

SURVEY OF RECENT DEVELOPMENTS IN INDIANA CIVIL PROCEDURE

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Indiana civil practitioners experienced a broad range of important developments during the survey period. The most notable change was the implementation of new Indiana Jury Rules, which took effect January 1, 2003, and which drastically change procedures relating to jury trials in Indiana. Other recent amendments to the Indiana Trial Rules and Indiana Rules of Appellate Procedure changed and improved specific areas of Indiana civil practice. Meanwhile, the Indiana Supreme Court issued a significant opinion modifying the legal test for determining when a mixed equitable/legal claim is to be tried to a jury. To assist Indiana practitioners, this Article outlines these key changes.

I. THE INDIANA JURY RULES

The enactment of the new Indiana Jury Rules is the most significant development in Indiana trial practice in recent years. Historically, only a few Indiana Trial Rules spoke to the selection and administration of juries.¹ Otherwise, the procedures for juries were either scattered among various appellate decisions,² several statutes,³ or left to the trial judge without any appellate or rule-based guidance.

To provide more guidance and improve the process for juries, the Indiana Jury Rules were adopted December 21, 2001, and took effect January 1, 2003.⁴ The Jury Rules were the product of a

four-year effort involving public hearings, written recommendations, public comment, and revisions, conducted by the members of the Citizens Commission on the Future of Indiana's Courts, by the judges who serve on the Judicial Administration Committee of the Judicial Conference, and by the Supreme Court Committee on Rules of Practice

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1. See, e.g., IND. TRIAL R. 47 (addressing number of jurors, peremptory challenges, and voir dire); IND. TRIAL R. 48 (majority verdicts); IND. TRIAL R. 49 (abolishing special verdicts and interrogatories to the jury).

2. See, e.g., *Rogers v. R.J. Reynolds Tobacco Co.*, 731 N.E.2d 36, 40 (Ind. Ct. App. 2000) (addressing trial judge's handling of question from juror whether jury could hold press conference after the verdict), *trans. granted, vacated*, 753 N.E.2d 5 (Ind. 2001).

3. See, e.g., IND. CODE § 34-36-1-6 (1998) (procedure for handling jury question regarding evidence or point of law).

4. *Order of Indiana Supreme Court Adopting Jury Rules* (Dec. 21, 2001), available at <http://www.state.in.us/judiciary/research/amend02/jury.pdf>; *Tincher v. Davidson*, 762 N.E.2d 1221, 1224 n.2 (Ind. 2002). The Indiana Jury Rules were amended July 19, 2002, prior to their effective date. *Order Of Indiana Supreme Court Amending Jury Rules* (July 19, 2002), available at <http://www.state.in.us/judiciary/rules/amend/july02/jury.pdf>.

and Procedure.⁵

Indiana's new Jury Rules "provide explicit guidance and directives to our trial judges and legal counsel so that the jurors might become better educated in the various aspects of our legal system generally, as well as the specific case for which they sit."⁶

The Jury Rules consist of thirty separate rules addressing topics ranging from the composition of the jury pool⁷ to procedures for assisting jurors during deliberations.⁸ Many of the new rules are unremarkable, but several will significantly impact Indiana jury practice.

For instance, Jury Rule 2 requires that the jury pool for each county shall be compiled annually. Further, that rule requires that the jury pool shall be compiled from voter's registration lists for the county, supplemented "with names from at least one other list of persons resident in the county, such as lists of utility customers, property taxpayers, persons filing income tax returns, motor vehicle registrations, city directories, telephone directories, and driver's licenses."⁹ This procedure should significantly enhance the number of individuals in, and the diversity of, the jury pool in Indiana counties, as previously only voter's registration lists were used in most counties for jury pools. Indeed, Marion County has not yet implemented Jury Rule 2 and still uses only voter's registration lists.¹⁰

Jury Rule 11 mandates that trial courts "shall provide prospective jurors with orientation prior to the selection process so they may understand their role in our legal system."¹¹ Jury Rule 14 specifies what the jury panel of prospective jurors must be told at the outset of the case, which must at least include nine items ranging from the nature of the case,¹² the applicable burdens of proof,¹³ and the "appropriate means by which jurors may address their private concerns to the judge."¹⁴

Most significantly, Jury Rule 14 adds a new concept of mini-opening statements to Indiana trials, providing, "[t]he facilitate the jury panel's understanding of the case, with the court's consent the parties may present brief statements of the facts and issues (mini opening statements) to be determined by the jury."¹⁵ This use of mini opening statements is an entirely new concept in

5. *Tincher*, 762 N.E.2d at 1224.

6. *Hall v. Eastland Mall*, 769 N.E.2d 198, 204 (Ind. Ct. App. 2002).

7. IND. JURY R. 2.

8. IND. JURY R. 28.

9. IND. JURY R. 2.

10. See *Jury Pool Information*, at <http://www.indygov.org/courts/jurypool/index.htm#1>, at No. 6 ("Voter's Registration is the source from which prospective jurors' names are selected").

11. IND. JURY R. 11.

12. IND. JURY R. 14(a)(2).

13. IND. JURY R. 14(a)(4).

14. IND. JURY R. 14(a)(6).

15. IND. JURY R. 14(b).

Indiana practice, and certainly could allow for more meaningful voir dire with the issues more meaningfully previewed by trial counsel. Practitioners will need to add the possibility of mini opening statements to their punch list of trial preparation subjects.

Jury Rule 17 speaks to challenges to prospective jurors for cause, and includes a provision that the court shall sustain a challenge for cause if the prospective juror served as a juror in a case that resulted in a verdict in that same county within the previous 365 days.¹⁶ For trial lawyers seeking to exclude a prospective juror not of their liking, this for cause provision could save a peremptory challenge.

Several of the new rules seek to enhance the information available to jurors during deliberation. For instance, Jury Rule 23 provides that the court may authorize the use of juror trial books to aid jurors, and that such books may contain “(a) all given instructions . . . (c) witness lists; and (d) copies of exhibits admitted for trial.”¹⁷ Jury Rule 26 requires the court to read the final instructions, and to provide each juror with written instructions *before* the court reads them.¹⁸ Significantly, this new rule requires that jurors “shall retain the written instructions during deliberations.”¹⁹ This requirement is a significant change in Indiana practice.

Jury Rule 27 addresses final arguments, and has a unique provision mandating that if the party opening and closing final argument (e.g., the plaintiff with final argument and then rebuttal argument) raises a new point or fact in its closing final argument (e.g., rebuttal), then the adverse party has the right to reply to the new point or fact.²⁰ Plaintiffs and prosecutors will need to be careful to avoid opening the door to this sur-rebuttal argument, and defense counsel will need to be vigilant to taking advantage of this new opportunity.

Finally, the most significant and controversial provision of the Indiana Jury Rules is Jury Rule 28, which addresses how to assist juries at an impasse. This new rule provides:

If the jury advises the court that it has reached an impasse in its deliberations, the court may, but only in the presence of counsel, and, in a criminal case the parties, inquire of the jurors to determine whether and how the court and counsel can assist them in their deliberative process. After receiving the juror’s response, if any, the court, after consultation with counsel, may direct that further proceedings occur as appropriate.²¹

Notably, the Indiana Supreme Court’s Committee on Rules of Practice and Procedure unanimously opposed this rule.²² In addition, two members of the

16. IND. JURY R. 17(a)(2).

17. IND. JURY R. 23.

18. IND. JURY R. 26.

19. *Id.*

20. IND. JURY R. 27.

21. IND. JURY R. 28.

22. *Tincher v. Davidson*, 762 N.E.2d 1221, 1226-27 (Ind. 2002) (Sullivan, J., concurring).

Indiana Supreme Court—Justices Sullivan and Rucker—dissented from the enactment of Jury Rule 28.²³

Justice Sullivan explained his reasons for his dissent in a 2002 opinion in which the Indiana Supreme Court applied the concepts of Jury Rule 28 even though it was not yet effective. Justice Sullivan explained:

I write to express my opposition to the majority's "urg[ing]" trial court judges "to facilitate and assist jurors in the deliberative process, in order to avoid mistrials." I do not think it proper, advisable, or (perhaps) constitutional for judges to "facilitate and assist" in jury deliberations absent the consent of the parties.

I acknowledge that the majority's view reflects the spirit of our new Jury Rule 28. As the majority's opinion reflects, Jury Rule 28 (adopted over Justice Rucker's and my dissent and over the contrary unanimous recommendation of our Supreme Court Committee on Rules of Practice and Procedure) is grounded in a goal of improved efficiency—and a desire to avoid mistrials. Certainly we should strive for improved efficiency. But I believe that the prejudice to the parties and our system of trial by jury, by allowing—indeed "urg[ing]"—judges "to facilitate and assist" in jury deliberations outweighs any benefits of improved efficiency in this regard.²⁴

It remains to be seen whether trial judges will be receptive to the *Tincher* majority's support of Jury Rule 28, or instead more cautious because of Justice Sullivan's concerns. One thing seems certain, however: if a trial judge assists the jury in its deliberative process in a manner not agreed to by the losing party, constitutional arguments will be presented on appeal, and at least two members of the Indiana Supreme Court are apt to be receptive to considering those arguments when considering a transfer petition on this issue..

In sum, the Indiana Jury Rules are unique and significant. Judge Baker's positive comments on these new rules in a 2002 Indiana Court of Appeals decision provide a good closing to this subject:

Hopefully, these new rules will aid in educating the jurors and will promote a better understanding of their vital role within our legal system. Additionally, Hoosier jurors may very well be provided with an opportunity to reconnect with their fellow citizens and their government. Moreover, the application of the rules may communicate to jurors that their time is valued.

The jury rules may also ward off those instances of inattention and frustration that often occur in a jury trial setting. Put another way, the

23. Order of Indiana Supreme Court Adopting Jury Rules (July 21, 2001), *available at* <http://www.state.in.us/judiciary/research/amend02/jury.pdf>; *Tincher*, 762 N.E.2d at 1220-27 (Sullivan, J., concurring).

24. *Tincher*, 762 N.E.2d at 1226-27 (Sullivan, J., concurring).

recent “overhaul” of the manner in which juries receive information and are treated by counsel and the courts alike, may prevent some incidents from occurring like those at this trial.²⁵

II. AMENDMENTS TO INDIANA TRIAL RULES

Several amendments were made to the Indiana Trial Rules during the survey period. For instance, Trial Rule 4.4(A)—Indiana’s long-arm statute—was amended to include new language after the list of eight examples of situations that give rise to personal jurisdiction. Specifically, since July of 2002, Trial Rule 4.4(A) now contains the following additional provision, “[i]n addition, a court of this state may exercise jurisdiction on any basis not inconsistent with the Constitutions of this state or the United States.”²⁶ This new language resolves any doubt that the Indiana long-arm statute extends to the full reach of due process. Some recent Indiana authority had cast significant doubt on that question.²⁷

Separately, in December 2001, Trial Rule 3 was amended to add to and clarify what is required for the commencement of an action. The new rule provides:

A civil action is commenced by filing with the court a complaint or such equivalent pleading or document as may be specified by statute, by payment of the prescribed filing fee or filing an order waiving the filing fee, and, where service of process is required, by furnishing to the clerk as many copies of the complaint and summons as are necessary.²⁸

This amendment added the filing fee and service requirements, which previously were not in the text of Trial Rule 3. Nonetheless, in 1993, the Indiana Supreme Court had ruled, at least in the small claims context, that payment of the filing fee was required to commence an action.²⁹ Thereafter the issue had been unsettled enough to draw debate and a dissent within a court of appeals

25. *Hall v. Eastland Mall*, 769 N.E.2d 198, 205 (Ind. Ct. App. 2002).

26. IND. TRIAL R. 4.4(A).

27. *See, e.g., Anthem Ins. Cos. v. Tenet Healthcare Corp.*, 730 N.E.2d 1227 (Ind. 2000).

If the Indiana long-arm statute were intended to be coextensive with the limits of personal jurisdiction under the Due Process Clause, it could be written with general language, such as the “any constitutional basis” statutes used in several other states. Most courts with “enumerated act” statutes, and indeed the correct approach under Indiana Trial Rule 4.4(A) is to, engage in a two-step analysis, first determining whether the conduct falls under the long-arm statute and then whether it comports with the Due Process Clause as interpreted by the United States Supreme Court and courts in this state.

Id. at 1232.

28. IND. TRIAL R. 3.

29. *Boostrom v. Bach*, 622 N.E.2d 175 (Ind. 1993).

decision.³⁰ With the amendment, there is no longer any uncertainty on the issue. To start an action, the complaint must be filed, the filing fee must be paid (or waived), and summons and complaint must be provided to the clerk for service.

Also in December 2001, a helpful amendment was made to Trial Rule 5(E) to allow a new fifth means of filing in court. Specifically, Trial Rule 5(E)(4) now allows filing to be effected by “any third-party commercial carrier for delivery to the clerk within three (3) calendar days, cost prepaid, properly addressed.”³¹ Thus, parties can now send filings to the court by commercial carriers such as Federal Express and have the filing dated as of the date of submission, not the date of receipt.

III. AMENDMENTS TO INDIANA RULES OF APPELLATE PROCEDURE

The most significant recent amendment to the Indiana Rules of Appellate Procedure is the addition of Indiana Appellate Rule 46(H), providing for an Addendum to briefs. The Addendum is different from the required appendix, and indeed pursuant to Appellate Rule 46(H) “is not recommended in most cases.”³² The Addendum “is a highly selective compilation of materials filed with a party’s brief at the option of the submitting party.”³³ The Addendum may not exceed fifty pages, may not contain argument, and

may include, for example, copies of key documents from the Clerk’s Record or Appendix (such as contracts), or exhibits (such as photographs or maps), or copies of critically important pages of testimony . . . , or full text copies of statutes, rules, regulations, etc. that would be helpful to the Court on Appeal but which, for whatever reason, cannot be conveniently or fully reproduced in the body of the brief.³⁴

The Addendum can be a very useful tool for getting critical evidentiary information before the reviewing court. Indeed, while only one copy of the Appendix is filed, an original plus eight copies of an Addendum must be filed.³⁵ This allows each of the three judges and their law clerks to have a copy of the Addendum.

IV. JURY TRIALS

The most significant procedural decision during the survey period was issued in *Songer v. Civitas Bank*,³⁶ in which the Indiana Supreme Court addressed when a mixed equitable/legal case is triable to a jury. The case had been tried to the

30. *Fort Wayne Int’l Airport v. Wilburn*, 723 N.E.2d 967 (Ind. Ct. App. 2000).

31. IND. TRIAL R. 5(E)(4).

32. IND. APP. R. 46(H).

33. *Id.*

34. *Id.*

35. *Id.*

36. 771 N.E.2d 61 (Ind. 2002).

court, and on appeal the appellant contended that he was entitled to a jury trial.³⁷ In a thorough discussion of this constitutional issue, the Indiana Supreme Court affirmed the trial court, and in so doing expounded on the proper legal standard:

If the essential features of a suit as a whole are equitable and the individual causes of action are not distinct or severable, the entitlement to a jury trial is extinguished. The opposite is also true. If a single cause of action in a multi-count complaint is plainly equitable and the other causes of action assert purely legal claims that are sufficiently distinct and severable, Trial Rule 38(A) requires a jury trial on the legal claims. A review of Rule 38(A) and more than 120 years of decisions reveals that *Songer* is correct in arguing that the simple inclusion of an equitable claim, standing alone, does not warrant drawing an entire case into equity. Such an approach violates Rule 38(A), and we disapprove cases holding otherwise. Something more than the mere presence of an equitable claim is necessary.³⁸

The *Songer* court then concluded that the “appropriate question is whether the essential features of the suit are equitable.”³⁹ To determine if equity takes jurisdiction of the essential features of a suit, the court held that “we evaluate the nature of the underlying substantive claim and look beyond both the label a party affixes to the action and the subsidiary issues that may arise within such claims.”⁴⁰ The court concluded “[c]ourts must look to the substance and central character of the complaint, the rights and interests involved, and the relief demanded. In the appropriate case, the issues arising out of discovery may also be important.”⁴¹

The *Songer* decision implicitly acknowledges that the analysis is case sensitive. But *Songer* does provide a refined and clearer statement of the rule of law to be applied.

CONCLUSION

These represent, to the author, the most significant developments in Indiana civil procedure during the survey period. Overall the developments are helpful to practitioners and should enhance Indiana civil practice.

37. *Id.* at 63.

38. *Id.* at 68.

39. *Id.*

40. *Id.*

41. *Id.*