

# ETHICAL CONDUCT OF ATTORNEY IN THE SELECTION OF VENUE

Editor's Note: Opinion No. 1 of 1970, issued September 11 by the Legal Ethics Committee of the Indiana State Bar Association, calls attention of all Indiana lawyers to the ethical considerations to be applied in determining "preferred venue" under new Trial Rule 75. This opinion should be studied and respected as "deliberate filing of a lawsuit in a county other than a proper county of preferred venue is unethical and is to be condemned."

## LEGAL ETHICS COMMITTEE

Opinion No. 1 of 1970

The Legal Ethics Committee has been consulted concerning the propriety of an attorney filing suits in a county other than the county of residence of the defendant, or of a majority of the defendants where there is more than one defendant.

Under the former Code of Civil Procedure, Burns 2-1011, the defendant was required to be sued in the county where he resided. However, the question was treated as one of venue rather than jurisdiction, and if the defendant failed to raise a question, the issue of the correct county of filing was waived.

At that time, there arose a practice of filing in some county other than the county of residence of the defendant. This matter was brought to the attention of the Legal Ethics Committee, and the Committee issued its Opinion Number 14 of 1965. This opinion stated flatly that the deliberate filing of a suit in the wrong county under the statutes then in effect was unethical, and was a practice to be condemned.

Since the adoption of the Indiana Rules of Civil Procedure, the practice has again arisen of filing a suit in a county other than the county of residence of the defendant. Some attorneys have interpreted Trial Rule 75 as authorizing the filing of any case in any county in the State. It is true that Trial Rule 75 provides "Any case may be venued, commenced and decided in any court in any county.

..." This appears to be a sweeping change from former law. However, it has always been the law that in the absence of objection, a case could be commenced and decided in any county.

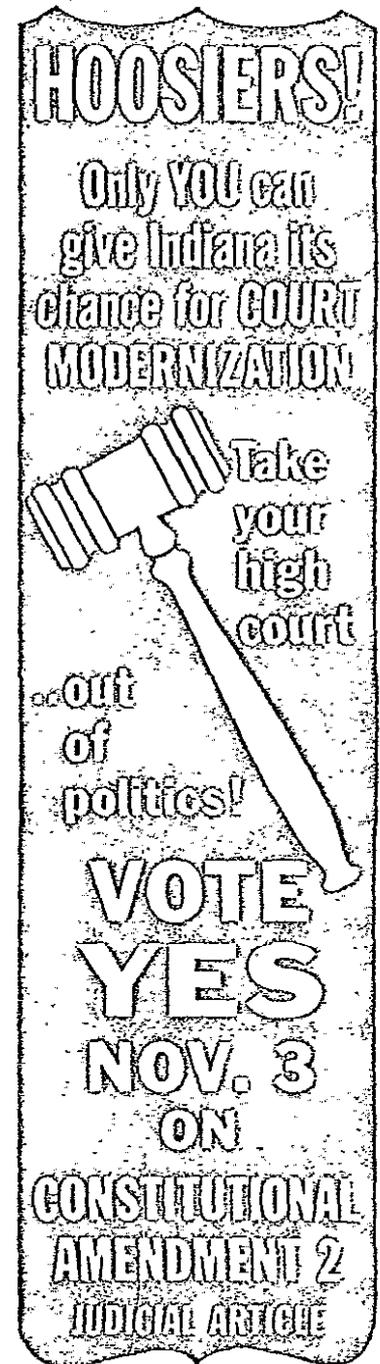
Trial Rule 75 also specifies a means of raising the question of "preferred venue." It provides that the court shall order the case transferred if it determines that the county or court where the action was filed does not meet "preferred venue" requirements, Trial Rule 75 then specifies where preferred venue lies. The first specification is "The county where the greater percentage of individual defendants included in the complaint resides, or, if there is not such greater percentage, the place where any individual defendant so named resides. . . ."

It thus appears that Trial Rule 75 makes very little actual change in the previous law of the State of Indiana as to the place of filing of an action. While a case can be commenced and decided in any court in any county, the Rule specifically designates the criteria for choosing the correct county of "preferred venue." A defendant has an absolute right to raise this question, and if the question is properly raised and the appropriate facts are established, the Court is required to transfer the case to a county of "preferred venue."

The Legal Ethics Committee therefore believes that the same considerations which led to Opinion Number 14 of 1965 are still applicable under the Indiana Rules of Civil Procedure which became effective on January 1, 1970.

Trial Rule 75 specifically sets forth the criteria of "preferred venue." A lawyer's oath requires him to avoid vexatious or harassing techniques. Filing cases in the wrong county leads to unnecessary inconvenience and unnecessary legal work, and is unfair to the client, the courts, and the public.

The Legal Ethics Committee maintains that a member of the legal pro-



profession has an obligation conscientiously to file a proper case in the proper court in the proper county, and he therefore has the duty to conscientiously determine the county of preferred venue in filing any action.

The Committee therefore holds that the deliberate filing of a lawsuit in a county other than a proper county of preferred venue is unethical and is to be condemned.

# Ethics Committee Considers Redraft of Opinion 1-1970

## STUDY OF CHALLENGED VENUE IN FILING OF LAW SUITS IS SUBJECT OF SEPT. 29 MEET

A redraft to amend Ethics Opinion No. 1, of 1970 is scheduled for consideration at a meeting of the Indiana State Bar Association's Professional Responsibility Committee tentatively scheduled for September 29, Indianapolis.

At issue is the question of ethics involved in the filing of law suits in counties other than the venue of the defendant.

Criticism of the result of strict interpretation of Opinion 1-1970 swelled as the result of statements appearing in the *Res Gestae* column, ETHICS IN THE PRACTICE, in the June 1973 issue at page 17.

The premise stated in this column was "challenged" in another column, RULES AND RULINGS For The Trial Lawyer, *Res Gestae*, August 1973, at page 16, by Sidney L. Berger, Chairman of the ISBA Trial Lawyers Section.

In adjoining columns in this issue E. Lowell Dinius, author of the column Ethics In The Practice, and Dean William F. Harvey, author and editor of the Column, Rules and Rulings for the Trial Lawyer, offer additional comments tending in some measure to clarify the situations and theories involved in the existing controversy.

Frederick E. Rakestraw, Chairman of the ISBA Professional Responsibility Committee said he feels that a redraft of Opinion No. 1-1970 should be made but added the view that "there should be appropriate emphasis on the ethical consideration involved."

George P. Osborn, chairman of the sub-committee on Legal Ethics, has been invited by Chairman Rakestraw to bring recommendations from his committee, or a suggested redraft of Opinion No. 1-1970, to the meeting of the Professional Responsibility Committee, September 29.



## Rules and Rulings For The Trial Lawyer

William F. Harvey, Dean, IUI Law School, Author and Editor

A monthly column sponsored by the Trial Lawyers Section, ISBA, as a service to section members. Sydney L. Berger, Evansville, chairman; Thomas L. Moorhead, Fort Wayne, chairman-elect; Carl G. Winter, Indianapolis, vice chairman; Theodore O. Lockyear, Evansville, secretary; Keith C. Reese, Indianapolis, treasurer. New members of section invited. Dues \$5.00 per year.

### VENUE AND THE CANONS OF ETHICS

No one question has been more often raised to me than that of Trial Rule 75 (place of Venue), and the commencement of an action, and how they relate to several interpretations of attorney's conduct culminating in ethical rulings. With some trepidation, a review of Trial Rule 75 and the problem is set out.

(1) *Legal Ethics Committee Opinion No. 14, 1965.*

This opinion addressed the question of the consequence of an attorney "repeatedly filing suits in one county although knowing full well that proper venue lay in another county." The Committee reviewed the venue statutes then applicable, and it concluded that "a member of the legal profession has an obligation conscientiously to file only a proper case in the proper court and in the proper county." Hence, the Committee held that "the deliberate filing of a lawsuit in the wrong county is unethical and is to be condemned."

In arriving at that conclusion, the Committee reviewed the suggestion that venue is a matter of defense, and is waived by a defendant when not asserted, and that the "court in which the case is filed has jurisdiction until such time as the venue question is raised." Thus the suggestion was made specifically that "an attorney therefore properly could file suits in any county within the state [of Indiana]."

That suggestion was expressly rejected because the statutes (which

were Burns Stat. §§ 2-701 through 2-709) "enunciate [d] where actions are to be commenced." And they were not to be commenced in any other place.

(2) *Legal Ethics Committee, Opinion No. 1, 1970.*

This opinion was reported in the October 1970 issue of *Res Gestae*, and it reviewed the impact of Trial Rule 75 upon Opinion No. 14 of 1965.

In that opinion the Committee did distinguish between jurisdiction and venue, and said that it was always the law that a case could be commenced and decided in any county. That statement was in reference to the jurisdictional power of a court, and not, apparently, in reference to the place where a suit was to commence.

The opinion then said that Trial Rule 75 made little change in the previous law in Indiana as to the place of filing an action. The thought was that while a case can be commenced in any court or county, the Rule specifically refers to "preferred venue" and that "a defendant has an absolute right to raise the question, and if raised and appropriate facts are shown, then the trial court is required to transfer the case to a county of preferred venue."

Finding that to be the case, in the Committee's view, it then concluded that for a plaintiff to deliberately file

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"a lawsuit in a county other than a proper county of preferred venue is unethical and is to be condemned." Hence, the 1965 opinion remained in force and effect.

The thought seemed to be that a defendant's right to transfer imposed a duty upon the plaintiff in filing the action.

There is no doubt that the gist of the 1970 Opinion was to attempt to control the filing of a "vexatious or harassing" action; but it is also true that those words as they were developed in the 1965 Opinion were used against a very different Venue rule than is found in Trial Rule 75.

### (3) Trial Rule 75, Venue Requirements

The Advisory Committee note on this Rule states, in part: "One of the main objectives of this new rule, providing for the place where actions may be brought, is to allow an action to be brought in any court in the state, subject to the right of an objecting party to transfer the case to a proper county or court as provided by this rule."

If, under this Rule, there is an "improper" choice of venue or choice of court by the plaintiff, then the result is to transfer the case to the "proper" court, pursuant to Trial Rule 75(B), with the costs attending the change or transfer to be paid by the party initiating the case in the "wrong" court.

At this point it is important to note that the words "improper" and "wrong" as they are used in this setting, in both text writing, the Rule itself, and the case of *State ex rel Knowles v. Elkhart Circuit Court*, 268 N.E.2d 79 (1971), does not mean "wrongdoing" or "impropriety" and should not be taken to mean "misconduct." In fact they were not intended to relate to that at all. They

refer to a court where a suit was filed, in comparison to which there is another, better court for place of filing, or a "preferred court" or a "preferred venue."

That leads then to the observation that it is most important to carefully read Trial Rule 75, and what it did, and was intended to do.

Trial Rule 75 created, in its language a two-step analysis. First, it states that any case may be venued, or commenced in any court in any county. That is the basic venue rule in Indiana today. Again, there is no restriction under Trial Rule 75 on the place where suit may be commenced. In short, any plaintiff may commence, as a matter of statutory right, his action in any court he selects, and in any county, if it is of competent jurisdiction. That is his right to do, and it is established by Trial Rule 75.

Secondly, granting the plaintiff that right, there may well be a better place to litigate, and a "preferred" place to litigate, or as is sometimes said, a "more preferred" court. The Rule provides that a "party" [and it does not say the defendant alone] may establish a preferred venue and if it is shown then the court shall transfer the action to the place of preferred venue which is selected by the party (again, the Rule does not specify the defendant) who first properly files the motion or pleading seeking that transfer.

Thus, the right to seek a transfer to a court of preferred venue rests also in the party who brought the action in the first instance—the plaintiff, should it appear to him or it that, after filing the action, there is another court of preferred venue. In such a case, the plaintiff would, of course, also pay the costs as are chargeable upon the transfer even though he sought the change.

Thirdly, Trial Rule 75 is *not* a change of venue provision; and a transfer under that Rule does not effect a change of venue, as under Trial Rule 76.

Trial Rule 75 speaks not of change of venue at all. It speaks to the place where the action is to be tried, or brought, and once that is determined or set, it is then that a change of venue may be obtained under Trial Rule 76.

Trial Rule 75 was a new provision. Trial Rule 76 came directly from prior Indiana law, namely Supreme Court Rule 1-12B. Under that Rule, there was a substantial amount of decisional law which was and is directly applicable to Trial Rule 76.

Such is not the case with Trial Rule 75. And under Trial Rule 75(A) the numerical listing of (1) through (10) is not, among themselves, stated in an order of preference. That is, (1) is not preferred over, say, (5), nor is (5) preferred over (10). Each one is a place of preferred venue, and each one is written against the background rule which is that a "case may be venued \* \* \* in any court in any county \* \* \*"

Finally, the potency of Trial Rule 75 is established under subsection (D) which declares that "the provisions of any statute fixing more stringent rules thereon shall be ineffective." The meaning of that provision is that to the extent that a former venue provision is effective after January 1, 1970, it is effective if at all pursuant to the language of Trial Rule 75 (A) (1) through (10). Accord, *Etherton v. Wyatt*, 293 N.E.2d 43 (1973).

### (4) A Re-examination of the Question

I shall attempt one specific example and that relates to an action for divorce. It is a hypothetical action, filed by A against B, each a resident of Marion County, and filed in either Boone County, or Hamilton County, or Hancock County, each of which is contiguous to Marion County.

The specific question is whether it is unethical for the plaintiff's attorney to file this action in one of

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those three counties, with no other element being present or raised.

I must conclude that it is not, because of Trial Rule 75 and its meaning. (And I exclude, for this discussion, any other enactment on the subject of Divorce)

Then the question arises whether the plaintiff's attorney filed the action to be unfair, or vexatious, or to harass, and if so, is that unethical? The answer is that if so, it is unethical.

The final question then becomes what does the place of filing have to do with vexatious litigation, given Trial Rule 75?

The answer I derive is that, standing alone, it has little or nothing to do with a vexatious suit. That is, the place alone does not. More must be added, and if so, then the place to remedy that kind of conduct is pursuant to Trial Rule 11, and the Canons of Ethics, generally.

If these conclusions are correct, then I am compelled to conclude also that:

- (A) Trial Rule 75 probably overruled Opinion No. 14, 1965.
- (B) If that is correct, then a sentence in one of my own works is incorrect, and it is found in Harvey & Townsend, Indiana Practice, page 545, § 75-16, second sentence.
- (C) Opinion No. 1, 1970, is open to very serious doubt and should be re-written.

In summary, the following observations are made: (1) As acknowledged in the *Etherton* case, supra, Trial Rule 75(A) established a place of venue in any county in a court of general jurisdiction for an action; and in so doing it amended those former venue provisions which re-

## Ethics in the Practice



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A Member of the Indianapolis Bar

The writer's reading of the letter by Mr. Sidney L. Berger published in Dean Harvey's Rules and Rulings for the Trial Lawyer in the August, 1973, issue of *Res Gestae* brings to mind a modified version of a current expression. A doctor has the privilege of burying his mistakes, but a legal writer must face his mistakes in print carefully enumerated by competent counsel. Mr. Berger's first exception is well taken, and the error is hereby acknowledged. The remaining exceptions appear to be an overzealous

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mained, to the extent that they did, after January 1, 1970. (T.R. 75 (D)).

(2) After opening the courts in any county as a proper place of venue, Trial Rule 75(A) established a preferred venue, found in the list of preferred venue provisions from (1) through (10).

(3) Any party, including the plaintiff, may seek a transfer to a place of preferred venue, and the party who filed the action shall pay the costs involved in that transfer. (T.R. 75(B) & (C)).

(4) A transfer under Trial Rule 75 is NOT a change of venue; it is to correctly place venue in the first instance.

(5) Prior opinions, including my own, should be re-examined, and re-written.

Your comments are invited and are sincerely welcome.

explosion resulting from pent up frustrations at the ethical restrictions placed upon the practice of law. Careful reading of the column in question will disclose that a lawyer should reveal the whereabouts of a criminal fugitive when the information received by the lawyer is unprivileged. In that circumstance, the lawyer stands as any other citizen in society.

The thrust of the June, 1973 column was to cause members of the Bar to reflect upon their motives as lawyers in the representation of their clients. In this regard, Mr. Berger's response is gratifying. His vigorous defense of the role of the lawyer coincides with the highest traditions of the Bar.

Ethical considerations become relevant when a lawyer's motivation is not on such a high plane. Ethical considerations are relevant when motivation is of a corrupt nature wherein the lawyer seeks to take advantage of his privileges without living up to his responsibilities. It is not asking too much of a lawyer to also examine his client's motives to determine whether or not the client intends to purchase the lawyer's legal talent for a corrupt purpose. Certainly, defense of an accused after the fact is not rendering legal service with a corrupt motive in view; but on the contrary, it is the response expected by a capable member of the Bar.

Corrupt motive is not the only indicator of unethical practice. The Code of Professional Responsibility establishes rules designed to maintain public confidence in our legal system by avoiding the appearance of impropriety. The appearance of impropriety does not involve dishonest conduct but still creates an ethical problem. This writer had the privilege of attending a meeting between representatives of the Indiana State Bar Association Professional Responsibilities Committee and representatives of the Indiana Prosecuting Attorneys Association. At that meeting some honest differences of opinion

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