

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 every Monday morning. The issues are intended to bridge the gap between the former **Indiana Law Blog** and its anticipated replacement (more about which will be coming later). Because it is a weekly, the **ILB Newsletter** (unlike the blog) will not be able to bring you the news *as it happens*. But it will highlight news you may have missed, and 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. (BTW, feedback and suggestions are encouraged - send to ilb.newsletter@indianalawblog.com.)

"In Banc?" Did the pre-1970 Court of Appeals decide some cases en banc?

Several items of interest in the [Sept. 28th COA opinion](#) in *Hamilton Southeastern Utilities v. IURC, et.al* . Hamilton moved to dismiss the IURC from the appeal, arguing that the Commission was an improper party as it “acted as a fact-finding administrative tribunal, hearing evidence from the opposing parties, and rendering its Order purportedly based on the evidence.” After reviewing several earlier decisions, the panel held:

[W]e find that the Commission’s Order should speak for itself, without the need to further rationalize its decision to our court. Accordingly, the Commission is not a proper party on appeal from its own decision and should be dismissed.

And there was this reference by the panel:

In *City of Terre Haute v. Terre Haute Water Works Corp., 180 N.E.2d 110, 111 (Ind. App. 1962)*, *In Banc*, this court held that it was improper to name the Commission as a party to the appeal on a rate-making decision it had rendered.

(You may access the 1962 *City of Terre Haute* opinion [here](#).)

Notice the “*In Banc*.” Did the Court of Appeals decide some cases en banc before the judicial amendment of 1970?

Referencing p. 17 of the [excellent 1997 Indiana Law Review article](#), “*The History of the Court of Appeals of Indiana*” by Judge Robert H. Staton and Gina M. Hickman, I was able

to trace the makeup of the Court of Appeals before the 1970 constitutional amendment went into effect.

YEAR	Number of Judges	Number of Districts
1891	Five	Five
1901	Six	Two
1957	Eight	Two
1970	Nine	Three

So in 1962, when *City of Terre Haute* was decided, the state was divided into two districts, with four judges in each district. It would appear that normally a panel of four judges decided a case. (See eg [*CHI. & CAL. DIST. TRANS. v. PSC*](#), 260 NE 2d 887 - Ind: Court of Appeals 1970.)

However, in the *City of Terre Haute* case, *all eight COA members participated*: Judge Myers authored the opinion and Judges Ryan (CJ), Kelley, Ax, Bierly, Cooper, Gonas, and Pfaff concurred.

The ILB will attempt to locate the appellate rules in effect in 1962. However, the Staton article says at p. 14: “Also in 1970, the Indiana Supreme Court promulgated the first Indiana Rules of Appellate Procedure.”

Tracing the history of an Indiana Code provision

Note: The Supreme Court's Underwood decision, discussed in the last two issues of the ILB Newsletter, brought some focus on the General Assembly's ongoing subject-matter recodifications of the various Titles of the Indiana Code. Portions of the following are adapted from a November 2008 Res Gestae article I authored, "Recodifications, legislative histories and tables."

Imagine that you had copies of all the volumes of the Acts of Indiana, going back to the 1852 Revised Statutes, each volume containing the laws passed during one session of the General Assembly. Now imagine that, in the margins of each page, someone had noted what had happened to each section of each act in the volume – was it repealed or amended, and by what law. Then these marginalia were converted into tables. That exercise actually was done in creating the 1971 Indiana Code.

Except for a few original provisions necessary to implement the new Code, every section of

the 1971 Indiana Code was followed by a line identifying what provision of the former law had been its source. This was done in part as assurance that nothing substantive had been changed in the move from the session laws to the Indiana Code. But it also was an essential tool in tracing the history of a provision. Because of time and funding limitations, only citations to the original enactment and last amendment of the prior law corresponding to each Code section were included in 1971; cites to the intervening amendments were not included.

This deficiency was remedied in the 1976 Indiana Code, where the citations to any intervening amendments were added to the "Formerly" lines. Subsequent changes to what was now an Indiana Code provision were indicated by "history lines," making it relatively simple to trace the evolution of the law, both *before* and *after* inclusion in the Indiana Code.

Here is an example: the last part of IC 1-1-9-1 (the list of state holidays) and all of 1-1-9-2, as they appear in the 2009 edition of the Indiana Code. Pre-Indiana Code source lines are enclosed within parenthesis and are designated as "Formerly". These are followed by citations to any subsequent (post-Code) amendments. (The second section was added to the law in 1986, and thus has no pre-code history.)

assembly, or a political subdivision on any such holiday shall be valid for all purposes.

(Formerly: Acts 1947, c.236, s.1; Acts 1949, c.2, s.1; Acts 1955, c.6, s.1; Acts 1969, c.59, s.1; Acts 1972, P.L.12, SEC.1.) As amended by Acts 1982, P.L.2, SEC.2; P.L.4-1989, SEC.1; P.L.4-1995, SEC.2; P.L.26-2000, SEC.1.

IC 1-1-9-2

Paid holidays for state employees; governor shifting observance; exception

Sec. 2. All legal holidays, except Sundays, shall be paid holidays for state employees. However, the governor may shift to another day the observance of a legal holiday, except that Martin Luther King, Jr.'s birthday shall be observed as a holiday on the third Monday in January.

As added by P.L.2-1986, SEC.1. Amended by P.L.4-1989, SEC.2.

The only difference between these citation lines in the 2009 (illustrated above) and the 2017 editions of the Indiana Code is that the parenthesis distinguishing the "Formerly" information from the post-Indiana Code action have been removed. The essential historical information is all there, allowing one to retrace, in this case, how the list of Indiana legal holidays has evolved over the past 70 years.

But until this year, as you looked through the Indiana Code you would quickly see that relatively few source lines continued to exist, other than those in Title 1. The reason is that whenever a recodification of an area of law has been enacted by the General Assembly, the pre-recodification historical information has not been retained, making understanding the genesis of a provision much more difficult.

For instance, many provisions in Indiana's public health laws had their origins in 1881, when the State Board of Health was created. But, until the 2017 edition, if you looked at the

Indiana Code, Title 16, Health, you would learn from the history lines only that Indiana's health laws were "added by P.L.2-1993." Here is IC 16-19-1-1 from the 2009 edition of the Indiana Code:

IC 16-19-1-1
Establishment of department
Sec. 1. The state department of health is established.
As added by P.L.2-1993, SEC.2.

Looking at the statute, many readers would conclude that the department of health was created in 1993, rather than that the laws relating to the department of health were recodified (without substantive change) and renumbered by P.L.2-1993. Many people are confused when they look at the history line of a provision in a recodified title, such as Title 33 or Title 16 and see a relatively current "As added by" history line. They may not have a clue that there is more history behind that provision, or how to access it.

As John Stieff, Director of OCR, wrote in a [2014 memo](#):

When a Title is recodified, the reader has to go to that Title's Derivation Table to determine what the citation of the law was before the recodification of the Title. While the Derivation Tables are on the General Assembly's web site, most users don't know about the Tables' existence. The staff suggests adding after the history line the pre-recodification citation and the last year that citation appeared in the Indiana Code.

(Aware of this problem, the ILB for many years maintained *The Indiana Law Blog's Legislative Research Shortcuts*, an online dashboard designed to aid in researching legislative history, with links to many resources including these tables.)

2017 update shows former citation of sections. As a result of work of the Office of Code Revision staff, the 2017 edition of the Indiana Code has been updated "to add pre-recodification citations to Indiana Code Titles recodified since 1991." In the [Oct. 24, 2016 minutes](#) of the Code Revision Commission, Mr. Stieff noted that "several recodifications occurred prior to 1991, and that ... he hoped that work could be done in time to include those pre-recodification citations in the 2018 Indiana Code." (These include, I believe, Titles 3, 7.1, and 36.)

The result. Here is the same IC 16-19-1-1 as cited above, but now as it appears in the 2017 edition of the Indiana Code:

IC 16-19-1-1 **Establishment of department**
Sec. 1. The state department of health is established.
[Pre-1993 Recodification Citation: 16-1-1-8.]
As added by P.L.2-1993, SEC.2.

The reader is alerted that this apparently new section added to the Code actually was the result of a recodification, and is provided the provision's prior citation..

But the reader is still left with how to find the history of the IC 16-1-1-8, which we know may date back to 1881. The most annoying thing is that this history was published until 1993, just as the information in Title 1 regarding state vacation time continues to be

available because Title 1 has not yet been recodified! If you can find a pre-1993 edition of the Indiana Code, you will find the history behind 16-11-1-8. Hopefully adding this information to the recodified sections will be a next step in the OCR's project.

Repealers. If dealing with the history of recodified Titles has been only a partial success so far, dealing with the dearth of information regarding repealed sections appears to be a great improvement. Here, again from Title 1 of the 2007 edition of the Indiana Code is a section that tells you absolutely nothing except that whatever had been there was repealed in 1990.

IC 1-1-4-2
Repealed
(Repealed by P.L.1-1990, SEC.3.)

Now here is the newly enhanced provision as it appears in the 2017 Code:

IC 1-1-4-2 **Repealed**
Formerly: Acts 1852, 2RS PART II, c.17, s.2. As amended by Acts 1982, P.L.2, SEC.1.
Repealed by P.L.1-1990, SEC.3.

So there is not longer a need to find a pre-1990 edition of the Indiana Code to learn the history of the repealed provision. All the past history of the section has been restored. (IMHO, the other item that would be very helpful to include would be the heading of the repealed provision, to tell the reader what it had been about.)

What is next? This new treatment of repealers marks a major step forward. But as Mr. Stieff wrote in his 2014 memo, there is more to be done:

The staff suggests that the style of the history lines of *chapters* and *articles* that are repealed not be changed at this time. However, the staff is looking into a way to create a computer program that would create *updated history lines for every section in a chapter that is repealed and for every chapter and section in an article that is repealed.* [ILB emphasis]

If I understand correctly, this would complete the circle, as this is where the various Titles' pre-recodification history and the repealer history projects meet and intertwine. The recodification of Title 16, Health, for instance, repealed and replaced all of Title 16's then-existing articles and chapters, comprised of hundreds of sections. Restoring the past history of each of these repealed sections [along with its heading] would be adding back the history of the sections' pre-recodification citations.

Oral arguments before the Indiana Supreme Court this month of October, 2017

Currently, only one more case is scheduled to be argued this month before the Supreme Court, and it doesn't take place until **Monday, Oct. 30th**. Notably, the argument will be held at the [University of Southern Indiana](#), a public university located just outside Evansville in Vanderburgh County.

- 10:30 AM - ***B.A. v. State of Indiana*** ([49S02-1709-JV-00567](#)) (Marion) A thirteen-year-old student was questioned in the assistant principal's office in the presence of school resource officers about a bomb threat written on a middle school wall, and the student made statements about the threat. After the State alleged him to be a delinquent child, the student moved to suppress his statements and argued he had been subjected to custodial interrogation without *Miranda* warnings and without waiving his rights. The Marion Superior Court denied the motion to suppress and found the student to be a delinquent child. The Court of Appeals affirmed, finding no error in admission of the statements. *B.A. v. State*, 73 N.E.3d 720 (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. Notice that the filings include an amicus brief, filed by the Center on Wrongful Convictions of Youth.

Webcasts of the Supreme Court's oral arguments are [available here](#). However, in this case only the live argument will be [videocast via this link](#).

Recommended this week

- ***Why You Should Set Up IOS 11's Emergency SOS Now*** - "With this new technology, you can call for help as quickly as possible, and you can do so discreetly. This could come in handy if you ever need to call 9-1-1 but you don't want to alert your attacker(s) that you're calling the police. All you have to do is click the 'Power' button five times, and emergency services will be alerted that you need help, and will be given your location." [Simplemost.com](#).
- ***How to use Google's reverse image search on a computer and on a mobile device***. This is a [NYT Tech Tip](#).
- ***If Kaspersky Bothers You, So Must Its Rivals*** - In response to [Consumer Reports' Oct. 12th story](#) ("*What the Kaspersky Antivirus Hack Means for Consumers: Home PCs were vulnerable; retailers offering software swaps*"), an [Oct. 13th opinion article in Bloomberg View](#) by Leonid Bershidsky ("*If Kaspersky Bothers You, So Must Its Rivals*") somewhat cynically responds:

If you're not an interesting target to governments, it makes no sense to react to store chains' and other anti-virus producer offers to replace Kaspersky products on your computer. For one thing, the replacement too could be compromised, perhaps also by Russian intelligence. For another, it doesn't really matter unless you're an NSA analyst or the keeper of important trade or military secrets.

- ***Making the Lives of Cybercriminals and Spies Harder Online*** - This is an outstanding column in the [Oct. 11th Personal Tech section of the NY Times](#). IMHO,

it is a must read.



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