

[CAPTION]

**MOTION TO TRANSFER CASE TO THE SUPERIOR COURT JUDGE (REGULARLY  
PRESIDING JUDGE)**

(Marion County)

The Defendant, by counsel, pursuant to I.C. 33-33-49-32(c), respectfully requests the Superior Court Judge to preside over this matter. In support of the Motion, the Defendant states the following:

1. I.C. 33-33-49-32(c) provides that, in Marion County:  
  
A party to a superior court proceeding that has been assigned to a magistrate . . . may request that an elected judge of the superior court . . . preside over the proceeding instead of the magistrate . . . Upon a timely request made . . . by either party, the magistrate . . . shall transfer the proceeding back to the superior court judge.
2. The Indiana Supreme Court in *Ringham v. State*, 768 N.E.2d 893, 897 (Ind. 2002), reiterated that a request to transfer a proceeding from a magistrate to the superior court judge was mandatory.
3. The Indiana Court of Appeals in *Capehart v. Capehart*, 771 N.E.2d 657, 662 (Ind.Ct.App. 2002) found that the Marion County statute also applies to commissioners, and thus, a request to transfer a matter from a commissioner to the superior judge is also mandatory.
4. In order to give full effect to the Defendant's statutory right to have the presiding judge hear this case, all pre-trial pleadings and evidentiary motions should be decided by the presiding judge. The importance of the same judge hearing both the pretrial motions and the trial is recognized by Indiana jurisprudence in cases discussing the rationale behind requiring a timely or contemporaneous trial objection to challenged evidence. Second, and critical to the Defendant's instant motion, is that because a pretrial ruling is not final, a timely objection permits the trial court to reconsider its pretrial ruling in the context of the actual evidence introduced at trial. *White v. State*, 687 N.E.2d 178 (Ind. 1997).
5. In order for the trial court to make a fully informed and fair final ruling on challenged evidence, the judge who heard the pretrial motion and ruled on the admissibility of evidence preliminary should be the same judge who makes the ultimate decision on

admissibility in light of the actual evidence at trial. *Magley v. State*, 335 N.E.2d 811, 821 (Ind. 1975) (“whereas in the case at bar, the judge who conducts the trial is not the judge who conducted and determined the pretrial motion, obstacles to a full and fair reconsideration at trial exist.”), *overruled on other grounds by* *Smith v. State*, 689 N.E.2d 1238 (Ind. 1997); See also Kerr, *Indiana Practice* Vol. 16A, Sec. 14 (b).

WHEREFORE, the Defendant, by counsel, respectfully requests this Court to transfer this cause back to the superior court judge to hear all matters, and for all other relief just and proper in the premises.

(Signature)

## REFERENCES

## CASEBANK B.7.d

I.C. 33-33-49-32(c) (the motion to transfer case back to presiding judge must be made not later than ten days after the omnibus date).


TR 63(e) (appointment of pro tempore). NOTE: Judge can appoint the magistrate or commissioner as a pro tempore which gives the magistrate or commissioner the powers of the judge.


For an argument that it is unconstitutional to appoint commissioners and magistrates as pro tempore judges, see the November 1999 issue of Indiana Defender, *Can a Defendant Request that the Presiding Judge Hear His Case Rather than the Commissioner, Pro Tempore or Magistrate?*

### NOTE

See I.C. 33-33-1 et. seq. for the rules in your county.

## CASE LAW

Pitman v. State, [635 N.E.2d 1098](#)  (Ind.Ct.App. 1994) (issue of whether commissioner was qualified to act cannot be raised for the first time on appeal).

Barker v. State, [622 N.E.2d 1329](#)  (Ind.Ct.App. 1993) (Master Commissioner did not err in directing jury selection, swearing in jury, ruling on motions in limine, ruling on separation of witnesses motion, and ruling on mistrial motion, as all of these functions are powers given to magistrates and master commissioners under statute).