

## The Taxation of Costs in Indiana Courts

### I. INTRODUCTION

Costs that an unsuccessful party must pay his opponent in litigation are not initially of great concern to attorneys or litigants. All too often, however, an unsuccessful litigant discovers with dismay that the costs taxed<sup>1</sup> against him are not an incidental expense but a major one. Further, attorneys are often unsure which of the other party's expenses their clients may be required to pay if unsuccessful in court. This is not surprising since there are no clear statutory or case law guidelines in the area, and the results of a questionnaire<sup>2</sup> sent to circuit courts reveal a wide variation even among counties in Indiana as to what items are included.

This Note will present an overview of the costs of litigation in Indiana—those chargeable against the losing party and those for which parties are responsible themselves. Unfortunately, in many areas it was difficult and sometimes impossible to determine from statutes, case law and secondary sources the extent to which certain items are allowable and to whom. In these areas, the results of the court questionnaire clarified actual practices to some extent. But the lack of county-to-county uniformity serves to emphasize the ambiguity and lack of guidance given by statute. Nowhere in the Indiana Code is there a definition of costs or a list of the items which may be charged to an unsuccessful litigant. Case law is not particularly helpful on the subject, although some old cases have discussed certain aspects of costs.<sup>3</sup>

The conclusions and suggestions of this Note were reached after discussions with attorneys and judges as well as a somewhat dissatisfying attempt to find order in the Indiana law on the subject of costs.

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<sup>1</sup>The term "taxation" when used in connection with costs means the "process of ascertaining and charging up the amount of costs in an action to which a party is legally entitled, or which are legally chargeable." BLACK'S LAW DICTIONARY 1631 (rev. 4th ed. 1968). It is frequently used, and is used in this Note, to refer to the process of charging to the losing party in litigation the costs expended by the prevailing party. As will be seen, the major problem in the procedure is to decide which expenses are "taxable" costs—that is, which are allowed to be assessed against the losing party.

<sup>2</sup>For a discussion of the questionnaire sent to the circuit courts, see note 29 *infra* and accompanying text. A sample questionnaire, with compiled results, is set forth as an Appendix to this Note.

<sup>3</sup>For a discussion of the attempts to define costs, see pp. 682-83 *infra*.

## II. BASES FOR AWARDING COSTS

Since costs were not awarded at common law, the courts' authority to award them is not inherent but must come from statute.<sup>4</sup> Indiana Code section 34-1-32-1 provides the broad statutory basis for awarding costs: "In all civil actions, the party recovering judgment shall recover costs, except in those cases in which a different provision is made by law."<sup>5</sup> Trial Rule 54(D) contains almost identical language,<sup>6</sup> but adds a provision giving the court discretion whether to award costs if some other provision of law is applicable.<sup>7</sup> Thus, in the great majority of cases, the court's final disposition on the merits determines which party is to receive costs.

There are statutory minimum recoveries which must be satisfied before a prevailing party can recover his costs from his opponent. In contract actions in circuit and superior courts, if a plaintiff has a judgment for less than \$50, his opponent recovers costs unless the recovery has been reduced below \$50 by a setoff or counterclaim of the defendant, in which case the successful party recovers costs.<sup>8</sup> In non-contract actions for damages, if a plaintiff recovers less than \$5 in damages, "he shall recover no more costs than damages, except in actions for injuries to character and false imprisonment, and where the title to real estate comes in question."<sup>9</sup>

There are many special cost provisions included in rules and statutes, which prevail over the general rule as to costs as discussed in the first paragraph of this section. If a plaintiff takes a voluntary dismissal without prejudice under Trial Rule 41(D), he must, if ordered to do so by the court, pay the costs of that action before being able to file a second action involving the same claim against the same defendant.<sup>10</sup>

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<sup>4</sup>State v. Holder, 260 Ind. 336, 295 N.E.2d 799 (1973); Taylor v. Strayer, 167 Ind. 23, 78 N.E. 236 (1906); Stayner v. Bruce, 123 Ind. App. 467, 110 N.E.2d 511 (1953).

<sup>5</sup>IND. CODE § 34-1-32-1 (Burns 1973).

<sup>6</sup>"Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs in accordance with any provision of law . . . ." IND. R. TR. P. 54(D).

<sup>7</sup>*Id.*

<sup>8</sup>IND. CODE § 34-1-32-2 (Burns 1973).

<sup>9</sup>*Id.* § 34-1-32-3.

<sup>10</sup>See State v. Holder, 260 Ind. 336, 295 N.E.2d 799 (1973) (Prentice, J., concurring); Zuelly v. Casper, 37 Ind. App. 186, 76 N.E. 646 (1906). The court's rationale in *Zuelly* was that the second action is presumed to be vexatious. In *Holder*, both Justice Prentice, concurring, 260 Ind. at 348, 295 N.E.2d at 801, and Chief Justice Arterburn, dissenting, *id.* at 340, 295 N.E.2d



Trial Rule 53.4 provides that a party requesting a continuance is liable to pay the expenses of the other parties caused by the motion if the court so orders.<sup>11</sup> The court has great discretion in awarding such expenses, and can even penalize a party for his attorney's actions. In *Brutus v. Wright*,<sup>12</sup> the Indiana Court of Appeals approved the trial court's order to the appellant to pay the appellee's expenses caused by a continuance when appellant's attorney withdrew his appearance shortly before the hearing without notifying the court. The appellant knew of the withdrawal but also did not notify the court. The court of appeals held that Trial Rule 53.4 authorizes such an award and that the act of an attorney is the act of the client. If the other party's behavior has necessitated a continuance, however, the moving party will not be liable for the former's expenses.<sup>13</sup>

Another special cost provision is found in Trial Rule 56(G). It provides that if a court finds affidavits presented in a motion for summary judgment are in bad faith or for delay, the court shall order the offending party to pay the other party his reasonable expenses caused by the filing of the affidavit, including reasonable attorney fees.<sup>14</sup> The Indiana Court of Appeals commented in *Donat v. Indiana Business & Investment Trust*<sup>15</sup> that the rule "should be strictly enforced to preserve the intent and purpose of the summary judgment proceeding,"<sup>16</sup> and presumably to avoid excessive expenses to the other party.

Where there are multiple parties or issues, a statute provides that each party can recover costs for the issues decided in his favor.<sup>17</sup> For example, in *Columbia Realty Corp. v. Harrelson*,<sup>18</sup> the trial court erroneously assessed costs for the whole action against appellant Columbia, even though it had been a co-defendant with Harrelson on a cross-claim by another defendant. The case was remanded for an apportionment of costs between the co-defendants on that issue.

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at 802, stated that Trial Rule 41(A)(2) gives courts discretion to award even attorney's fees in appropriate cases of voluntary dismissal to avoid inequities to the other party.

<sup>11</sup>*Cf.* *Holzman v. Hibben*, 100 Ind. 338 (1884); *Mitchell v. Stephens*, 23 Ind. 466 (1864).

<sup>12</sup>324 N.E.2d 165 (Ind. Ct. App. 1975).

<sup>13</sup>IND. R. TR. P. 53.4.

<sup>14</sup>*Id.* 56(G).

<sup>15</sup>147 Ind. App. 276, 259 N.E.2d 428 (1970).

<sup>16</sup>*Id.* at 278-79, 259 N.E.2d at 429.

<sup>17</sup>IND. CODE § 34-1-32-5 (Burns 1973).

<sup>18</sup>293 N.E.2d 804 (Ind. Ct. App. 1973).

A final special cost provision is found in Indiana Code section 34-1-32-6.<sup>19</sup> If a plaintiff could have joined several actions he had against the same defendant but did not do so, the plaintiff is allowed to recover costs in only one action, unless different rights or interests are affected.

### III. ITEMS ALLOWED AS COSTS IN INDIANA TRIAL COURTS

The term "costs" has not been conclusively defined by Indiana courts, nor has it been defined in any of the statutes or rules already discussed. Many cases have said what costs are not,<sup>20</sup> but none have enumerated the expenses chargeable as costs. An early definition of costs was given in *Alexander v. Harrison*.<sup>21</sup>

The word "costs" is a word of known legal signification. It signifies, when used in relation to the expense of legal proceedings, the sums prescribed by law as charges for the services enumerated in the fee bill.<sup>22</sup>

A more recent definition was given in *State v. Holder*.<sup>23</sup> "[C]osts' . . . concerns only those usual and ordinary expenses of a trial which are prescribed by statute to be paid to the court."<sup>24</sup> It is unclear whether the court intended this definition to define costs for all purposes, because the action was an eminent domain proceeding and the court was interpreting the cost provision of the Eminent Domain Act.<sup>25</sup> However, the court referred to the definition as the "ordinary sense" of the word costs,<sup>26</sup> so it may have been intended to apply to all actions. Neither definition is very enlightening. Both are very narrow definitions and would necessarily exclude deposition costs, which are paid to the re-

<sup>19</sup>IND. CODE § 34-1-32-6 (Burns 1973) provides:

When the plaintiff shall, at the same court, bring several actions against the defendant, upon demands which might have been joined in one [1] action, he shall recover costs only in one [1] action, unless it shall appear to the court that the actions affect different rights or interests, or other sufficient reasons exist why the several demands ought not to have been joined in one action.

<sup>20</sup>*See, e.g.*, *Saint Joseph's College v. Morrison, Inc.*, 302 N.E.2d 865 (Ind. Ct. App. 1973) (attorney fees); *State ex rel. Friedman v. Freiberg*, 70 Ind. App. 1, 122 N.E. 771 (1919) (attorney fees); *Alexander v. Harrison*, 2 Ind. App. 47, 28 N.E. 119, 120 (1891) (officer's fees in serving out-of-county witnesses). *But see* discussion of attorney fees at pp. 688-91 *infra*.

<sup>21</sup>2 Ind. App. 47, 28 N.E. 19 (1891).

<sup>22</sup>*Id.* at 48, 28 N.E. at 119, quoting from *Apperson v. Mutual Benefit Life Ins. Co.*, 38 N.J.L. 388, 390 (N.J. 1876).

<sup>23</sup>260 Ind. 336, 295 N.E.2d 799 (1973).

<sup>24</sup>*Id.* at 339, 295 N.E.2d at 801.

<sup>25</sup>IND. CODE § 32-11-1-10 (Burns 1973).

<sup>26</sup>260 Ind. at 339, 295 N.E.2d at 801.



porter who recorded and transcribed the deposition<sup>27</sup> and not to the court nor by fee bill.<sup>28</sup>

### A. Court Survey

Because of the difficulty in determining what costs of litigation are assessed against the losing party in Indiana courts, a questionnaire<sup>29</sup> was sent to each of the ninety circuit courts in Indiana. Thirty-eight counties, through their clerks' offices, responded. A sample questionnaire, with a composite response, is included as an Appendix to this Note. The replies reveal an appalling lack of uniformity among the counties as to items assessed as costs. For example, twenty-five counties reported they included witness fees in taxable costs while thirteen said they did not;<sup>30</sup> and thirteen counties indicated deposition costs were included while twenty-five said they were not.<sup>31</sup> The procedures used by the courts in taxing costs, however, were fairly uniform.<sup>32</sup> A more detailed discussion of the replies will be included as each category of costs is considered.

### B. Filing Fees

A wide variety, but by no means all, of the expenses incurred during litigation are taxable as costs against the losing party, and as noted above, the allowance of certain items varies from court to court. The first and most obvious category of taxable costs is the filing fee paid in order to initiate the lawsuit. This fee encompasses docket fee, clerk's service fee, and the cost of service of process, either by sheriff or registered mail. The filing fee which can be collected upon the filing of a lawsuit is prescribed

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<sup>27</sup>See pp. 687-88 *infra* for a discussion of deposition costs.

<sup>28</sup>IND. CODE § 33-1-10-1 (Burns 1975).

<sup>29</sup>Hereinafter cited and referred to in text as "Court Survey." The author would like to express her appreciation to the staff of the Indiana Judicial Center for their assistance in this Survey, as well as to the county clerks and judges who replied to the questionnaire. A sample questionnaire with compiled results is set forth as an appendix to this Note, and all completed questionnaires received from the courts are on file at the offices of the *Indiana Law Review*, 735 West New York Street, Indianapolis, Indiana 46202. The counties whose clerks replied to the questionnaire are: Boone, Carroll, Clay, DeKalb, Elkhart, Fayette, Franklin, Fulton, Gibson, Greene, Jackson, Jasper, Jefferson, Knox, Kosciusko, LaGrange, Lawrence, Marion, Morgan, Newton, Noble, Orange, Owen, Parke, Porter, Posey, Putnam, Randolph, Shelby, Starke, Steuben, Sullivan, Vermillion, Warren, Warrick, Wayne, White, and Whitley.

<sup>30</sup>Court Survey, question 3.

<sup>31</sup>*Id.*, question 5.

<sup>32</sup>*Id.*, questions 6 to 10.

by statute,<sup>33</sup> which breaks it down into categories. The statute provides that only the docket fee portion of the filing fee is taxable as a cost,<sup>34</sup> but the courts almost uniformly award the entire filing fee as a cost against the losing party.<sup>35</sup>

### C. Witness Fees

The statutory fees paid to witnesses are also taxable as costs.<sup>36</sup> Witnesses subpoenaed or appearing voluntarily at trial are allowed a per diem allowance plus mileage going to and returning from court.<sup>37</sup> At present, for circuit, superior and criminal courts, the per diem is \$5 and the mileage allowance is equal to the mileage allowance for state employees, regardless of whether the court is in the witness' home county.<sup>38</sup> If more than three witnesses are subpoenaed to testify to the same fact in a civil case, however, the party calling them must bear the costs of all in excess of

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<sup>33</sup>IND. CODE § 33-1-9-1 (Burns 1975).

(a) Upon the institution of any civil action or proceeding . . . there shall be paid by the party or parties so instituting such action or proceeding the sum of nineteen dollars [\$19.00], seven dollars [\$7.00] of which shall constitute a docket fee payable to the state of Indiana, and which said docket fee now required by law to be taxed by clerks of circuit courts for any action in any circuit, superior, or probate court wherein there is a plaintiff and defendant, except as hereinafter set out; six dollars [\$6.00] of which shall constitute a clerk's service fee, which . . . shall belong to and become the property of the general fund of any county where such civil action is filed and the remaining six dollars [\$6.00] shall constitute an advance payment on service of process fees . . . .

<sup>34</sup>*Id.* § 33-1-9-1(c). "If the party instituting any such action or proceeding shall recover judgment, such judgment shall also include as costs an amount equal to the docket fee provided for by this section."

<sup>35</sup>All counties but one tax the entire filing fee. Court Survey, question 1. According to a clerk's manual used by many of the clerks, the term docket fee may, as a practical matter, be used to refer to the entire filing fee. Manual of Instructions and Legal Guide for Clerks of the Circuit Courts of Indiana 132 (State Bd. of Accts. 1966).

<sup>36</sup>1947 OPS. ATT'Y GEN. IND. NO. 10, at 37.

<sup>37</sup>IND. CODE § 5-7-9-4 (Burns Supp. 1975) provides in part:

Witness fees in the circuit, superior and criminal courts shall be as follows, to wit:

Every witness attending the circuit, superior, and criminal courts, in his own county, per day, five dollars [\$5.00].

Every witness attending the circuit, superior, and criminal courts, from another county, per day, five dollars [\$5.00].

For each mile necessarily traveled in going, and returning from court, from his residence, a sum for mileage equal to that sum per mile paid to state officers and employees.

<sup>38</sup>*Id.*



three.<sup>39</sup> This seems a just rule. Three witnesses should be sufficient in almost any situation to testify to the same fact, and the losing party should not be penalized if his opponent belabored a point.

It is initially the responsibility of the party calling the witness to pay his fees: witnesses are entitled to have one day's fee and mileage tendered to them at the time they are served with a subpoena.<sup>40</sup> After the first day, the witness must claim the fee from the court and the party calling him must pay the fee to the court. The party taxed with costs is thus responsible to his adversary rather than to the witness for those fees.<sup>41</sup> The witness himself must claim his fee and mileage allowance during the term of the court he attends.<sup>42</sup> Thirteen of the courts responding to the Court Survey said they did not include witness fees in costs taxed against the losing party.<sup>43</sup> However, the comments<sup>44</sup> indicated the reason is probably that witnesses do not receive their fee from the court, but at least presumably are paid directly by the party for whom they testify. Since the money does not come through the court, it has no record of the payment to the witness and cannot include the amount in taxable costs unless the attorney gives the information to the clerk.

Courts have great discretion in deciding whether to allow costs for witnesses who are not used.<sup>45</sup> If the unsuccessful party's conduct made his opponent believe a witness was needed, the former is taxed with the costs of that witness even if he was not called.<sup>46</sup> Ordinarily, if an action is dismissed before trial, the loser is liable for the fees and mileage of his adversary's witnesses.<sup>47</sup>

Even though it is frequently necessary for a party to pay an expert witness a higher fee to testify for him, a statute provides that experts are entitled to the same per diem and mileage as other witnesses;<sup>48</sup> therefore only the statutory amount would be taxable against the losing party, provided the expert claimed the fee from the court.

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<sup>39</sup>*Id.*

<sup>40</sup>IND. R. TR. P. 45(G).

<sup>41</sup>1947 OPS. ATT'Y GEN. IND. No. 10, at 37.

<sup>42</sup>IND. CODE § 5-7-9-9 (Burns 1974).

<sup>43</sup>Court Survey, question 3.

<sup>44</sup>*E.g.*, "If claimed," "If the witnesses file a claim with the Clerk of the Court," "When subpoena is turned in," "If filed."

<sup>45</sup>Chandler v. Beall, 132 Ind. 596, 32 N.E. 597 (1892).

<sup>46</sup>Ohio & Miss. Ry. v. Trapp, 4 Ind. App. 69, 30 N.E. 812 (1892).

<sup>47</sup>Alexander v. Harrison, 2 Ind. App. 47, 28 N.E. 119 (1891).

<sup>48</sup>IND. CODE § 34-1-14-12 (Burns 1973).

### D. Jury Fees

The courts vary as to whether they include in costs any fees collected in cases where juries are called.<sup>49</sup> When a jury fee is included in costs, it does not include the per diem and mileage fees paid to jurors for serving,<sup>50</sup> but rather nominal amounts charged as clerk's service fees and jury fees.<sup>51</sup> At present these amounts are: a \$3 clerk's service fee and a \$10 jury fee when a jury is sworn;<sup>52</sup> a \$5 clerk's service fee when a jury is called but not used;<sup>53</sup> and a \$3 fee payable to the county or city, if in a city court, when a cause is tried by a jury.<sup>54</sup> However, if a party requests a struck jury,<sup>55</sup> he is liable for the jurors' full compensation and mileage and is not entitled to be reimbursed when costs are taxed unless the court has determined that the special jury was needed.<sup>56</sup>

### E. Change of Venue

A party requesting a change of venue from the county is liable to pay the costs of the change before the papers and transcript are sent to the new county.<sup>57</sup> If he fails to do so, he may properly be taxed with all costs in the case to the time of his failure to perfect the change of venue.<sup>58</sup> The costs involved are the clerk's costs in preparing the transcript and certifying it.<sup>59</sup> These costs must be paid before a change of venue can be perfected, and if the cause has already been transferred to the new county of venue, it should be returned to the original county if the costs are not paid.<sup>60</sup> If the requesting party does not pay the costs of the change, his adversary may perfect the change if he so wishes by paying the costs himself.<sup>61</sup>

<sup>49</sup>Court Survey, question 4. Twenty-two courts said they did tax the clerk's jury fee, and fourteen said they did not. Two courts did not reply.

<sup>50</sup>IND. CODE § 33-4-5-8 (Burns 1975).

<sup>51</sup>*Id.* §§ 33-1-11-5, 33-4-5-8.

<sup>52</sup>*Id.* § 33-1-11-5.

<sup>53</sup>*Id.*

<sup>54</sup>*Id.* § 33-4-5-8.

<sup>55</sup>Forty names are drawn from the box containing the names of the persons selected for jury service; the parties or their representatives then strike off names alternately until only sixteen remain. The first twelve of the sixteen who are seated comprise the jury. *Id.* § 34-1-20-1 (Burns 1973).

<sup>56</sup>*Id.* § 34-1-20-3.

<sup>57</sup>*Id.* § 34-1-13-2.

<sup>58</sup>*Id.*

<sup>59</sup>State *ex rel.* O'Neill v. Pyle, 204 Ind. 509, 184 N.E. 776 (1933).

<sup>60</sup>Furry v. O'Connor, 1 Ind. App. 573, 28 N.E. 103 (1891).

<sup>61</sup>Clinton Coal Co. v. Chicago & E.I.R.R., 190 Ind. 465, 130 N.E. 798 (1921).



Since the statute and cases are so clear that the moving party is responsible for paying the costs of the change of venue, no question on the subject was included in the Court Survey. However, the *Manual of Instructions and Legal Guide for Clerks of the Circuit Courts of Indiana*, published by the State Board of Accounts and relied on by many of the clerks,<sup>62</sup> includes the cost of a change of venue in the costs assessed against the losing party.

If an action is commenced in a court of improper venue and there is an objection, that court transfers the cause to a court in which it should have been filed. The person responsible for the improper filing must pay the same costs as are chargeable on a change of venue.<sup>63</sup> That person must also pay the mileage expenses of the objecting party and his attorney in resisting the original venue.<sup>64</sup> Additionally, if the court finds that there was bad faith in commencing the action in an improper court, it may require the person responsible to pay the objecting party's reasonable attorney fees in resisting venue.<sup>65</sup>

#### F. Depositions

Often the most financially significant item which an unsuccessful litigant must pay his adversary is the cost of depositions. The cost of one deposition can be hundreds of dollars. In the Court Survey, thirteen counties replied they did tax deposition costs, while twenty-five replied they did not.<sup>66</sup> The amount involved in those counties which do tax deposition costs, is the "notary fee" which is entered on the outside of an envelope containing a deposition when it is delivered to the court by the reporting service. The clerk's office enters this amount into the docket book and indicates which party has paid for the deposition. The notary fee is the amount charged by the reporting service for producing an original copy of the deposition for the court; it includes the reporter's transportation and expenses, recording and transcribing of the deposition, and postage to the court if necessary.<sup>67</sup>

According to the replies to the Court Survey, only one county which does tax depositions requires that the deposition actually be used at trial before costs will be taxed to the losing party. All the other courts allowing depositions add no further requirements. Several of the counties which do not tax deposition costs as a

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<sup>62</sup>Clerk's Manual, *supra* note 35, at 138.

<sup>63</sup>IND. R. TR. P. 75(B).

<sup>64</sup>*Id.* 75(C).

<sup>65</sup>*Id.*

<sup>66</sup>Court Survey, question 5.

<sup>67</sup>Conversation with Mr. Don Oakes, Powell & Oakes Reporting Service, Indianapolis, Indiana.

general rule indicated that they are occasionally allowed when the court so directs.<sup>68</sup>

Both practices can be supported by authority. If the definition from *State v. Holder*<sup>69</sup> is followed, the taxing of deposition costs should not be allowed because the cost is not paid directly into the court, but to the reporting service. However, Indiana Code section 34-1-33-1 provides:

When in any suit pending in any court in this state it shall be necessary to procure a transcript of any judgment or proceeding, or exemplification of any record, as evidence in such action, the necessary expense of procuring such transcript or exemplification shall be taxed with the other costs in the cause, and recovered as in other cases.<sup>70</sup>

This language would seem to authorize the taxing of deposition costs. This impression is strengthened by the fact that the taxation of deposition costs in federal courts is held to be authorized under a similar provision: "A judge or clerk of any court of the United States may tax as costs the following: . . . (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case."<sup>71</sup> For a deposition to be taxable in federal courts, it must have been used for trial or reasonably necessary.<sup>72</sup> If that somewhat vague "necessariness" test could be defined by a ruling of the Indiana Supreme Court, it would seem to fit the requirements of the statute and at the same time provide a more equitable distribution of costs. If a deposition is necessary, there is no reason the losing party in the action should not have to pay his opponent's costs in taking it. On the other hand, the prevailing party should not be able to burden his opponent with frivolous charges.

### G. Attorney Fees

The most controversial element of costs has been attorney fees. The general rule in Indiana, as in most other jurisdictions, is that attorney fees are not recoverable as a cost by the prevailing party to a lawsuit, whether in law or equity, unless there is a statute authorizing such an award or an enforceable agreement or stipulation about attorney fees.<sup>73</sup> There have been certain ex-

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<sup>68</sup>Court Survey, question 5.

<sup>69</sup>260 Ind. 336, 295 N.E.2d 799 (1973).

<sup>70</sup>IND. CODE § 34-1-33-1 (Burns 1973).

<sup>71</sup>28 U.S.C. § 1920 (1970).

<sup>72</sup>See the discussion of costs in federal courts at pp. 695-97 *infra*.

<sup>73</sup>*Saint Joseph's College v. Morrison, Inc.*, 302 N.E.2d 865 (Ind. Ct. App. 1973).



ceptional situations in which the courts have used their inherent equity power to award attorney fees absent statute or agreement. The exceptions were discussed by the Indiana Court of Appeals in *Saint Joseph's College v. Morrison, Inc.*<sup>74</sup> They are: (1) Cases in which the opposing party has acted in bad faith; (2) common fund situations, as in class actions; and (3) private attorney general situations. In the *Saint Joseph* case, the court refused to allow an award of attorney fees to stand because the appellant's behavior had not been vexatious or oppressive, and the other exceptions did not apply.

One of the most recent Indiana cases on the subject of attorney fees is *Palace Pharmacy, Inc. v. Gardner & Guidone, Inc.*,<sup>75</sup> an action to recover damages and costs on an injunction bond after the injunction had been dissolved. The court held that in such cases attorney fees are a proper element of recovery because the purpose of the bond is to compensate the defendant for any expenses incurred in defending against the injunction.

Until recently the case of *La Raza Unida v. Volpe*<sup>76</sup> had been widely cited in those cases where a private citizen was acting to effectuate strong congressional policy, and attorney fees were awarded under the private attorney general exception to the general rule that parties pay their own attorney fees. However, in 1975, the United States Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*<sup>77</sup> expressly disapproved the award of attorney fees by federal courts in private attorney general situations. The Court held that to make such awards would be to "make major inroads on a policy matter that Congress has reserved for itself."<sup>78</sup> The majority reasoned that since Congress has enacted legislation allowing attorney fees in specific private attorney general situations, the absence of authorization in other situations implies that attorney fees are not allowable in the latter situations. Additionally, the Court pointed out that there is a statute<sup>79</sup> which allows small amounts of attorney fees, or "attor-

<sup>74</sup>302 N.E.2d 865, 870 (Ind. Ct. App. 1973), *citing* *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972).

<sup>75</sup>329 N.E.2d 642 (Ind. Ct. App. 1975).

<sup>76</sup>57 F.R.D. 94 (N.D. Cal. 1972).

<sup>77</sup>421 U.S. 240 (1975).

<sup>78</sup>*Id.* at 269.

<sup>79</sup>28 U.S.C. § 1923 (1970). This statute reads in part:

(a) Attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows:

\$20 on trial or final hearing . . . in civil, criminal, or admiralty cases, except that in cases of admiralty and maritime jurisdiction where the libellant recovers less than \$50 the proctor's docket fee shall be \$10;

. . . .

ney's docket fees,"<sup>80</sup> to be taxed as costs and that this statute has been consistently enforced by the courts as the only general authorization for the recovery of attorney fees as costs.<sup>81</sup>

The Supreme Court approved the other two judge-made exceptions to the "American Rule"<sup>82</sup> that attorney fees are not recoverable. In the case of bad faith, attorney fees are an appropriate penalty; and in common fund situations, the "party preserving or recovering a fund for the benefit of others in addition to himself . . . [may] recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit."<sup>83</sup> Thus, as a district court noted recently in *Samuel v. University of Pittsburgh*,<sup>84</sup> the decision in *Alyeska* leaves only four situations in which the American rule of payment by each party of his own attorney fees may be deviated from: statutory authority, enforceable agreement,<sup>85</sup> bad faith, and common fund.

The Court in *Alyeska* did note, however, that "a very different situation is presented when a federal court sits in a diversity case."<sup>86</sup> If a state has a substantial policy of granting or denying attorney fees, forum shopping could result from allowing litigants to thwart the policy by proceeding in federal court. If a state has a statute granting attorney fees in certain situations, the federal court would be bound to apply it. Although "the same would clearly hold for a judicially created rule, . . . the question of the proper rule to govern in awarding attorneys' fees in federal diversity cases in the absence of state statutory authorization loses much of its practical significance in light of the fact that most States follow the restrictive American rule."<sup>87</sup> Although the Indiana Court of Appeals in *Saint Joseph's College* cited *La*

\$5 on discontinuance of a civil action;

\$5 on motion for judgment and other proceedings on recognizances;

\$2.50 for each deposition admitted in evidence.

The *Alyeska* Court commented that the intent of this statute was that recovery of attorney fees as costs be limited to the sums specified in the statute.

<sup>80</sup>See also the discussion of costs in federal courts pp. 695-97 *infra*.

<sup>81</sup>421 U.S. at 255-57.

<sup>82</sup>The "English Rule," on the other hand, is that counsel fees may be and regularly are allowed to be awarded as a cost. *Id.* at 247.

<sup>83</sup>*Id.* at 257.

<sup>84</sup>395 F. Supp. 1275 (W.D. Pa. 1975).

<sup>85</sup>A recent Indiana case, *Honey Creek Corp. v. WNC Development Co.*, 331 N.E.2d 452 (Ind. Ct. App. 1975), confirmed that Indiana will uphold a contractual agreement to pay attorney fees so long as the contract is not contrary to law or public policy. *Id.* at 459.

<sup>86</sup>421 U.S. at 259 n.31.

<sup>87</sup>*Id.*



*Raza Unida*<sup>88</sup> with approval, no case has been found where attorney fees were allowed as a cost in a private attorney general situation in Indiana.

A recent Seventh Circuit decision, *Satoskar v. Indiana Real Estate Commission*,<sup>89</sup> followed the Supreme Court's holding in *Alyeska* and refused to allow the award of attorney fees to a plaintiff who had succeeded in having an Indiana statute precluding aliens from applying for real estate licenses declared unconstitutional but who had not succeeded on class and damages aspects of the case. The plaintiff was not entitled to attorney fees under a private attorney general rationale because of the *Alyeska* decision, and was not entitled to attorney fees under the common fund exception because the class of persons benefited was too indefinite and the benefits to resident aliens of Indiana was "merely theoretical and not reducible to monetary figures."<sup>90</sup> So the courts are not going to allow attorney fees when there is merely common benefit, but only when there is actually a common fund recovered.

#### IV. PROCEDURES INVOLVED IN TAXING COSTS IN TRIAL COURTS

The actual taxation of costs is a ministerial duty of the clerk.<sup>91</sup> There is some dispute in the authorities about whether the judge must enter a judgment for costs, or whether the clerk can automatically assess the costs against the losing party without the order of the judge. On the one hand, case law developed under Indiana Code section 34-1-32-1, which provides for the prevailing party to recover costs, has consistently held that there must be a judgment for costs<sup>92</sup> and that if there is no judgment for costs, each party must bear his own costs.<sup>93</sup> On the other hand, when the Civil Code Study Commission proposed Trial Rule 54(D), it specifically stated that its intention was that the rule make it unnecessary for a judgment for costs to be entered before the clerk could tax costs.<sup>94</sup> At the same time, the commission indicated that prevailing law would continue to control the matter

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<sup>88</sup>302 N.E.2d at 870, citing *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972).

<sup>89</sup>517 F.2d 696 (7th Cir.), cert. denied, 96 S. Ct. 276 (1975).

<sup>90</sup>*Id.* at 698.

<sup>91</sup>IND. R. TR. P. 54(D) ("costs may be computed and taxed by the clerk on one [1] day's notice"); 3 W. HARVEY, INDIANA PRACTICE 496 (1970).

<sup>92</sup>*McNelis v. Wheeler*, 225 Ind. 148, 73 N.E.2d 339 (1947).

<sup>93</sup>*Id.*

<sup>94</sup>3 W. HARVEY, INDIANA PRACTICE 491-92 (1970) (Civil Code Study Commission Comments).

of costs.<sup>95</sup> From comments made in some of the responses to the Court Survey, it appears that many judges do enter judgments for costs and that the clerks depend on this to know whether to tax costs against the losing party.<sup>96</sup>

Even in cases where judges do believe it necessary to enter a judgment for costs, it is not necessary for taxable costs to be enumerated in the judgment,<sup>97</sup> nor is it proper for the court to make findings with regard to costs.<sup>98</sup> It is the clerk's duty to ascertain the amount of taxable costs and see that they are charged against the losing party.

Costs are normally entered into the docket book as they accrue in Indiana trial courts; the clerk totals these items and determines which amounts the prevailing party has paid or is liable to pay. The loser, then, in most courts,<sup>99</sup> pays this amount into the court; the clerk apportions the amounts payable to the court and officers of the court to the proper fund, and the remaining amount may be claimed by the prevailing party.<sup>100</sup> The statute which allows clerks to receive money in payment of judgments<sup>101</sup> has been construed to authorize them to collect money for costs.<sup>102</sup>

A further duty of the clerk is to secure a cost bond from any plaintiff who is a nonresident of the state.<sup>103</sup> If he fails to do so, the opposing party may move to require such a cost bond.<sup>104</sup> A clerk can even become liable on his own bond for unpaid costs to the court and officers of the court if he fails to require a bond from a nonresident of the state.<sup>105</sup>

The remedy for improper taxation of costs is a motion to retax.<sup>106</sup> Trial Rule 54 provides that the action of the clerk may be reviewed by the court on motion within five days after the taxation of costs. A motion to retax must specify the errors in

<sup>95</sup>*Id.*

<sup>96</sup>*E.g.*, "If so ordered," "If so ordered by judge," "Judge's order."

<sup>97</sup>*Palmer v. Glover*, 73 Ind. 529 (1881).

<sup>98</sup>*Newlin v. Newlin*, 114 Ind. App. 574, 52 N.E.2d 503 (1944).

<sup>99</sup>Court Survey, question 10. Only four courts responding said the losing party did not pay the costs into the court to be withdrawn by the prevailing party.

<sup>100</sup>*Id.*

<sup>101</sup>IND. CODE § 33-15-14-1 (Burns 1975).

<sup>102</sup>*Hammann v. Mink*, 99 Ind. 279 (1884).

<sup>103</sup>IND. CODE § 34-1-32-7 (Burns 1973).

<sup>104</sup>*See Smith v. Keyes*, 103 Ind. App. 487, 9 N.E.2d 119 (1937).

<sup>105</sup>IND. CODE § 5-7-1-15 (Burns 1974).

<sup>106</sup>*Washington Hotel Realty Co. v. Bedford Stone & Constr. Co.*, 196 Ind. 396, 148 N.E. 405 (1925).



taxation and notice must be given to the opposing party.<sup>107</sup> If a party wishes to appeal the denial of a motion to retax, he should assign such denial in a motion to correct errors;<sup>108</sup> the denial of the motion to retax would then be appealable along with the judgment in the action so long as there was a final disposition of the cause.<sup>109</sup> If the assignment of error is that costs were awarded to an improper party, it has been held to be properly raised in a motion to modify the judgment.<sup>110</sup> A judgment for costs gives to its owner the same rights as any other money judgment.<sup>111</sup>

## V. COSTS ON APPEAL

The costs taxable to the losing party on appeal are fewer and therefore easier to ascertain than those in the trial courts. Appellate Rule 15(G) provides that the "fee paid for procuring the transcript . . . and the costs of serving and notice of appeal are a part of the costs of the court on appeal." It is additionally provided by statute that the cost of the transcript of any judgment or proceeding necessary for appeal is taxable.<sup>112</sup> It must be noted, however, that only that portion of the transcript from the trial court which is necessary to support the assignment of error is taxable. In *Adams Express Co. v. Welborn*,<sup>113</sup> the appellant assigned as error a question of law and was not allowed to be reimbursed by his opponent for the transcript of evidence since it was not necessary for the appeal. It follows that if the transcript of evidence is necessary, the fee paid to the court reporter for it is taxable as well as the fee paid to the clerk of the trial court for the court transcript.<sup>114</sup> Appeal bond premiums are taxable<sup>115</sup>

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<sup>107</sup>*Crews v. Ross*, 44 Ind. 481 (1873); see *Reimer v. Sheets*, 128 Ind. App. 400, 149 N.E.2d 554 (1958); MARION COUNTY IND. CIR. & SUPER. CT. R. PRAC. & P. 28.

<sup>108</sup>IND. R. TR. P. 59.

<sup>109</sup>*Kelley v. Augsperger*, 171 Ind. 155, 85 N.E. 1004 (1908).

<sup>110</sup>*Merrill v. Shirk*, 128 Ind. 503, 28 N.E. 95 (1891).

<sup>111</sup>*Keifer v. Summers*, 137 Ind. 106, 35 N.E. 1103 (1894). A judgment for costs can be collected in the same manner as the principal of the judgment, including execution. *Church v. Hay*, 93 Ind. 323 (1884). The same rules as to exemptions under a writ of execution apply to costs when collected along with a judgment. *Id*; *Donaldson v. Banta*, 5 Ind. App. 71, 29 N.E. 362 (1891). Thus, costs in tort actions are subject to no exemptions and those in contract actions are subject only to the exemptions in the statute. See IND. CODE § 34-2-28-1 (Burns 1973). But a judgment for costs standing alone is not subject to exemptions. *Ross v. Banta*, 140 Ind. 120, 34 N.E. 865 (1895).

<sup>112</sup>IND. CODE § 34-1-33-1 (Burns 1973). For the text of section 34-1-33-1, see p. 688 *supra*.

<sup>113</sup>59 Ind. App. 330, 336, 109 N.E. 420 (1915) (on motion to retax costs).

<sup>114</sup>*Howard v. Robinette*, 123 Ind. App. 206, 109 N.E.2d 432 (1952).

<sup>115</sup>*Houston v. First Fed. Sav. & Loan Ass'n*, 144 Ind. App. 604, 248 N.E.2d 169 (1969).

but only if they have actually been paid;<sup>116</sup> and a special docket fee of \$10 is taxable to the losing party on appeal.<sup>117</sup> But each party must bear the cost of printing his own brief.<sup>118</sup>

The clerk of the Indiana Supreme Court can automatically include those costs which are paid directly to the court, such as filing fees, but the prevailing party has the responsibility to inform and prove to the clerk the amount of fees paid to the clerk or court reporter of the trial court for transcripts since those persons are not required to inform the appellate courts of these costs.<sup>119</sup> The usual procedure is for the clerk to send the losing party a statement of taxable costs to be paid by him; therefore, the prevailing party must inform the clerk of such items as transcripts within a reasonable time so that the party paying the costs can be sure his obligation has been satisfied.<sup>120</sup> A reasonable time has been defined as within the time for filing a petition for rehearing,<sup>121</sup> but petitions for taxation of costs have been allowed after that time, and the determination of reasonableness seems to depend on the facts and circumstances of each case.<sup>122</sup> A motion to retax costs in the appellate courts must also be filed within a reasonable time, for the same reasons.<sup>123</sup>

If the judgment appealed from is affirmed in whole, the appellee recovers costs; if it is reversed in whole, the appellant recovers his costs in both the appellate and trial courts; and if the judgment is affirmed in part and reversed in part or otherwise disposed of, the court can apportion costs as it deems equitable.<sup>124</sup>

When an Indiana appellate court finds that an appeal has been taken frivolously, it has the power under Appellate Rule 15(F) to award an assessment against the appellant of ten per-

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<sup>116</sup>IND. CODE § 23-1-16-7 (Burns 1972). See *General Grain, Inc. v. Goodrich*, 142 Ind. App. 142, 233 N.E.2d 187 (1968). In this case, a portion of the appeal bond premium had not yet been paid, and the appellee was not allowed to recover the unpaid amount from the appellant.

<sup>117</sup>IND. CODE § 33-3-2-16 (Burns 1975).

<sup>118</sup>IND. R. APP. P. 15(G) (2).

<sup>119</sup>*Howard v. Robinette*, 123 Ind. App. 206, 109 N.E.2d 432 (1952). An enumeration of costs expended is usually included in a motion to tax costs. 1 A. BOBBITT, *INDIANA APPELLATE PRACTICE AND PROCEDURE* 471 (1972).

<sup>120</sup>*Howard v. Robinette*, 123 Ind. App. 206, 109 N.E.2d 432 (1952).

<sup>121</sup>*Id.*

<sup>122</sup>See *Houston v. First Fed. Sav. & Loan Ass'n*, 144 Ind. App. 604, 248 N.E.2d 169 (1969); *General Grain, Inc. v. Goodrich*, 142 Ind. App. 142, 233 N.E.2d 187 (1968).

<sup>123</sup>*Howard v. Robinette*, 123 Ind. App. 206, 109 N.E.2d 432 (1952).

<sup>124</sup>IND. R. APP. P. 15(G) (1). In *Snider v. Mt. Vernon Hancock School Bldg. Corp.*, 250 Ind. 10, 234 N.E.2d 632 (1968), the issues being litigated had become moot by the time the parties appeared before the court for oral argument; however neither party had informed the court. The court ordered costs to be apportioned equally.



cent of a money judgment or a discretionary amount where there are no money damages. Although technically an item of damages, this award is generally considered to be an additional element of costs and so will be discussed here. The test for such an award is a strict one, as articulated by the Indiana Supreme Court in *Annee v. State*:<sup>125</sup> the damages are discretionary and "should not be issued without a strong showing of bad faith."<sup>126</sup> Some judges feel the standard should be relaxed somewhat. In *King v. Pollard*,<sup>127</sup> Judge Buchanan, writing for the majority, felt damages should be assessed because the appellant's attorneys had misstated the record.<sup>128</sup> But since there was an allegation in the assignment of error that the evidence at trial had been insufficient to sustain the judgment, he felt the *Annee* test had not been satisfied and reluctantly declined to assess damages. In *Krick v. Farmers & Merchants Bank*,<sup>129</sup> the appellee's attorney fees were included in the Appellate Rule 15(F) damages, demonstrating the courts' wide discretion in awarding these damages.

It is clear from the foregoing discussion that the rules about costs allowable in the appellate courts are more clear-cut and definite than those in the trial courts. If there were only a rule of procedure or a statute pertaining to costs in the trial courts which was equally clear, the lack of uniformity among the trial courts could perhaps be ended.

## VI. COSTS IN FEDERAL COURTS

The taxation of costs in federal courts is a more orderly process than in Indiana courts. The Federal Rules of Civil Procedure are, of course, the model for the Indiana Rules of Procedure, and thus many of the same rules apply in both courts. Federal rule 54(d) provides that costs are usually awarded as of course to the prevailing party, and that the clerk shall tax costs and the court review them. Thus far, the federal and Indiana practices are the same. However, Indiana statutes and procedures for taxing costs are less similar.

In order to initiate the clerk's action in taxing costs in federal courts, the prevailing party must file a bill of costs<sup>130</sup> enumerating the allowable costs which he has expended along with

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<sup>125</sup>256 Ind. 691, 274 N.E.2d 260, *denying petitions for rehearing to* 256 Ind. 686, 271 N.E.2d 711 (1971).

<sup>126</sup>*Id.* at 692, 274 N.E.2d at 261. The *Annee* test was followed in *Hobby Shops, Inc. v. Drudy*, 317 N.E.2d 473 (Ind. Ct. App. 1974).

<sup>127</sup>311 N.E.2d 454 (Ind. Ct. App. 1974).

<sup>128</sup>*Id.* at 457.

<sup>129</sup>151 Ind. App. 7, 279 N.E.2d 254 (1972).

<sup>130</sup>28 U.S.C. § 1920 (1970).

an affidavit<sup>131</sup> stating that the items were necessarily incurred in the case and any services which were paid for were actually and necessarily performed. The clerk supplies the party with any data which have been entered in the docket book. The opposing party has the opportunity to object to the taxation of any of the items claimed.<sup>132</sup> Costs which are due to the prevailing party are paid directly to him,<sup>133</sup> not into the court as in most Indiana counties.

A federal statute<sup>134</sup> enumerates the categories of taxable costs. Most of them are the same as the items allowable in the majority of Indiana counties, such as fees of the clerk and marshal, witness fees, and transcript fees. Deposition fees are taxed as costs in federal courts to the extent they were used at trial or were reasonably necessary for use at trial. Those which were taken exploratorily or for preparation are not normally taxable.<sup>135</sup> Although the standard seems vague, the federal courts have interpreted it so often that it is a more authoritative standard than it seems. In *Electronic Specialty Co. v. International Controls Corp.*,<sup>136</sup> the test was stated as follows:

[A] deposition which is not used at the trial is still taxable in favor of the prevailing party if it appeared to be reasonably necessary to the parties in the light of a particular situation existing *at the time it was taken*. The fact that the deposition is not received in evidence at the trial does not necessarily prevent the taxation of its cost. However, costs incurred for depositions which are merely fishing expeditions and only for the convenience of counsel in marshaling his case, as distinguished from a necessity for use in the solution of issues of the case, are not allowable.<sup>137</sup>

Another version of the test was given in *Federal Savings & Loan Insurance Corp. v. Szarabajka*:<sup>138</sup>

A deposition taken within the proper bounds of discovery, even if not used at trial, will normally be deemed to be "necessarily obtained for use in the case," and its

<sup>131</sup>*Id.* § 1924.

<sup>132</sup>Peck, *Taxation of Costs in United States District Courts*, 37 F.R.D. 481, 484 (1965).

<sup>133</sup>*Id.* at 485.

<sup>134</sup>28 U.S.C. § 1920 (1970).

<sup>135</sup>Peck, *Taxation of Costs in United States District Courts*, 37 F.R.D. 481, 487 (1965). See also cases cited note 139 *infra*.

<sup>136</sup>47 F.R.D. 158 (S.D.N.Y. 1969).

<sup>137</sup>*Id.* at 162 (emphasis the court's) (citations omitted).

<sup>138</sup>330 F. Supp. 1202 (N.D. Ill. 1971).



cost will be taxed unless the opposing party interposes a specific objection that the deposition was improperly taken or unduly prolonged.<sup>139</sup>

Perhaps the test could be stated in different words, but the federal courts seem to have little difficulty in deciding whether a deposition was "reasonably necessary" or not.

Two items which are allowable in federal courts, but not in Indiana courts, are fees for exemplifications and copies, including exhibits, maps or drawings necessary for the action, and attorney's docket fees described in 28 U.S.C. § 1923.<sup>140</sup> Section 1923 allows small amounts to be taxed as attorney's and proctor's docket fees whenever a hearing, dismissal or motion occurs, and a small charge for each deposition admitted into evidence.<sup>141</sup> This section was referred to in the *Alyeska* case as being the only general statutory authorization for attorney fees being taxed as costs.<sup>142</sup>

The Seventh Circuit has recently interpreted federal rule 54(d) to require no judgment for costs to be entered by the court before costs can be taxed by the clerk. In *Popeil Brothers v. Schick Electric, Inc.*,<sup>143</sup> the court held that the good faith of the plaintiff was not enough to overcome the presumption created by rule 54 that the prevailing party should recover costs. "The language of the rule reasonably bears the intendment that the prevailing party is prima facie entitled to costs and it is incumbent on the losing party to overcome the presumption."<sup>144</sup> The analogy to Indiana's Trial Rule 54 and the comments of the Civil Code Study Commission is clear: perhaps this same presumption attaches to Indiana Rule of Trial Procedure 54(D).

## VII. CONCLUSION

From the foregoing discussion, it is evident that a definitive statement is needed of what items are allowable as costs and to what extent in Indiana trial courts. The subject is clarified for appellate courts by the Rules of Appellate Procedure and case

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<sup>139</sup>*Id.* at 1210. See, e.g., *Advance Business Systems & Supply Co. v. SCM Corp.*, 287 F. Supp. 143 (D. Md. 1968); *Nationwide Auto Appraiser Serv., Inc. v. Association of Cas. & Sur. Cos.*, 41 F.R.D. 76 (W.D. Okla. 1966).

<sup>140</sup>28 U.S.C. § 1920 (1970). See note 79 *supra* for the pertinent portions of 28 U.S.C. § 1923.

<sup>141</sup>See note 79 *supra*.

<sup>142</sup>421 U.S. at 255-57. See the discussion at pp. 689-90 *supra*.

<sup>143</sup>516 F.2d 772 (7th Cir. 1975).

<sup>144</sup>*Id.* at 775. The court quoted at length from the case of *Chicago Sugar Co. v. American Sugar Ref. Co.*, 176 F.2d 1 (7th Cir. 1949). The gist of the quoted passage was that a showing of extreme bad faith on the part of the prevailing party would be necessary to overcome the presumption.

law. The problem with the subject for trial courts apparently is that the issue of trial court costs does not often reach the appellate level, and there is therefore no opportunity for those courts to rule on questionable areas. Costs is not a subject covered in law school procedure courses, so new attorneys must learn from experience or simply accept the clerk's actions without knowing in advance what items are allowable.

One solution to the problem would be for the Indiana Supreme Court and the Civil Code Advisory Commission to promulgate an additional rule enumerating what expenses of litigation Indiana trial courts are authorized to tax as costs. Since the Indiana Rules of Trial Procedure are based on the Federal Rules of Civil Procedure and therefore similar provisions as to costs are in both sets of rules, another logical solution would be for Indiana to follow the federal practice as to costs to the extent this would be practical. In the absence of a rule promulgated by the Indiana Supreme Court, the Indiana General Assembly could enact legislation similar to 28 U.S.C. §§ 1920 and 1924, giving a list of categories of items taxable as costs in Indiana and the procedures to be followed in claiming them. The requirement of a bill of costs itemized by the party recovering costs and certified by him to the clerk of the court is a sound one in that it makes clear exactly what items are being taxed, enables the party to recover costs expended by him which have not found their way into the docket book, and gives the party paying the costs the opportunity to object to specific items he feels are improper. The federal practice of allowing only depositions which were reasonably necessary for use in the case is a fair one also, and is not unworkably vague. The federal attorney's docket fee statute,<sup>145</sup> however, is antiquated; the amounts given to the attorneys are nominal and bear no reasonable relationship to the rest of the litigation. That sort of statute would serve no useful purpose if enacted in Indiana. If the legislature or the supreme court believes that the majority of courts in Indiana are correct in not taxing deposition costs,<sup>146</sup> or believes the judge should make an independent determination in each case, there is still a need for a rule or statute so stating.

At the very least, each court should publish local rules pertaining to costs or supply a form listing allowable items of costs

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<sup>145</sup>28 U.S.C. § 1923 (1970).

<sup>146</sup>See Court Survey, question 5. Twenty-five counties responding said they did not tax deposition costs while only thirteen said they did. The author feels the sample obtained is probably representative of all circuit courts because the replies received were distributed among all sizes and locations of counties.



to each litigant in the court, setting out the procedures for claiming and reporting costs. Then an attorney could let his client know what sort of expenses he might incur if he were unsuccessful in the action. The publication of such rules would also serve to emphasize the lack of guidance given the courts by current law.

One additional suggestion with respect to costs in Indiana is that the test for awarding damages for frivolous appeals be softened, in accordance with the expressed opinion of at least one appellate court judge.<sup>147</sup> It seems ludicrous that an appellant can escape being taxed with this cost simply by alleging that the judgment was contrary to the evidence in the case, even if the record shows the evidence was clearly sufficient. If the standard were relaxed and the damages for frivolous appeals were awarded more frequently, perhaps prospective appellants would be more judicious in deciding to appeal a case, and perhaps the caseload in the appellate courts would be eased. In addition, appellees put to unnecessary expense and aggravation in defending questionable appeals would be at least partially compensated for their trouble and for their attorney fees, which otherwise would not be reimbursed.

It is encouraging to note that the new County Court Law,<sup>148</sup> which became effective on January 1, 1976, contains a clear costs section<sup>149</sup> for small claims cases and provides that all parties re-

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<sup>147</sup>See note 127 *supra* and accompanying text.

<sup>148</sup>IND. CODE §§ 33-10.5-1-1 to -8-6 (Burns Supp. 1975).

<sup>149</sup>*Id.* § 33-10.5-8-5. This section reads in pertinent part:

(a) The costs in cases on the small claims docket of the court, including those involving actions by a city or town for ordinance violations, shall consist of:

(1) A county docket fee in the amount of ten dollars [\$10.00] to include service of process by registered mail;

(2) The costs of publication of notices, if any, or sheriff's costs for the service of any writ, process or other papers issued by the court, or the proper officer thereof, as is required by law to be taxed and charged for like services in circuit courts; and

(3) Witness fees, if any, in an amount as is provided for by law in circuit court.

The county docket fee provided herein shall be in lieu of any docket fee or clerk's service fee required by law to be taxed by circuit courts in civil actions and shall be paid upon the institutions [institution] of each civil case.

(c) Costs in other cases including those on the plenary docket and those involving actions by a city or town for ordinance violations shall be taxed and adjudged in the same manner and for the same amount as costs are taxed and adjudged in the circuit court. In an action in the county court, if a party shall recover judgment, he shall also recover costs regardless of the amount involved.

(Bracket in original).

covering judgment in the county courts shall recover costs with no limitations as to the amount involved.<sup>150</sup>

The subject of costs in Indiana is confusing at best. Although the system no doubt functions fairly and equitably most of the time within individual courts, it is unthinkable that there should be ninety different methods of computing costs, varying with the county one happens to be in. The possibility of abuse of the system is thus clearly present, and since the inequities and lack of uniformity could be cured by statutory enactment or rule of procedure, it is inexcusable to continue the system in such a haphazard way.

LYNN BRUNDAGE

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<sup>150</sup>*Id.* § 33-10.5-8-5(c).



## Appendix

### QUESTIONNAIRE

Name of court: \_\_\_\_\_

Please reply to the following questions based on the practice in your county in taxing costs against the losing party in litigation:

1. Is the entire filing fee included in taxable costs?  
Yes 37 No 1
2. Is only the docket fee portion of the filing fee included?  
Yes 0 No 38 Comments:
3. Are witness fees (per diem and mileage) included?  
Yes 25 No 13 Comments:
4. Are clerk's jury fees included?  
Yes 22 No 14 Comments: [No reply: 2]
5. Are depositions included?  
Yes 13 No 25  
Is it necessary for the deposition to have been used at trial?  
Yes 1 No 37 Comments:  
Are there any other requirements as to depositions?  
Yes 0 No 38 Comments:
6. Does the taxation procedure in your court involve the filing by the prevailing party of a bill of costs?  
Yes 5 No 31 [No reply: 2]
7. Does the clerk ascertain the amount of costs solely from the docket book?  
Yes 34 No 2 Comments: [No reply: 2]
8. Do you have any local court rules regarding costs?  
Yes 2 No 36 Specify:
9. Is a statement sent to the losing party enumerating costs?  
Yes 12 No 26
10. Is the money paid into the court and withdrawn by the prevailing party?  
Yes 32 No 4 [No reply: 2]