended not to convey meaning, but to mask and distort.

Many awful expressions of the day emerge out of misguided compassion. An example is a long *New York Times* discussion of a famous writer's plagiarism. The *Times* could not bring itself to use the P-word, but talked delicately of "unacknowledged repetitions" and "inappropriate borrowings," since it did not want to hurt the plagiarist's feelings. The idea of offending or hurting feelings can lead to the greatest corruption of language. It can undermine the straight, simple prose that communicates ideas, images, or yes, even feelings, to a great number of people.

So how should we write and restore the integrity of good English? Candor, clarity and sincerity are important keys. All of us are weary of writers who dance around their subjects, protecting friends, bending facts to push a cause. "The great enemy of clear language is insincerity," Orwell wrote. "When there is a gap between one's real and declared aims, one turns instinctively to long words and exhausted idioms."

Further, our minds are clogged with the clichés, idioms, and rhythms of other people, and we have to work to avoid them. Paul Johnson says, "Most people when they write, including most professional writers, tend to slip into seeing events through the eyes of others because they inherit stale expressions and combinations of words, threadbare metaphors, clichés and literary conceits. This is particularly true of journalists."

Kurt Vonnegut has said that a writer's natural style will almost always be drawn from the speech he heard as a child. Vonnegut grew up in Indiana, where, he said, "common

speech sounds like a band saw cutting galvanized tin." He wrote: "I myself find I trust my own writing most and other people seem to trust it most, when I sound most like a person from Indianapolis, which is what I am."

When I started my column in *U.S. News & World Report* 18 years ago, I decided to write in a conversational style. This meant I would never use words such as "nonetheless," "moreover," "albeit," and "to be sure," because they are in nobody's speaking vocabulary. It also meant that I wrote as though I were addressing each reader personally, talking about something that interested us both. My model here, believe it or not, was John Madden, the football announcer. Madden is the most famous TV football analyst not because he knows the most, though he may, but because he sounds like a friend on the next bar stool watching the game and sharing his thoughts with you.

After a month or so, I realized that readers of columns don't just follow the words. They listen to the background music too. Readers want to know who you are. Is the writer consistent and fair? Does his take on the world relate to me? Is he humorless or playful? Do I want to spend time with him? Is he in the pocket of some cause or political party?

A few years ago, I taught a summer class in nonfiction writing at Southampton College on Long Island. I was very impressed by the students' abilities, but they had a group flaw: they wanted to write primarily about their own feelings. One day I said: Write me 2000 words on any subject, but don't use the word "I." Many in the class balked at this and wrote their essays with great difficulty. Confusing an opinion with an argument has one big advantage. The text is uncriticizable, since the writer can always say, "It's my prose and I'm entitled to my opinion."

But writing isn't a personal or private enterprise. It's an attempt to change consciousness and change the world. In his book *The Ethics of Rhetoric*, Richard Weaver says that the right to utter a sentence is one of the world's greatest freedoms. It is the "liberty to handle the world, to remake it, if only a little, and to hand it to others in a shape which may influence their actions." Speech and writing constitute what Weaver calls "the office of assertion," a force adding itself to the other forces of the world. Writing is power. If you write well, you can have an impact.

This article is adapted from a speech delivered at Ursinus College. The full text is available at johnleo.com.

Section Four

One-on-One with Judges Molter & Weissmann

Hon. Derek R. Molter
Indiana Court of Appeals
Indianapolis, Indiana

Hon. Leanna K. Weissmann
Indiana Court of Appeals
Indianapolis, Indiana

Section Four

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