

PUBLICATION UPDATE

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Indiana Pleading and Practice with Forms

Publication 339

Release 81

November 2021

HIGHLIGHTS

The following chapters in Civil Volumes 1 through 6 have been updated:

- Chapter 1 Scope of the Rules
- Chapter 2 One Form of Action
- Chapter 3 Commencement of an Action
 - Chapter 3.1 Appearance
- Chapter 4 Process
- Chapter 5 Service and Filing of Pleading and Other Papers
- Chapter 8 General Rules of Pleading
- Chapter 9.1 Pleading and Proof of Contributory Negligence, Assumed Risk, Res Ipsa Loquitur, Consideration, Bona Fide Purchaser, Matters of Judicial Notice, Answer of Distraint
- Chapter 9.2 Pleading and Proof of Written Instruments
- Chapter 11 Signing and Verification of Pleadings
- Chapter 12 Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings
- Chapter 15 Amended and Supplemental Pleadings
- Chapter 16 Pre-Trial Procedure; Formulating Issues
- Chapter 19 Joinder of Persons Needed for Just Adjudication
- Chapter 23 Class Actions
- Chapter 26 General Provisions Governing Discovery
- Chapter 37 Failure To Make or Cooperate In Discovery; Sanctions
- Chapter 41 Dismissal of Actions

- Chapter 51 Instructions to Jury: Objections, Requests: Submission in Stages
- Chapter 52 Findings by the Court
- Chapter 53.3 Motion To Correct Error; Time Limitation for Ruling
- Chapter 54 Judgment; Costs
- Chapter 55 Default
- Chapter 56 Summary Judgment
- Chapter 59 Motion To Correct Errors
- Chapter 60 Relief From Judgment or Order
- Chapter 61 Harmless Error
- Chapter 63 Disability and Unavailability of a Judge
- Chapter 65 Injunctions
- Chapter 79 Special Judge—Selection: Circuit, Superior, Probate, Municipal, and County Courts
- Chapter 81 Local Court Rules

Highlights include the following:

- The Court amended Trial Rules Procedure 3.1, 5, and 86 for purposes of clarity (effective 07/15/21).
- The Court amended Trial Rule 9.2 to exclude mortgage foreclosures from Trial Rule 9.2(A)(2) (effective 07/15/21).
- The Court amended Trial Rule 53.3 and Trial Rule 59 to delete the requirement regarding service on the judge (effective 07/15/21).
- The Court amended the lan-

guage in Trial Rule 63 to make clear that a successor judge may be designated at any time after a presiding judge determines she is unable to perform the necessary duties (effective 07/15/21).

- The Court vacated Trial Rule 86 (effective 07/15/21).
- The Indiana Supreme Court denied a writ of mandamus and prohibition following a split vote, as required under Trial Rule ¶ 1.18[2]. *Indiana ex rel. Roman Catholic Archdiocese of Indianapolis, Inc. v. Marion Superior*, 160 N.E.3d 182, 182 (Ind. 2020). *See* ¶ 1.18[2].
- In a case of first impression, the Indiana Supreme Court in 2021 adopted as part of the discovery rule the widely recognized adverse domination doctrine that “tolls statutes of limitations for claims by corporations against its officers, directors, lawyers and accountants for so long as the corporation is controlled by those acting against its interests.” *City of Marion v. London Witte Group, LLC*, 169 N.E.3d 382, 390–91 (Ind. 2021) (quoting *Clark v. Milam*, 452 S.E.2d 714, 718 (W.V. 1994)). The Court also determined that the doctrine should apply to both public and private corporations as

well as to co-conspirators of the wrongdoers. *Id.* Thus, as in the discovery rule, once the co-conspirator establishes a prima facie statute of limitations defense, the burden shifts to the plaintiff to show why, under the adverse domination doctrine, the onset of the limitations period was delayed. In showing the adverse domination doctrine applied, the plaintiff must prove an intentional wrongdoing. *Id.* at 391–92. See ¶ 3.12.

- In *Jane Doe I, as Legal Guardian v. Carmel Operator, LLC*, 160 N.E.3d 518, 526 (Ind. 2021), the Supreme Court rejected the use of federal common law when determining the scope of an arbitration agreement, *disapproving German American Financial Advisors & Trust Co. v. Reed*, 969 N.E.2d 621 (Ind. Ct. App. 2012). In *Jane Doe I*, the Court ruled that the doctrine of equitable estoppel may be used to allow a non-signatory to enforce a contract by becoming part of the arbitration, but only if Indiana’s equitable estoppel requirements are met (and none were shown in this case). See ¶ 16.14[2][A].
- The Supreme Court in *G&G Oil Co. of Indiana, Inc. v. Continental Western Insurance Co.*, 165 N.E.3d 82, 86

(Ind. 2021), remanded the case for further proceedings since genuine issues of material fact existed regarding whether a ransomware attack “fraudulently caused a transfer of money” and whether the loss “resulted directly from the use of a computer,” under the Computer Fraud provision of the insurance policy. See ¶ 56.10[2].

- The Indiana Court of Appeals in *Muir Woods Section One Assoc. v. Fuentes*, 164 N.E.3d 752, 756–57 (Ind. Ct. App. 2021), remanded the case for consideration of the homeowners’ association’s mandamus petition since the association was unable to get a final ruling from the county officials, precluding the homeowners’ jurisdiction in the Tax Court (following the rulings in *State Board of Tax Commissioners v. Mixmill Manufacturing Co.*, 702 N.E.2d 701 (Ind. 1998), and *State Board of Tax Commissioners v. L.H. Carbide Corp.*, 702 N.E.2d 706 (Ind. 1998)). “[F]ailure of an administrative agency to act can confer jurisdiction on the trial court to order the agency to act, but not to direct any portended result of that action.” *Mixmill Mfg. Co.*, 702 N.E.2d at 704, quoted in *Muir Woods*, 164 N.E.3d at

756. See ¶ 12.07[1][B].

- In *Gresser v. Reliable Exterminators, Inc.*, 160 N.E.3d 184, 190–191 (Ind. Ct. App. 2020), the Indiana Court of Appeals distinguishes a negligence per se claim from a private-right-of-action claim and discusses how to determine whether the legislature intended to create a duty enforceable by a private tort action. See ¶¶ 2.09; 15.08; 51.06; 51.10[1]; 51.10[2][C][1].
- The Court of Appeals found a vicarious liability claim against a hospital, filed before the running of the statute of limitations, could be brought before the Medical Review Board; however, the omission in naming the individual physicians prior to the statute’s running resulted in their being individually immune from the suit. *Anonymous Hosp. v. Spencer*, 158 N.E.3d 380, 387 (Ind. Ct. App. 2020). See ¶ 3.15[2].
- In *Herco. LLC v. Auto-Owners Insurance Co.*, 167 N.E.3d 770, 775–776 (Ind. Ct. App. 2021), the Court of Appeals discusses, for purposes of *res judicata*, the difference between forcing a defendant to defend multiple suits when one or more wrongful causes of action are based on the same wrongful act, in contrast to where the plaintiff’s motive is trying to split a cause of action or defense. See ¶ 8.22[29].
- In two cases, the Court of Appeals ruled that officers not yet taking their oath of office was only a technicality and did not invalidate their actions. *B.L. Reeve Trans. v. Dept. of State Rev.*, 163 N.E.3d 968, 971–72 (Ind. Tax Ct. 2021); *Chapo v. Jefferson County Plan Commission (JCPC)*, 164 N.E.3d 131, 134–35 (Ind. Ct. App. 2021), *reh’g denied* (commissioner members’ failure to be sworn in does not invalidate the actions of the JCPC; to do so based on a technical defect would undermine the exact purpose of the de facto officer doctrine, which is “to insure the orderly functioning of the government despite technical defects in title to office.” (quoting *Fields v. State*, 91 N.E.3d 601 (Ind. Ct. App. 2017)). See ¶¶ 12.07[1][A]; 12.07[1][B]; 12.07[5][A].
- In *Wood v. Scott Co Bd. of Comm’rs*, 162 N.E.3d 1105, 1109–1110 (Ind. Ct. App. 2020), the Court of Appeals ruled that a failure to file the administrative record within 30 days was a condition precedent to establishing jurisdiction; the party’s mo-

tion to amend the initial complaint once the filing deadline passed was properly denied and the complaint dismissed, following *Carmel Bd. of Zoning Appeals v. Bidgood*, 120 N.E.3d 1045, 1050 (Ind. Ct. App. 2019), and distinguishing *Browning v. Walters*, 616 N.E.2d 1040, 1044 (Ind. Ct. App. 1993), and *State ex rel. Young v. Noble Circuit Ct.*, 332 N.E.2d 99 (Ind. 1975). See ¶ 12.07[1][A].

- In *Miller v. Patel*, 160 N.E.3d 1111, 1115 (Ind. Ct. App. 2020), the motion for leave to amend was denied, relying on the court’s previous ruling in *Williams v. Inglis*, 142 N.E.3d 467 (Ind. Ct. App. 2020) (ruling that the federal Emergency Medical Treatment and Active Labor Act’s two-year statute of limitations preempted Trial Rule 15(c)’s provision allowing amendments relating back to an original pleading; thus, dismissal proper since futile). See ¶¶ 15.07; 15.08; 15.14.
- In *Lake County v. House*, 168 N.E.3d 278, 284 (Ind. Ct. App. 2021), the Court of Appeals discusses the federal case law reviewed by the court regarding Trial Rules 41(A)(2) and 41(F). See ¶ 41.10.
- The Court of Appeals dismissed without prejudice

the case, *Truelove v. Kinnick*, 163 N.E.3d 344, 346 (Ind. Ct. App. 2021), since the trial court order granting the motion to dismiss was neither a final judgment nor an appealable interlocutory order under Trial Rule 54(B) and, therefore, the appellate court lacked jurisdiction; the certification of the order disposing of less than the entire case did not express in writing the magic language that “there is no just reason for delay”; see *Georgos v. Jackson*, 790 N.E.2d 448, 452 (Ind. 2003), *reh’g denied* (setting down a bright line rule dictating a final judgment). See ¶ 54.05.

- In *Back v. State*, 162 N.E.3d 593 (Ind. Ct. App. 2021), the Court of Appeals found no error when the post-conviction court *sua sponte* reopened evidence to listen to a recording, finding the prosecutor stated in the recording that the State would prove beyond a reasonable doubt defendant possessed a bomb, correcting the written transcript that stated the prosecutor said the State would not prove the possession of the bomb). See ¶ 60.06.
- The Court of Appeals found the lower court’s granting defendant’s motion to strike an abuse of discretion, since

defendant's submitting new evidence and arguments minutes before the show-cause hearing in fact a "gaming view" of litigation the court rejects, so plaintiff's surreply was properly filed; Trial Rule 81[H] allows a court to "suspend or modify compliance" with any local rule "if the interests of justice so require," which occurred here. *I-65 Plaza, LLC v. Indiana Grocery Group, LLC*, 167 N.E.3d 1161, 1173 (Ind. Ct. App. 2021). *See* ¶ 81.07[3].

Volume 7 Criminal Procedure Forms

All 27 chapters in Volume 7 have been updated to reflect the latest legal developments.

Highlights include the following:

- In *Wright v. State*, 168 N.E.3d 244 (Ind. 2021), the Indiana Supreme Court adopted a "tailoring" test to determine whether a defendant properly waives the right to counsel in capital and life without parole (LWOP) cases. The trial court should frame its waiver inquiry with the State's heightened reliability interests in mind. *See* ¶ CR-1.11.
- Effective July 1, 2019, expungements now include collateral actions. A collateral action means an action or proceeding, including an

administrative proceeding that is factually or legally related to an arrest, a criminal charge, a juvenile delinquency allegation, a conviction, or a juvenile delinquency adjudication and includes a proceeding or action concerning a seizure, civil forfeiture, and a petition for specialized driving privileges. Ind. Code § 35-38-9-0.5. The version of the expungement statute in effect at the time of the filing of the expungement petition is controlling. A person whose petition for expungement was granted prior to July 1, 2019 may file a petition for a supplemental order of expungement under Ind. Code § 35-38-9-9 to obtain the benefit of changes in SEA 235-2019 as enacted in the 2019 session, if applicable. *See* ¶ CR-2.36.

- In *Johnson v. State*, 157 N.E.3d 1199 (Ind. 2020), the defendant offered to sell drugs to another man at a casino at 7:00 a.m. The majority of the Indiana Supreme Court upheld a pat-down search, concluding "that the agent had reasonable suspicion that criminal activity was afoot (so he could stop Johnson), that Johnson could be armed and dangerous (so he could pat Johnson down after entering a confined space), and the

lump in Johnson’s pocket was immediately apparent as contraband (so it could be seized).” *Id.* at 1202. Justice Slaughter dissented. In his view “neither the time nor the location gives rise to the inference that Johnson was armed,” as required for a Terry pat-down search. *Id.* at 1209. *See* ¶ CR-3.29.1.

- Noting that “[w]hat is reasonable for vehicles is different from what is reasonable for homes,” the U.S. Supreme Court ruled that the community caretaking exception could not be extended to the home without violating the Fourth Amendment. *Caniglia v. Strom*, No. 20-157 (U.S. 05/17/2021) *See* ¶ CR-3.29.3.
- Chapter CR-4 includes a discussion of the importance of counsel at the first appearance hearing. *See* ¶ CR-4.12.
- In *State v. E.R.*, 123 N.E.3d 675 (Ind. 2019), the Indiana Supreme Court identified some of the factors that may be considered under the totality of objective circumstances in determining whether a suspect is in custody: “the location, duration, and character of questioning; statements made during the questioning; the number of law-enforcement officers present; the extent

of police control over the environment; the degree of physical restraint; and how the interview begins and ends.” *Id.* at 680. *See* ¶ CR-7.24.

- Chapter CR-9 summarizes recent cases finding abuse of discretion in allowing the State to belatedly amend charging information. *See* ¶ CR-9.22.
- In *Watson v. State*, 155 N.E.3d 608 (Ind. 2020), the Indiana Supreme Court appeared to send a strong signal that defendants should argue Article 1, Section 12 is more protective than the Sixth Amendment under *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972). The court implied that the Indiana constitutional analysis for speedy trial claims is different from the federal analysis in that Article 1, Section 12 is a “directive” rather than a “right.” Thus, a defendant need not assert his right to a speedy trial in making a claim under the Indiana Constitution because “the speedy trial demand is effectively made for him.” *Id.* at 614, Fn. 2. In a different case, the court reiterated that once counsel has been appointed, even if counsel has not yet entered an appearance, a defendant speaks to the court through counsel. *See* ¶ CR-11.02,

¶ 11.05.

- In *Wadle v. State*, 151 N.E.3d 227 (Ind. 2020), the Indiana Supreme Court expressly overruled the Constitutional tests formulated 24 years ago in *Richardson v. State* as they apply to claims of substantive double jeopardy, noting that the standard had caused “more confusion than clarity.” In its place, the court articulated a new analytical framework to resolve multiple punishment claims going forward. It remains unclear whether the Indiana’s common law double jeopardy rules have been superseded by the *Wadle* analysis. Chapter 12 also includes a discussion of *Gamble v. State*, 139 S. Ct. 1960 (2019), which upheld the longstanding dual-sovereignty doctrine and Indiana’s greater statutory protection barring subsequent prosecution in Indiana after a conviction for the “same conduct.” See ¶ CR-12.02.
- Chapter CR-13 includes an expanded alibi discussion. See ¶ CR-13.02, ¶ CR-13.04, ¶ CR-13.05, and ¶ CR-13.07.
- Ind. Code § 35-40-5-11.5, enacted in 2020, requires the defense to show “extraordinary circumstances” or to obtain prosecutorial

consent to depose a child under age 16 who is an alleged victim of a sex offense. Chapter CR-16 discusses two recent Indiana Court of Appeals cases holding that the new procedural statute is a nullity because it impermissibly conflicts with the Indiana Trial Rules governing the conduct of depositions. See ¶ CR-16.04.

- In *State v. Jones*, No. 20A-CR-664 (Ind. June 22, 2021), the Indiana Supreme Court reversed the trial court’s order directing the State to produce a confidential informant for a face-to-face interview, finding that the informant’s identity would be inherently revealed through their physical appearance at such an interview. Thus, the State met the threshold requirement to show that the confidential informer’s privilege applies. The burden then shifts to the defendant to show why disclosure of the informant’s identity is relevant and helpful to the defense or that it is necessary for a fair trial. The court remanded to the trial court to engage in a balancing inquiry to determine whether an exception to nondisclosure is warranted. See ¶ CR-16.14.
- Under Indiana law, only ju-

venile courts have power to adjudicate a child a delinquent. In *K.C.G. v. State*, 156 N.E.3d 1281 (Ind. 2020), the State alleged 16-year-old K.C.G. delinquent for committing the offense of dangerous possession of a firearm. However, by the statute’s plain terms, an adult can never commit the offense of dangerous possession of a firearm. Thus, the juvenile court lacked subject-matter jurisdiction because juvenile courts have “exclusive original jurisdiction” to hear proceedings in which the State alleges that a child committed “an act that would be an offense”—a crime—“if committed by an adult.” Ind. Code § 31-37-1-2 and Ind. Code § 31-30-1-1(1). Because this offense can never be committed by an adult, a juvenile cannot be adjudicated delinquent for committing it. The statute defines the offense solely in terms of a “child” with an unauthorized firearm. The court acknowledged this might not have been the legislature’s intent, but the plain language of Ind. Code § 35-47-10-5 and the juvenile jurisdiction statutes mandate this result. Also, the court concluded that a delinquency proceeding for violating Ind. Code § 35-47-

10-5 could not be considered another “proceeding[] specified by law” over which a juvenile court could have jurisdiction under Ind. Code § 31-30-1-1(14). See ¶ CR-17.02.

- A defendant can appeal an “open plea” where the plea agreement leaves sentencing discretion to the trial court even if the plea agreement wrongly states that the plea is not an open plea and the appeal is waived. In *Johnson v. State*, 145 N.E.3d 785, 786–7 (Ind. 2020), the Indiana Supreme Court held that a plea agreement’s generalized statement that the defendant “waives right to appeal,” without more, was insufficient to establish a knowing and voluntary waiver of the defendant’s right to appeal his sentence. See also *Williams v. State*, 164 N.E.3d 724 (Ind. 2021) (reminding trial judges that “the plea agreement, guilty plea and sentencing hearing colloquy, and sentencing order must be clear and consistent as to whether a defendant waives only the right to appeal the conviction or the right to appeal the conviction and sentence.”). See ¶ CR-18.16.
- In *Barcroft v. State*, 111 N.E.3d 997 (Ind. 2018), a 3-2 opinion, the Indiana Supreme Court held that trial

courts may ignore the unanimous conclusion of three mental health experts that the defendant was insane at the time of the crime and find defendant guilty but mentally ill based on demeanor evidence or other evidence of probative value from which a conflicting inference can be drawn. In *Payne v. State*, 144 N.E.3d 706 (Ind. 2020), another 3-2 opinion, the court distinguished “Barcroft’s sparse medical record,” from “Payne’s long history of mental illness [that was] consistent and thoroughly documented.” Coupled with unanimous expert opinion of insanity, Payne’s consistently documented record “fully undermines the probative value of any relevant demeanor evidence” and left no “‘reasonable [or] logical’ inferences to draw from the evidence in support of the verdict.” See ¶ CR-19.05.

- In *Dadouch v. State*, 126 N.E.3d 802 (Ind. 2019), the Indiana Supreme Court reversed the trial court’s finding that the defendant had been properly advised because the defendant was never advised he had to file a demand for a jury trial within 10 days before the first scheduled trial date or that his failure to file a de-

mand within that period would result in the waiver of his right. The court noted that the Criminal Benchbook provides an advisement dialogue that would have insured the requirements of Criminal Rule 22 were met. *Id.* at 805. It further urged trial judges to use an accurate written advisement of rights form, and “[t]he very best practice in these cases is to use both a written advisement of rights form together with the dialogue to insure that a reversal does not occur.” *Id.* See ¶ CR-21.08.

- Effective July 1, 2019, Ind. Code § 33-37-2-3(g) allows trial courts to reduce some or all of the court costs owed by a person who performs community service or approved uncompensated volunteer work under certain conditions. In making an indigency determination before ordering a defendant to pay costs of representation, the court must take into account both the amount of the proposed fee and the defendant’s assets, income, and necessary expenses when determining whether or not the defendant is able to pay. See Ind. Code § 35-33-7-6.5(a) (2020). See ¶ CR-26.28.
- Indiana Rules of Procedure, Post-Conviction Rule 2 au-

thorizes a petition for permission to file a belated notice of appeal. The rule does not permit belated consideration of an appeal of a probation revocation. *Cummings v. State*, 137 N.E.3d 255 (Ind. Ct. App. 2019). However, the probationer can file a motion and cite *In re adoption of O.R.*, 16 N.E.3d 965 (Ind. 2014), where the Indiana Supreme Court held that “[t]he un-

timely filing of a Notice of Appeal is not a jurisdictional defect depriving the appellate courts of the ability to entertain an appeal.” *Id.*, at 971, and argue that under the extraordinary compelling reasons of a given case the court should permit a late filing of a notice of appeal. See ¶ CR-27.03 and New Form CR-27:4(a).

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Publication 339 Release 81

November 2021

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<input type="checkbox"/>	CR14-1.	CR14-1
<input type="checkbox"/>	CR14-19	CR14-19
<input type="checkbox"/>	CR15-1 thru CR15-7	CR15-1 thru CR15-9
<input type="checkbox"/>	CR16-1 thru CR16-45	CR16-1 thru CR16-46.7
<input type="checkbox"/>	CR16-57 thru CR16-83	CR16-57 thru CR16-81
<input type="checkbox"/>	CR17-1 thru CR17-23	CR17-1 thru CR17-24.3
<input type="checkbox"/>	CR18-1 thru CR18-37	CR18-1 thru CR18-38.1
<input type="checkbox"/>	CR19-1 thru CR19-11	CR19-1 thru CR19-12.1
<input type="checkbox"/>	CR20-1 thru CR20-7	CR20-1 thru CR20-7
<input type="checkbox"/>	CR21-1 thru CR21-29	CR21-1 thru CR21-30.5
<input type="checkbox"/>	CR22-1 thru CR22-7	CR22-1 thru CR22-7
<input type="checkbox"/>	CR23-1 thru CR23-19	CR23-1 thru CR23-21
<input type="checkbox"/>	CR24-1 thru CR24-6.1.	CR24-1 thru CR24-6.1
<input type="checkbox"/>	CR24-17 thru CR24-29	CR24-17 thru CR24-29
<input type="checkbox"/>	CR25-1 thru CR25-11	CR25-1 thru CR25-11
<input type="checkbox"/>	CR26-1 thru CR26-29	CR26-1 thru CR26-30.7
<input type="checkbox"/>	CR26-38.1 thru CR26-45	CR26-39 thru CR26-57
<input type="checkbox"/>	CR27-1 thru CR27-5	CR27-1 thru CR27-6.1

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|--------------------------|--------------------------------|----------------------|
| <input type="checkbox"/> | CR27-15 thru CR27-23 | CR27-15 thru CR27-27 |
| <input type="checkbox"/> | I-1 thru I-35 | I-1 thru I-37 |

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