

Procedural Issues

Transfer and Venue

Trial Rules 12, 75, 76 & 78

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Several trial rules define the location (venue) where a case may be filed and heard. Under Ind. Trial Rule 75(A) a case may be commenced in any court or county subject to transfer to a county of preferred venue or a change of venue from the county.

Preferred Venue – T.R. 75(A)

The rule sets forth criteria that determine the appropriate location (county) for the filing of a civil case. Preferred venue exists in a county where:

- the greater percentage of individual defendants reside, or, if there is not a greater percentage, the place where any individual defendant resides
- the land or chattels or a portion thereof are regularly located or kept if

the complaint relates to injury to the land or chattels including

- recovery of possession or for injury
- establishment of use or control
- quiet title
- determine any interest
- avoid or set aside conveyances
- foreclose liens
- partition
- any *in rem* relief
- the collision or accident occurred involving operation of a motor vehicle or a vehicle on railroad, street, or interurban tracks

- the principal office of a defendant organization or the office or agency of a defendant organization or individual is located
- either one or more individual plaintiffs reside or the principal office of a defendant governmental organization or the office of a defendant governmental organization to which the claim relates or out of which the claim arose is located
- determined by written stipulation signed by all the parties named in the complaint
- where the individual is held in custody or restrained if the complaint seeks relief with respect to such individual's custody or restraint upon his liberty
- designated by statute recognizing or creating a special or general remedy for the claim
- all or some of the property is located or can be found if the case seeks only an *in rem* judgment against the property due to service by publication.

The foregoing list is set forth by Ind. T.R. 75 (A)(1-9). None of the listed criteria has precedence over another. Thus, if a complaint is filed in any of them, it is properly filed even if filing in another county under another one of the criteria would also have been authorized.

In the event none of the first nine criteria control, then under section (A)(10) the case may be filed in the county:

- of residence of either one or more individual plaintiffs
- of the location of the principal office of any plaintiff organization or governmental organization or
- the location of the office of any such plaintiff organization or governmental organization to which the claim relates or out of which the claim arose.

Challenges to Venue and Transfer of Cases – T.R. 12(B)(3)

Deadline and Waiver

The venue of a case or the authority of a court to decide a case may be challenged by a motion brought under Ind. T.R. 12(B)(3). If a responsive pleading is not required by the rules, the challenge must be filed within twenty days of service of the

complaint. If a responsive pleading is required, the motion must be filed before or contemporaneously with the responsive pleading. The right to challenge venue is waived if it is not asserted within the time allowed by the rules.

Once a motion challenging venue has been filed, the Court may rule based upon allegations contained in the complaint, affidavits or documentary evidence filed with the motion or in opposition or upon evidence presented at a hearing. If the Court determines venue is improper or that it is not authorized to decide the case, **it should not dismiss the case but must transfer the case** to a county or court selected by the party first properly filing the motion if the selected county or court has preferred venue and is authorized to decide the case. T.R. 75(A) and (B)(1).

Subject Matter Jurisdiction Differentiated

The concept of the filing of a case in a court not authorized to decide it and the determination of whether to transfer the case to another court is close to, but different from, the issue of subject matter jurisdiction. Subject matter jurisdiction, i.e., the legal authority of a given court to decide cases of a certain type; should be raised by a motion under Ind. T.R. 12(B)(1). A motion under Ind. T.R. 12(B)(3) should be restricted to filing in an inappropriate county or in a court other than as specified by a statute creating or recognizing a special remedy or proceeding. See T.R. 75(A)(8).

Procedure on Transfer

Once an order for transfer is entered, the party filing the motion must pay the costs chargeable upon a change of venue within twenty days. Upon payment of these costs, the pleadings and records are certified by the Clerk and transferred to the county or court named in the order where the case proceeds as though commenced upon the date of filing in the original court. T.R. 75(B)(2).

If the costs are not paid within the twenty-day period, the Court is required to dismiss the case without prejudice and order payment of mileage expenses of the parties and attorneys in resisting venue as well as reasonable attorney fees to the party that properly objected to venue. Ind. T.R. 75(B)(3).

Penalties Assessable for Non-Preferred Venue Filing

Assessment of Costs, Travel Expenses, and Attorney Fees – Ind. Trial Rule 75(C)

A party who commences a case in a county of improper venue or a court not authorized to decide a case is liable under Ind. T.R. 75(C) for the assessment of:

- the costs of refiling the case in the proper court
- mileage expenses reasonably incurred by the parties and their attorneys in resisting venue
- reasonable attorney fees incurred by parties successfully resisting venue if the case was commenced in the wrong county by sham pleading, bad faith or without cause.

T. R. 75(D) – All other prescriptions, whether by rule or statute, regarding venue or the authority of a court to hear a case are subject to the provisions of Ind. Trial Rule 75 and are not a requirement of jurisdiction.

Change of Venue from the County – T. R. 76(A)

Change of venue is a substantive law right conferred by the legislature under Ind. Code 34-35-1 whereas the procedure by which it may be obtained is governed by Supreme Court rule.

A civil case may be transferred to a different county through Change of Venue under T.R. 76 (A) by filing a verified application alleging the grounds upon which the motion is based. The rule does not apply to all civil cases but only to those “where a change of venue the county may be granted.” Historically, a change of venue was prohibited regarding certain cases that were not considered to be “civil”

- civil contempt
- enforcement of an attorney’s lien
- habeas corpus
- proceedings related only to administration of a receivership and
- Eminent domain proceedings before the issue of damages.

Limitations on Change of Venue

- The moving party must establish that
 - the county where suit is pending is a party or
 - the party seeking the change will be unlikely to receive a fair trial due to local prejudice or bias regarding a party or the claim or defense presented by a party.
- A party may only receive one change of venue from the county.
- An application must be filed no later than ten days after the issues are first closed on the merits except:
 - in cases where a pleading or answer is not required by the defending party to close issues (or a responsive pleading is not required under a statute), each party has thirty [30] days from the date the case is placed and entered on the chronological case summary of the court as filed;
 - in cases of claims in probate, receivership proceedings, remonstrances, and similar matters, the parties have thirty [30] days from the date the case is placed and entered on the chronological case summary of the court as filed;
 - if the trial court or a court on appeal orders a new trial, or if a court on appeal otherwise remands a case such that a further hearing and receipt of evidence are required to reconsider all or some of the issues heard during the earlier trial, the parties have ten [10] days from the date the order of the trial court is entered or the order of the court on appeal is certified;
 - in the event a change is granted from the judge or county within the prescribed period, a request for a change of judge or county may be made by a party still entitled thereto within ten [10] days after the special judge has qualified or the moving party has knowledge the cause has reached the receiving county or there has been a failure to perfect the change. Provided, however, this subdivision (4) shall operate only to enlarge the time allowed for such request under such

circumstances, and it shall not operate to reduce the period prescribed in subdivisions (C), (C)(1), (C)(2), (C)(3);

- where a party has appeared at or received advance notice of a hearing prior to the expiration of the date within which a party may ask for a change of judge or county, and also where at said hearing a trial date is set which setting is promptly entered on the Chronological Case Summary, a party shall be deemed to have waived a request for change of judge or county unless within three days of the oral setting the party files a written objection to the trial setting and a written motion for change of judge or county;
- if the moving party first obtains knowledge of the grounds for change of venue from the county or judge after the time above limited, they may file an application, which must be verified personally by the party, specifically alleging when the cause was first discovered, how discovered, the facts showing the grounds for a change, and why such cause could not have been discovered before by the exercise of due diligence. Any opposing party has the right to file counter-affidavits on the issue within ten [10] days, and the ruling of the court may be reviewed only for abuse of discretion.

Issues are deemed to have been “first closed upon the merits” when the defendant files an Answer. *State ex rel. Yockey v. Marion Superior Court*, 1974 Ind. LEXIS 360, 261 Ind. 504, 307 N.E.2d 70, 40 Ind. Dec. 632 (1974). *State ex rel. Katz v. Marion Superior Court*, 1974 Ind. LEXIS 379, 261 Ind. 623, 308 N.E.2d 694, 41 Ind. Dec. 285 (1974). Thus, in a case involving multiple defendants, an application for change of venue must be filed no later than ten days after the filing of the first answer by a defendant. However, a party added by a subsequently filed pleading may apply for a change of venue within ten days of the filing of its Answer. *Rayburn v. Eisen*, 1975 Ind. App. LEXIS 1360, 166 Ind. App. 329, 336 N.E.2d 392, 49 Ind. Dec. 304 (1975). *State ex rel. Travelers Ins. Co. v. Madison Superior Court*, 354 N.E.2d 188 (1976).

Selection of New County for the Venue of the Case

Once a Motion for Change of Venue from the County is granted, T.R. 75 (D) controls the method for selection of the new venue county. The county may be selected

- the parties may agree in open court on the county for venue of the case within three days of the granting of the motion
- the parties may strike from a list of adjoining counties submitted by the court with the moving party having the first strike and the case being sent to the remaining county.

For striking, the term “party” has been interpreted to mean all party plaintiffs or all party defendants. In cases involving multiple plaintiffs or defendants, all plaintiffs and all defendants must join in the exercise of a strike. This requirement flows from the decision in *State ex rel. First State Bank v. Porter Superior Court*, 447 N.E.2d 568 (Ind. 1983), where the Court determined that only a single change of venue could be granted to parties plaintiff and defendant.

In situations where a party is brought into the action as provided in Ind. Trial Rule 14, and thereafter files a motion for change of venue that is granted, then only the added party and the plaintiff are entitled to strike. T. R. 76(D).

Effect of Failure to Strike

Once the court submits a list of counties for striking, the parties have a limited period to exercise their strikes. Section (D) specifies the period to be

- seven days from the date of mailing of the notice by the Clerk or
- the period set by the Court which cannot exceed fourteen days.

A moving party that fails to strike within the period is not entitled to a change of venue and the court shall resume jurisdiction of the cause. If a nonmoving party fails to strike within the time limit, the clerk shall strike for such party.

T.R. 78 – Jurisdiction Pending Change of Venue from the County

Pending a ruling upon a Motion for Change of Venue, a trial court is divested of jurisdiction regarding a case except to rule upon emergency matters. *State ex rel. Kealing v. Clay Circuit Court*, 207 Ind. 259, 263, 192 N. E. 423 (1934). Once the motion is granted, the divestiture continues pending perfection of the transfer to the new county. Once the costs of the venue change have been paid, if any were due, any party may file a certified copy of the order granting the change of venue with the court that is to receive the case. Thereafter, the receiving court has full jurisdiction over the case even though the transcript and papers have not been received from the sending court.

QCSR Implications

The decision to move a case to another court has a variety of QCSR implications. Cases moved to a court in another county are specified as “venued out” regardless of whether it resulted from a motion for change of venue under T.R. 76 or a challenge to preferred venue under T.R. 75. Similarly, the case in the receiving county is specified as “venued in.”

When a case is moved to another court within the same county, it is assigned a “transferred out” designation. The case in the receiving court is specified as “transferred in.”