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Indiana Law Blog Newsletter

Thank you for subscribing to the ILB Newsletter. Invite your friends and colleagues to sign up to receive this free weekly newsletter, emailed in 2018 every other Monday morning. Because it is a biweekly, the *ILB Newsletter* (unlike the earlier *Indiana Law Blog*) will not be able to bring you the news *as it happens*. But it will highlight news you may have missed, and try to provide some depth on news you may have had questions about. Because it is a newsletter, length will be limited to what I believe the normal reader can tolerate. (Feedback and suggestions are encouraged - send to ilb.newsletter at indianalawblog.com.)

2018 Schedule: With the exception of the occasional special issue (or unless a sponsor steps forward), the *ILB Newsletter* will publish *every other week* in 2018.

Incorporation by reference of copyrighted $$ industry codes into Indiana agency rules

Back in 2008 the *Indiana Law Blog* complained that many essential Indiana legal mandates were not freely accessible to the public. An August 8, 2008 *ILB* post was headed *"Indiana building codes, part of the Indiana Administrative Code, are copyrighted and not available online."* From that post:

> It is not an easy thing to review the Indiana State Building Codes in the Indiana Administrative Code (here is the link to 675 IAC).
>
> Why not? Because Indiana has *incorporated by reference* the copyrighted "International Building Code, 2006 Edition, first printing, as published by the International Code Council, Inc." 675 IAC 13-2.5-1* provides:
>
> > Sec. 1. (a) That certain document being titled the International Building Code, 2006 Edition, first printing, as published by the International Code Council, Inc., 500 New Jersey Avenue NW, Sixth Floor, Washington, D.C. 20001-2070, is hereby adopted by reference as if fully set out in this rule save and except those revisions made in sections 2 through 36 of this rule.
> >
> > (b) This rule is available for review and reference at the:
> > Code Services Department
> > Indiana Government Center-South
> > 402 West Washington Street, Room W246
> > Indianapolis, Indiana 46204.
>
> All you will find in the Indiana rules are provisions such as:

> > 675 IAC 13-2.5-3. * * * (F) Add the definition: BUILDING CODE: BUILDING CODE means the INDIANA BUILDING CODE.
>
> These are exceptions to what is in the published International Code, and of course mean nothing to you if you can't read them with a copy of that Code.
>
> So what is an Indiana citizen to do? The copyrighted codes are nowhere freely available online. You might go downtown [if you are in Indianapolis] and read the agency's copy. Or maybe there is one at your library. Or you can purchase one for $95 from the International Code. Actually, in all cases it is two copies: you'll need both the International Code and the state exceptions. And the state has a number of different codes, plumbing, electrical, mechanical, etc. * * *
>
> This situation with copyrighted building codes forming part of our state law is not unique to Indiana.
>
> _____
>
> *That was in 2008; in 2018 the cite is to 675 IAC 13-**2.6**-1.

The *ILB* had many more posts on this topic, including this one from May 22, 2012, headed *"Industry group insists on charging you $1195 to read a public law"*:

> This will be a familiar topic to many ILB readers - you may recall a number of posts on the Indiana building and fire codes, for example, being available not in the Indiana Administrative Rules, and not online, but only by purchase from private vendors.
>
> David Halperin wrote May 18th [2012] in the Huffington Post about the same issue on the federal level. Here is how the article (which also includes video) begins:
>
> > Today, private organizations charge U.S. citizens hundreds of dollars simply to read a copy of standards they issue, standards that regulate things like gas pipeline safety, crane usage, and toy manufacturing -- even though citizens are required to obey those standards, because the federal government has incorporated them into regulations. This adds up to tens of millions of dollars annually that businesses, consumers, even government officials must pay to receive copies of our own laws. It's a ridiculous situation, and at last there's a public fight over it. This week that fight heated up.

On May 22, 2013, the *ILB* pointed to a then-forthcoming article in the Michigan Law Review, by Michigan Law prof Nina A. Mendelson, titled *"Private Control Over Access to Public Law: The Puzzling Federal Regulatory Use of Private Standards"*. The article has now been published (Mich. L. Rev. 112, no. 5 (2014): 737-807). From the abstract:

> To save resources and build on private expertise, federal agencies have incorporated privately drafted standards into thousands of federal regulations — but only by "reference." These standards range widely, subsuming safety, benefits, and testing standards. An individual who seeks access to this binding

> law generally cannot freely read it online or in a governmental depository library, as she can the U.S. Code or the Code of Federal Regulations. Instead, she generally must pay a significant fee to the drafting organization, or else she must travel to Washington, D.C., to the Office of the Federal Register's reading room. This law, under largely private control, is not formally "secret," but it is expensive and difficult to find. It raises the question of what underlies the intuition that law, in a democracy, needs to be readily, publicly available.

The article, at p. 765, looks at the origins of the *Federal Register* and the *Code of Federal Regulations*:

> In the 1930s, with an upsurge of rules, particularly the large volume of New Deal rules under the National Industrial Recovery Act, Congress recognized that administrative rules, unlike the Statutes at Large and the U.S. Code, were being published in a fashion that was disorganized and ad hoc at best, although the rules possessed the force of law and "the property and persons of the citizens may be at stake."[166] As the *Federal Register Act* legislative history describes, Harvard Law professor (later dean) Erwin Griswold helped identify the problem and devise a solution. By that time, there had even been litigation in which the government brought an action to enforce a regulatory requirement that turned out not to exist.
>
> ---
>
> [166] *See, e.g.* , H.R. Rep. No. 74-280, at 2 (1935) ("[R]ules and regulations frequently appear in separate paper pamphlets, some printed on single sheets of paper and easily lost. Any attempt to compile a complete private collection of [them] . . . would be wellnigh impossible. No law library, public or private, contains them all. Officials of the department issuing them frequently do not know all of their own regulations.").

The solution was the *Federal Register* (see history here). The litigation referenced was the 1935 SCOTUS decision, *Panama Refining Co. v. Ryan,* also known as the Hot Oil case.

From the Michigan article's conclusion:

> With the increasing reliance on IBR [incorporation by reference] standards in federal rules, we are in the process of creating a situation very similar to the one that Professor Griswold complained about in 1934 and that prompted Congress to enact the Federal Register Act. Regulations that impact "persons and property" are published ad hoc in numerous locations and are hard to locate, even when federal agencies provide SDO [standards development organizations] contact information in the CFR. And of even greater concern, our access to these standards is primarily through private organizations empowered to charge significant fees. Indeed, current access might be compared unfavorably to the accessibility of edicts at the time of Caligula. Then, a citizen could use a ladder and a magnifying device. With IBR rules, moreover, the public's access is not randomly impaired but is instead impaired disproportionately based on income. Those with smaller budgets, such as consumers, employees in hazardous workplaces, or small businesses, are obviously and disproportionately affected.

Our Indiana Supreme Court recently addressed incorporation by reference in the case of *Bellwether Properties, LLC v. Duke Energy*, decided Dec. 20, 2017, The 5-0, nine-page opinion is authored by Justice Slaughter.

In 1957, the prior owner of real estate now owned by Bellweather granted a perpetual 10-foot-wide utility easement to what is now Duke Energy. In 2002 the Indiana Utility Regulatory Commission adopted the 2002 edition of the National Electrical Safety Code. The Court writes at p. 2: "The Commission did not reproduce the Safety Code's text within an administrative rule, but merely incorporated the Code by reference and advised that copies could be obtained from the Institute in New Jersey and the Commission in Indianapolis. 170 IAC. 4-1-26(b)."

> In 2015, Bellwether brought an inverse-condemnation action alleging that Duke Energy's maintenance of its electrical line on Bellwether's property, in accordance with the Safety Code, imposes a 23-foot-wide easement — thirteen feet more than the easement permits. According to Bellwether, this additional burden effected a taking of its property for a public use requiring the payment of just compensation. Duke Energy responded by filing a motion to dismiss under Rule 12(B)(6) , arguing that Bellwether's claim was time-barred under the applicable six-year statute of limitations. The trial court agreed and granted Duke's motion, concluding that Bellwether's claim was untimely because more than six years had passed since adoption of the Safety Code in 2002 .

But the Supreme Court wrote on p. 5 of 9 that:

> Because the complaint does not establish that the statute of limitations had already run when Bellwether sued, Duke Energy jumped the gun by arguing the claim's untimeliness in a motion to dismiss. Based on the current record, we are unable to conclude that Bellwether's allegations would not entitle it to relief against Duke Energy under any circumstances. We thus reverse the trial court's judgment dismissing Bellwether's complaint with prejudice.

In the second half of the opinion, beginning on p. 5, the Court raises *sua sponte* "an additional issue ... that the parties and the trial court may wish to consider on remand: whether the 2002 Safety Code was reasonably accessible to Bellwether." Interesting!

Re the practice of incorporation by reference in Indiana rules, the Court notes at p. 6-7:

> Indiana has authorized this practice since 1985. 1985 Ind. Acts 298-99 . The incorporated materials usually include not only state and federal statutes and regulations, but also privately developed standards, written by various industry and professional groups, that are often beyond the technical expertise of government officials. * * *
>
> But the practice of incorporating private standards by reference comes at a cost. The cost may be negligible for regulations that incorporate federal statutes, regulations, and other open-source materials, much of which can now be viewed online for free with just a few extra mouse clicks. But

> regulations incorporating copyrighted materials are often practically unavailable without the accompanying text, which can be difficult and expensive to obtain.

Under the heading "B. Does incorporation by reference of copyright-protected materials provide meaningful access to laws today? " the Court writes at p. 7:

> Just as the Safety Code must be accessible to persons charged with following it, so too must it be available to courts faced with legal disputes concerning it. The parties did not include a copy of the Safety Code as part of the record on appeal. So we undertook to obtain our own copy — and not without difficulty. One of our employees telephoned the Commission's office in Indianapolis. Our employee identified herself to the Commission representative by name and title and asked about obtaining a copy of the Code, which turns out to be hundreds of pages long. The Commission's representative told our employee she could make an appointment to come in during office hours to inspect the Code. But the representative advised that the Commission does not make copies of the Code available for purchase, and that our employee could not check out the Code for copying elsewhere, because of restrictions imposed by the publisher. Our employee did not challenge these instructions, but merely noted them and reported back what she had been told.
>
> These "facts" obviously are not part of the record. They represent the experience of one person contacting the Commission's office on one occasion fifteen years after the Commission incorporated the 2002 Safety Code by reference. Our employee's unsuccessful effort to obtain a copy of the Code from the Commission may be a one-off. But if it happened once, it is not inconceivable it happened before. And if it did, a fair question is whether the practice recurs in accordance with Commission policy.

The Court acknowledges on p. 8 that it was finally able to obtain a copy of what appears to be the 2002 Safety Code at this link. However, the site housing the link is the private Internet Archive Wayback Machine, rather than an authorized and authenticated source!

The article, "*Assuring authentic legal information in the digital age: Part II - The Indiana Register and the Indiana Administrative Code*," 51 *Res Gestae* 2 (Sept. 2007), pp. 33-37, looked at the standards set out in a 2007 American Association of Law Libraries report "that investigated whether [even] government-hosted legal resources on the Web are *official* and capable of being considered *authentic."* The four criteria used by the AALL to determine the trustworthiness of state-level primary legal resources on the Web are: Are they official? Are they authentic ? Are they permanently accessible? Are they secure?

A perhaps poorly-conceived series of amendments. As quoted earlier, the Court at p. 6 states that "Indiana has authorized this practice since 1985." The Indiana Code provision is the much amended IC 4-22-2-21. Sec. 21(a)(2) allows the incorporation by reference of a "code, manual, or other standard adopted by an agent of the United States, a state, or a nationally recognized organization or association." Subsection (d) requires that "the agency shall also submit a copy of the full text of each matter incorporated by

reference under subsection (a) into the rule." There is no mention, however, of where or how these documents are to be maintained. [But see IC 4-22-7-5 which seem to put the burden on the "publisher" - i.e. the LSA] Finally IC 4-22-9-3 deals with judicial notice of rules:

IC 4-22-9-3 Judicial notice of rules

Sec. 3. (a) Any rule that has been adopted in conformity with IC 4-22-2 (including a matter incorporated by reference into a rule) shall be judicially noticed by all courts and agencies of this state.

(b) Subject to subsection (c), the official publication of a rule in the Indiana Register or the Indiana Administrative Code, including the official publication of rules published only in electronic format after July 1, 2006, shall be considered prima facie evidence that the rule was adopted in conformity with IC 4-22-2 and that the text published is the text adopted.

(c) The 1979 edition of the Indiana Administrative Code shall be conclusively presumed to contain the accurate, correct, and complete text of all rules in effect on December 31, 1978. All rules filed with the secretary of state before December 31, 1978, and not compiled in the 1979 edition of the Indiana Administrative Code are void.

As added by P.L.31-1985, SEC.36. Amended by P.L.123-2006, SEC.24.

But as Justice Slaughter writes on p. 8:

> [W]e do not know why the [Indiana Utility Regulatory] Commission does not make this material readily available on its website today. Incorporation by reference of copyright-protected materials may have made sense in an era when statutory and administrative texts were printed in bound volumes at significant expense. Allowing agencies to incorporate extrinsic materials by reference spared them the cost of printing what are often voluminous materials. But that practice has little justification today, given the pervasive use of the internet. Indeed, our Legislative Services Agency discontinued issuing printed volumes of the Indiana Administrative Code beginning in 2005 and the Indiana Register beginning in 2006. Now the official versions of these publications are available only online. In light of prevailing technology, incorporating copyright-protected materials by reference seems antiquated and at odds with government's obligation to provide meaningful access to laws.

More on: Indiana University opposes 2016 fetal tissue law in federal court

As the Sept. 18, 2017 edition of the *ILB Newsletter* reported re the Planned Parenthood (PPINK) and the Indiana ACLU challenge to HEA 1337-2016, PPINK's injunction was granted by federal district judge Pratt on June 30, 2016. But the Indiana University suit, challenging a different provision in the law, remained outstanding. The case, *Trustees of Indiana University et al v. Prosecutor of Marion County* (1:16-cv-01289-JMS-DML), was decided Dec. 22, 2017 by Judge Magnus-Stinson. Here is the 42-page opinion. Some quotes:

> This case is the latest in a series of challenges to various statutory provisions that were enacted as part of House Enrolled Act 1337. This Act codified a number of abortion-related provisions, some civil and some criminal. In this action, Plaintiffs the Trustees of Indiana University, Fred Cate, Dr. Bruce

Lamb, and Dr. Debomoy Lahiri (collectively "IU") challenge a provision that criminalizes the acquisition, receipt, sale, and transfer of aborted fetal tissue. IU moves for summary judgment, arguing that the provision violates the United States and Indiana Constitutions, based on five different constitutional challenges. Defendants, the prosecutors of Marion and Monroe counties, cross-move for summary judgment, contending that the statute does not offend the Constitution. * * *

- The Court **GRANTS IN PART** IU's Motion for Summary Judgment, [Filing No. 77], as to IU's Due Process Clause claim, to the extent that the Court determines that the text indicated by strikethrough below is unconstitutionally vague, and Defendants are permanently enjoined from enforcing those portions:

  (a) As used in this section, 'aborted' means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus. The term includes abortions by surgical procedures and by abortion inducing drugs.
  (b) As used in this section, 'fetal tissue' includes tissue, organs, ~~or any other part~~ of an aborted fetus.
  (c) This section does not apply to the proper medical disposal of fetal tissue.
  (d) A person who intentionally ~~acquires, receives~~, sells, ~~or transfers~~ fetal tissue commits unlawful transfer of fetal tissue, a Level 5 felony.
  (e) A person may not alter the timing, method, or procedure used to terminate a pregnancy for the purpose of obtaining or collecting fetal tissue. A person who violates this subsection commits the unlawful collection of fetal tissue, a Level 5 felony.

[10] Again with this claim, because IU does not challenge the portions of the statute pertaining to the the sale of fetal tissue, the Court need not conduct a First Amendment analysis of the portions of statute that remain following the void-for-vagueness determination.

Articles in the first twelve issues of the weekly ILB Newsletter

Dec. 18, 2017 ILB Newsletter

- Application forms available, deadline set for submissions, and dates set for interviews for Marion County judges seeking retention
- More change in Southern District of Indiana judgeships
- Bloomington annexation plan effectively killed by non-related language inserted at the last minute into the 2017 budget bill; now in court and bears watching ...

Dec. 4, 2017 ILB Newsletter

- The Marion County Judicial Selection Committee meets for the first time
- How to keep current with the ever-expanding area of LGBT law
- Justice Christopher M. Goff issues his first Supreme Court opinion

Nov. 13, 2017 ILB Newsletter

- Opiod story is being told in obituaries
- CA 7: Ban on women exposing breasts in public doesn't violate First Amendment or equal protection clause
- Supreme Court: Whistleblower protection statute does not apply to the State itself because the legislature did not expressly say so
- Federal appeals courts rapidly being restyled: Nearly half of appeals judges are eligible for senior status

Nov. 6, 2017 ILB Newsletter

- Judge Tanya Walton Pratt blocks military judge from having U.S. marshals seize Indianapolis defense attorney Richard Kammen
- Some movement in filling the vacancies on 7th Circuit and Indiana federal district courts
- Deer hunting on public lands redeux, again . . .
- Lawyers coding
- Ind. Courts - Amicus Briefs in Indiana: Rare but Welcomed and Impactful

Oct. 30, 2017 ILB Newsletter

- Errors in SCOTUS opinions
- IU general counsel Jacqueline Simmons acts to make employee compensation information more accessible to public
- Moot court competition at Wabash College
- A second update on *Underwood v. Bunger*
- Update on overlooked 2016 legislative deer hunting prohibition not implemented until this fall
- A big test of police body cameras in DC defies expectations

Oct. 23, 2017 ILB Newsletter

- Deer hunting: Overlooked 2016 legislative prohibition not implemented by DNR until this fall
- Indiana pays hefty price for enacting unconstitutional laws
- Federal Judge Unseals New York Crime Lab's Software for Analyzing DNA Evidence
- Antoinette Dakin Leach Award Luncheon

Oct. 16, 2017 ILB Newsletter

- In Banc?" Did the pre-1970 Court of Appeals decide some cases en banc?
- Tracing the history of an Indiana Code provision

Oct. 9, 2017 ILB Newsletter

- A look at a per curiam (short, unsigned) Supreme Court opinion: *Miller v. State*
- Some statistics on per curiam opinions
- Update on: An issue with the 2017 Supreme Court decision in *Underwood v. Bunger*
- What if language disappears from the Indiana Code?

Oct. 2nd ILB Newsletter

- An issue with the 2017 Supreme Court decision in *Underwood v. Bunger*?

- Governments turn tables by suing public records requesters
- The blockchain. What is it and why does it matter?
- Today is the "First Monday in October"

Sept. 25th ILB Newsletter

- Southern District of Indiana grieves the loss of Senior Judge Larry J. McKinney
- "As Foxconn heads to Wisconsin, Indiana is a lucky loser"
- Update to earlier story involving PPINK lawsuit
- Petition for transfer argued that a litigant who receives a memorandum decision instead of published one does not enjoy the same "meaningful opportunity" for review by the Supreme Court: *Danny Burton v. State*
- Indiana's Uniform Fiduciary Access to Digital Assets Act and the Indiana Code

Sept. 18th ILB Newsletter

- Amicus briefs: How do Indiana's attorneys general decide when to author or sign on to amicus briefs, and where can we learn about them?
- Amicus briefs: What could possibly go wrong?
- Indiana University opposes 2016 fetal tissue law in federal court: *Trustees of Indiana University et al v. Prosecutor of Marion County*
- Updates to earlier stories
    - Judge Posner's abrupt retirement
    - Suits by Attorneys General against the Trump administration over DACA

Sept. 11th ILB Newsletter

- Judge Posner abruptly retires; the pro se problem; and the status of the 7th Circuit
- A CA 7 ruling we are anticipating any day now: *Henderson v. Adams*
- Looking a little deeper: DOJ buckles under state AGs' threatened lawsuit

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Oral arguments currently scheduled before the Indiana Supreme Court for the month of January, 2018

Thursday, Jan. 11th:

- 9:00 AM - ***B.T.E. v. State of Indiana*** (36S05-1711-JV-00711) (Jackson) In the fall of 2015, fifteen-year-old B.T.E. was arrested for conspiring with another student to commit a school shooting during their senior year of high school. The Jackson

Superior Court found B.T.E. to be a delinquent child for committing attempted aggravated battery and conspiracy to commit aggravated battery. The Court of Appeals affirmed in part, reversed in part, and remanded, holding that the evidence supported the conspiracy finding but that the student had not taken the "substantial step" necessary to sustain the attempted battery conviction. *B.T.E. v. State*, 82 N.E.3d 267 (Ind. Ct. App. 2017), vacated. The Supreme Court has granted transfer and has assumed jurisdiction over the appeal.

The briefs and lower court opinions may be accessed via the links above. Webcasts of the Supreme Court's oral arguments are available here.

Recommended this week

- ***66 Ways to Protect Your Privacy Right Now*** - Very long Nov. 2016 article from *Consumer Reports* magazine, excellent.