

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 on Monday mornings. 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 at indianalawblog.com](mailto:ilb.newsletter@indianalawblog.com).)

Holiday Schedule: The **ILB Newsletter** was published *only twice* in November, and will publish *only twice* in December. The December publication dates are Dec. 4th and Dec. 18th.

The Marion County Judicial Selection Committee meets for the first time

Commentary by Joel Schumm, professor at Indiana University's Robert H. McKinney School of Law.

In response to the Seventh Circuit finding the statute for selecting Marion Superior Court judges unconstitutional, the General Assembly enacted [HEA 1036-2017](#) to create a new method.

On [Tuesday, November 28](#), the newly-created Marion County Judicial Selection Committee met for the first time. Thirteen of the fourteen members attended the three and a half hour meeting in the conference room of the Indiana Supreme Court. As detailed below, the Committee discussed applications and processes for (1) reviewing current judges seeking retention, (2) selecting finalists for new judicial appointments, and (3) general policies and procedures.

Retention of Current Judges

The new statute requires incumbents seeking retention submit an application and appear for an interview before the Committee. The Committee will then make a recommendation on retention that will appear on an Indiana Supreme Court website and be shared with the public through the “news media and voter outreach organizations.” Twenty judges are up for retention in 2018 and must submit necessary paperwork with the clerk and secretary of state by February 9.

The Application

The [proposed draft of the application for retention](#) was discussed and approved with few changes.

Question 7(B) asks about diagnosis or treatment for “any emotional or mental condition or

illness, including any condition that involves treatment for drug or alcohol use.” The second sentence asks for dates of assessment or treatment and the names and addresses of doctors.

Several Committee members raised concerns, noting the question was “too invasive” and could deter some from applying or “discriminate against qualified applicants.”

The Committee ultimately decided to strike last sentence of 7(B) and modify the first sentence to require disclosure of only those conditions or illnesses “that will impair your ability to perform your judicial responsibilities?” The motion carried by a close vote (8-5) that cut across party and specialty bar lines with Committee members Breaux, Christie, Cline, Jackson, and Slash voting against the change.

At Mr. Christie’s request, the Committee unanimously decided to require submission of a photograph with the application.

The Committee also decided unanimously that the applications will be posted online.

Public Interview

Each of the judges who seeks retention will also appear before the Committee for a public interview. Justice Massa addressed a conflict in two parts of the statute:

- 13.1(q)(2): “all interviews of candidates are conducted at meetings open to the public”
- 12(e): “Each judge is entitled to a hearing before the committee. The hearings shall be in executive session.”

Committee Counsel Tom Carusillo offered his legal opinion of ambiguity, noting that one section says to do one thing and the other says to do another. The Committee unanimously agreed with Justice Massa that the Committee should err on the side of openness and transparency and hold the retention interviews in public.

Potential interview topics and public/bar input

Beyond the application materials, I would anticipate some of the following topics may arise as part of the retention review: appellate reversals and the reasons for the reversals, case management information, court staff and office administration.

What remains unclear is whether input of the public and bar will be sought—and, if so, whether this will be done by the Committee or rely on bar organizations, like IndyBar, which has done a judicial poll in the past. Regardless, Committee members are likely to receive some comments, which presumably will be shared with the rest of the group. Rather than rely on ad hoc comments at retention time, Indiana might consider a more systematic solicitation of feedback through judicial performance evaluations (JPE). Here is [an example from Colorado](#).

Selection of New Judges

One or more Marion County judges are likely to retire, which means the Committee will also need to review new applicants for the bench, from which it will submit to the Governor a list of the three “most qualified candidates” for each vacancy.

The Application

The [draft application for new judges](#) was modeled after the application from St. Joseph County, where Justice Massa chaired the nominating committee, and the Indiana Judicial Nominating Commission (JNC) application used for selecting appellate judges, the process

Justice Massa and Judge Bradford both experienced as recently as 2012. The new Marion County selection statute requires some variation, for example Question 2(C) invites disclosure of anything considered “pertinent to the question of how you reflect the diversity and makeup of Marion County,” a statutory consideration not found elsewhere. Question 2(D) asks not only about partisan affiliation but also “its duration.” Section 13.4 of the statute limits no more than 52% of the Marion County bench to “members of the same political party.”

The most controversial topic, as discussed above, was disclosure of mental health or substance abuse treatment. The Committee decided greater disclosure should be required of new applicants than from those seeking retention. Thus, ten years (not three) must be disclosed, and the follow-up question regarding assessment dates and the names and addresses of doctors was retained. The question was modified slightly to make clear only mental (not all illnesses) must be disclosed. The revised question 9(B) reads as follows: “Within the past ten years, have you been diagnosed or treated for any emotional or mental condition or mental illness? Include any condition that involves treatment for drug or alcohol use. If so, provide the dates of assessment and/or treatment and the names and addresses of your doctors or other treatment providers.”

Unlike the JNC application, which segregates a few questions including mental health treatment onto a separate part of the application that is not posted online, the Marion County application will be posted online in its entirety. The [Allen County application](#) does not ask about mental health treatment.

Two other changes to the draft application were unanimously approved:

- Question 1(c) will require applicants list their date of bar admission. Applicants must be admitted to the Indiana bar for five years under the statute.
- Question 6(a), which addresses writings on public or civic affairs, was broadened to include “online commentary.”

Finally, although question 1(F) asks for degrees and a list of honors, awards, or scholarships, the application does not require submission of law school transcripts, which the Allen County and JNC applications do.

Personality, Partisanship, and Temperament

The application ends with a broad question requiring applicants to “consider carefully and disclose any other information that you feel there is a reasonable chance the Committee might consider significant, including, but not limited to: 1) Information regarding your likely judicial temperament; 2) Personality traits, including the exercise of sound judgment, ability to compromise and conciliate, patience, decisiveness, and dedication.”

One way to assess these difficult topics is input from the bar and public, as discussed above. The JNC and Allen County applications require applicants to list personal, professional, and opposing counsel references, but the Marion County application does not. The JNC application allows submission of a “reasonable number” of reference letters, and nothing would prohibit Marion County applicants from submitting letters, although having your friends write nice things about you is of limited value. Requiring applicants take part in a practical interview, such a mock hearing that simulates the work of a new judicial officer, is a novel idea on which I will write separately.

Policies and Procedures

The meeting concluded with a discussion and approval of “Policies and Procedures,” which are [linked here](#).

As discussed above, all interviews will be public. Question 8 further makes clear they will

be 20 minutes “except as otherwise permitted by the Chair.”

The Committee agreed to add as a policy that executive session discussions are confidential.

Finally, the policies are silent and will remain silent regarding Committee members meeting individually with applicants for retention or appointment. Members noted it would be difficult to enforce a rule and unclear whether an individual meeting would include things like advice in a hallway. Mr. Christie noted each JNC member had discretion to meet individually with applicants, and he found those meetings helpful. Mr. Gaerte, the IndyBar appointee, said he had already been asked to talk with potential applicants. Mr. Carpenter, who was appointed by the Marion County Republican Party chair, said that he would be expected to meet with Republican candidates. Ms. Slash, also a Republican appointee, found it attractive that she would not have to meet individually with applicants, which would help ensure a level playing field. Mr. Mallon said he wanted the ability to meet with people he thinks are well-qualified but does not know, although he did not want to meet with everyone. Ms. Cline noted that seeking out Committee members shows initiative.

Allowing individual meetings means that some will view them as expected. With as many as 20 retention applicants and perhaps 30 or more applicants for vacancies in 2018, Committee members will be very busy with required public meetings and reviews, regardless of optional individual meetings with applicants that appear likely for most Committee members with at least some applicants.

Future meetings

The Committee will meet again on February 19 at 10:00 a.m. to discuss procedures. Public interviews of judges seeking retention will be held on March 12 or 13.

How to keep current with the ever-expanding area of LGBT law

The oral arguments in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* will be heard tomorrow before the SCOTUS. Here is the [SCOTUSblog case page](#), linking to all the case filings and news coverage.

Here, from Twitter, is a [photo taken Sunday](#) of the line awaiting admission to Tuesday's oral argument. I communicated Saturday with Kathleen Perrin, who it turned out is camped out in the line in front of the Supreme Court. There are 18 people ahead of her. She runs [Equality Case Files](#), which is the place to look for documents and files on LGBT-related litigation. There is a twitter feed, @EQCF, and a new, invaluable newsletter. Here are [the issues so far](#).

Finally, there is a nationwide [list of recent cases](#). Both of the Indiana cases the ILB has been following are listed:

- ***Henderson v. Adams*** (presumptive parentage on birth certificates) - which currently is awaiting a decision from the 7th Circuit, following a May 22nd oral argument. The Sept. 11th issue of the [ILB Newsletter had a story](#) headed "A CA 7 ruling we are anticipating any day now..."
- ***Hively v. Ivy Tech Community College*** (Employee's Title VII sexual orientation discrimination claim against Indiana school) - where the 7th Circuit ruled in favor of Hively: "The judgment of the District Court is REVERSED, with costs, and the case is REMANDED for further proceedings consistent with the

Opinion." The case is now before Judge Jon E DeGuilio and Magistrate Judge Michael G Gotsch, Sr. [See EOCF docket.](#)

1/ Do you enjoy this Newsletter? Do you miss the ILB? I'm looking for support for an all-new and even better Indiana Law Blog.

2/ Could your organization or firm use some help with a challenging short or long-term project? Then let's talk.

Oral arguments scheduled before the Indiana Supreme Court for this week of December 3rd, 2017

Thursday, Dec. 7:

- 9:00 AM - ***Care Group Heart Hospital v. Roderick Sawyer, M.D.*** ([49S05-1710-PL-00671](#)) (Marion) St. Vincent Medical Group terminated Dr. Sawyer's employment in 2011. In 2012, Care Group cashed out Dr. Sawyer's membership interest and sent him a check. Dr. Sawyer then sued St. Vincent and Care Group for breach of contract related to the termination of his employment and the calculation of his membership interest. The Marion Superior Court entered judgment on a jury verdict for Dr. Sawyer and awarded him \$27,233.19 in attorney's fees. The Court of Appeals affirmed in part, reversed in part, and remanded. [Care Grp. Heart Hosp. v. Sawyer](#), 80 N.E.3d 190 (Ind. Ct. App. 2017), *vacated*. The Supreme Court has granted petitions to transfer the case and has assumed jurisdiction over the appeal.
- 9:45 AM - ***Kristopher Weida v. State of Indiana*** ([79S02-1711-CR-00687](#)) (Tippecanoe) The Tippecanoe Superior Court sentenced Weida for Level 5 felony incest and imposed conditions for probation restricting his use of the internet. The Court of Appeals affirmed. [Weida v. State](#), 83 N.E.3d 704 (Ind. Ct. App. 2017), *vacated*. The Supreme Court has granted Weida's petition to transfer and assumed jurisdiction over the appeal.
- 10:30 AM - ***Paul Gresk, et al. v. Demetris, M.D*** ([49S02-1711-MI-00686](#)) (Marion) A minor and her family filed a proposed medical malpractice complaint against a doctor who reported suspected medical child abuse to the Department of Child Services, but the Marion Superior Court dismissed the complaint, relying on the Anti-Strategic Lawsuits Against Public Participation Statute. The Court of Appeals reversed and remanded after concluding the [anti-SLAPP] statute does not apply here. [Gresk v. Demetris](#), 81 N.E.3d 645 (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

- **Enlarge the Screen in Windows 10** - This is cool, I never knew it was possible to zoom in and out like this until I read about it in a [Nov. 13th NY Times article](#).
- **The latest iOS update bakes in a few important security updates that you're going to want to tap into** - [Wired, Nov. 11th](#).
- **Clean Up Your Google Chrome Browser** - "Even Chrome can slow down and have issues after awhile. If you've had problems with Chrome, here are some things to try to get it back to its typical performance." [TechGuy Labs](#).
- **Stop ID Theft After a Death** - "Identity theft affects 2.5 million estates every year, according to the IRS. If a loved one has died, send a copy of the death certificate to the IRS (the funeral home may help with that). Also, cancel any driver's license, and notify credit agencies, banks, insurance firms, and financial institutions." Consumer Reports, Feb. 21, 2017.



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