

Can you rely on the Indiana Code?

OVERVIEW

The May *Res Gestae* article set out some examples of noncode provisions that could impact statutes in the Indiana Code. This month’s article gives more examples, both that I have located, and that readers have sent me. Plus, some solutions will be suggested.

EXAMPLES FROM READERS

Example 1 – adverse possession

In 1998 the General Assembly passed PL 86-1998 (HEA 1229), a brief law that read in full:

SECTION 1. IC 32-1-20-2 IS AMENDED TO READ AS FOLLOWS: Sec. 2. Title to real property owned by the state or a political subdivision (as defined in IC 36-1-2-13) may not be alienated by adverse possession.

SECTION 2. A cause of action based on adverse possession may not be commenced against a political subdivision (as defined in IC 36-1-2-13) after June 30, 1998.

An attorney wrote to me after reading the May article that seven or eight years ago a client received permission from a county to develop and use a previously undeveloped small county road as a secondary entrance to commercial property the client had recently purchased. A neighboring landowner filed suit against the client and the county, claiming she had adversely possessed the county road. (This occurred after June 30, 1998.) The lawyer continued:

We filed a motion to dismiss based on the noncode provision. In response to our motion to dismiss, opposing counsel argued that noncode provisions were not actually binding laws, and no prior authority existed preventing adverse possession suits against political bodies. * * *

Attorney at Law Our motion to dismiss Indianapolis, Ind. was ultimately denied, www.indianalawblog.com although I do not believe

Part II – More noncode provisions, some recommendations

the trial court provided any rationale for its decision.

We eventually prevailed on the adverse possession issue at trial because the trial court found (based on Indiana cases we had located that were almost 100 years old) that Indiana had a longstanding prohibition against adverse possession suits against political bodies, and the noncode provision did not change the existing law. If I remember correctly, the trial court based its decision on the cases we found, rather than the noncode provision.

In 2002 the General Assembly passed a recodification of Title 32, the property laws. (See PL 2-2002; SEA 57.) IC 32-1-20-2 was recodified as IC 32-21-7-2; the language of the provision was not changed.

Sec. 2. Title to real property owned by the state or a political subdivision (as defined in IC 36-1-2-13) may not be alienated by adverse possession.

The noncode language prohibiting the commencing of a cause of action based on adverse possession against a political subdivision after June 30, 1998, however, was not included in the recodification. Neither was it repealed by the recodification of Title 32. As a result, this provision is still part of Indiana law, but it is not in the Indiana Code. Its existence is noted in the Compiler’s Notes to *Burns Indiana Statutes Annotated*, Title 32 (2002 Replacement Volume), following §32-21-7-2.

Example 2 – jurisdictional authority of the Tax Court

A lawyer wrote to me in July with “another example of something that exists in a noncode section but should be in the general laws.” He continued:

The Tax Court is a court of limited jurisdiction, and it can only address cases that fall within its statutory

jurisdiction, which includes “final determinations” of the Board of Tax Review and the Department of State Revenue. (See IC 33-26-3-1.)

When the State Board of Tax Commissioners was divided into the Board of Tax Review and the Department of Local Government Finance, only the Board of Tax Review was carried over into the jurisdictional statute.

But the Department of Local Government Finance also makes some decisions that can be subject to judicial review. However, the jurisdictional statute for the Tax Court does not say that decisions of the Department of Local Government Finance can be challenged in the Tax Court.

One has to find a noncode section in the enormous bill that divided the State Board of Tax Commissioners that says that any decision of the Department of Local Government Finance that would have been reviewable if it had been made by the State Board of Tax Commissioners is within the Tax Court’s jurisdiction.

My research revealed that the enormous bill the writer described was HEA 1499 (PL 198) from 2001. SECTION 98 amended IC 33-3-5-2, relating to the jurisdiction of the Tax Court, replacing the Board of Tax Commissioners with the Board of Tax Review in the jurisdictional statute. The Tax Court is also granted “exclusive jurisdiction over any case that was an initial appeal of a final determination made by the state board of tax commissioners before Jan. 1, 2002,” but nothing is said in IC 33-3-5-2 about post-2002 appeals.

However, HEA 1499 includes a noncode SECTION 116 that supplies the missing jurisdictional language:

SECTION 116. Notwithstanding IC 33-3-5-2, as amended by this act,

TO ELABORATE

the tax court has exclusive jurisdiction over any case that arises under the tax laws of this state and that is an initial appeal initiated after Dec. 31, 2001, of a final determination made by the department of local government finance if the following apply:

(1) The tax court would have had jurisdiction over the case if the appeal had been initiated before Jan. 1, 2002.

(2) This act does not provide that the final determination is subject to appeal to the Indiana board of tax review.

But this language was not made a part of the Indiana Code.

Compounding the problem, the General Assembly passed a recodification of Title 33, the court laws, in 2004 (*see* PL 98-2004). IC 33-3-5-2 was recodified without change except that it was broken up to form IC 33-26-3-1 through 6.

However, as with the adverse possession provision discussed in Example 1, the noncode provision set out in PL 198-2001, SECTION 116 was neither included in the recodification nor repealed by the recodification. It remains – *an important statement of jurisdictional law* – never included in the Indiana Code, either in 2001, when it was written as a noncode section, or in 2004, when it was evidently overlooked by the recodification of Title 33.

Example 3 – property tax laws

Introduction

Indiana tax laws are replete with noncode provisions. For instance, HEA 1001 (PL 146-2008), the property tax relief bill passed by the General Assembly this year, is 805 pages long and has 872 SECTIONS, many of which are noncode provisions. The noncode provisions appear to begin with

SECTION 820, on p. 771 of the Enrolled Act.

An example is SECTION 832, a noncode provision that applies to certain township assessors elected before July 1, 2008. Subsection (b), which made news earlier this year, provides:

(b) Notwithstanding any other provision of this act, an elected township assessor referred to in subsection (a) is entitled to remain in office until the end of the term to which the individual was elected or for which the individual was selected to fill a vacancy. The sole duty of the individual is to assist the county assessor in the transfer of records and operations from the township assessor to the county assessor under this act.

Subsection (d) of the noncode SECTION 832 states that it will expire Jan. 1, 2013.

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Attorney General Steve Carter issued Official Opinion 2008-2 referencing this provision on May 9, 2008. He stated at p. 4:

Noncode provision, HEA 1001 section 832(b), addresses the abolishment of the office of township assessor when assessor duties are assumed by the county assessor either by law on July 1, 2008 or referendum on Jan. 1, 2009. Section 832(b) provides that any township assessor elected before July 1, 2008, may remain in office until the end of the township assessor's elected term. The same holds true for an individual who was selected to fill a vacancy in the office of elected township assessor before July 1, 2008. While serving out the term of his or her office, "the sole duty of the individual is to assist the county assessor in the transfer of records and operations from the township assessor to the county assessor under this act." HEA 1001, §832(b).

This is, in short, a provision of substantive import, and it will continue to be so until at least Jan. 1, 2013, but it is not in the Indiana Code because it has been drafted as a temporary provision. Under standards now followed for legislative

bill drafting, a substantive provision will not be made part of the Indiana Code if an expiration date is appended.

More complexity

The provision allowing township assessors to continue in office is one of the simpler examples of noncode tax-related provisions. An expert in state and local taxes wrote me in July about the earlier *Res Gestae* articles:

I've enjoyed your recent articles in *Res Gestae* concerning the reliability of the IC and IAC, both online and hard copy versions. Rarely do I find articles that pierce the very heart of lawyering to the extent these do. You address questions I ask myself nearly every time I crack open the Indiana Code: Is this version of the Code up to date? Is this exactly the way the words were written and formatted in the enrolled act? Is there a noncode provision elsewhere in the act that enacted or amended this statute that limits its application or specifies its effective date? Is there a provision in another act, perhaps enacted the same session, perhaps later, that addresses some aspect of the statutory provision or that supersedes the

noncode provision in the first act? Your work should be required reading for all Indiana lawyers of all ages, and certainly for all Indiana law students.

The writer then goes on to add yet another dimension of the problem:

In my practice as a state and local tax attorney, I find these and related issues commonplace. Tax statutes are regularly overhauled, tweaked, technically corrected, clarified, amended, sunsetted, extended, repealed and reenacted. In some instances, the West edition of the Indiana Code recites three or four versions of a single code section, each applicable to a different effective time frame. Even worse, sometimes, than a hidden noncode provision that specifies an effective date is an enactment whose effective date is subject to multiple reasonable interpretations.

Indiana tax statutes are minefields for taxpayers and their legal counsel [not only] because of the reasons you have highlighted in your article, but also because the "effective dates" stated in the acts – code and noncode provisions alike – are very often ambiguous.

MORE EXAMPLES OF NONCODE LANGUAGE

My non-exhaustive review of the Acts of 2007 and 2008 has turned up many additional examples of statutes of substantive import not included in the Indiana Code. I've categorized some of these.

Example 4 – Medicaid waivers and other Medicaid legislation from 2007 and 2008

From the 2008 General Assembly, I found these substantive noncode laws. There may be more of them:

PL 73-2008, SECTION 1. A Medicaid waiver provision that is written to expire July 1, 2016.

PL 121-2008, SECTION 5. A provision re: comprehensive care beds, written to expire June 30, 2011.

PL 134-2008, SECTION 55. Re: coverage for adults and children for medically necessary umbilical cord transplants and other related procedures under the state Medicaid program. Written to expire Dec. 31, 2013.

From the 2007 General Assembly, I found these substantive noncode laws – again, the search was not exhaustive:

PL 152-2007, SECTION 1. State plan amendment or Medicaid waiver re: cord blood. Expires July 1, 2013.

PL 158-2007, SECTION 1. Provides that comprehensive care beds may not be added or constructed in Indiana. Expired March 30, 2008.

PL 173-2007, SECTION 49. Authorizes a health care management program. Expires Jan. 1, 2013.

PL 173-2007, SECTION 50. Authorizes a pilot project to provide health care services to employees of small employers. Expires Dec. 31, 2013.

PL 212-2007, SECTION 32. Requires application to HHS to amend the state's upper payment limit program and make changes to the state's disproportionate share hospital program. Expires Dec. 31, 2013.

PL 218-2007, SECTION 55. Amendment or waiver re: presumptive eligibility for a pregnant woman.

PL 218-2007, SECTION 58. Amendment or waiver re: health insurance coverage program and premium assistance program. Expires Dec. 31, 2013.

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PL 218-2007, SECTION 59. Amendment re: the state's upper payment limit program and for changes to the state's disproportionate share hospital program. Expires Dec. 31, 2013.

In addition, I found that some provisions were written with relatively short expiration dates, then amended year after year to extend the date. For example:

PL 3-2007, SECTION 1. (SEA 5) Continuation of a 2003 act re: Medicaid nursing home facilities utilization. Expires Aug. 1, 2009. [Amends PL 18-2006, SECTION 1 (SEA 169), which expired Aug. 1, 2007.] [Amends PL 186-2005, SECTION 1 (HEA 1662), which expired Aug. 1, 2006.] [Amends PL 78-2004, SECTION 27 (HEA 1320), which expired Aug. 1, 2005.] [Amends PL 224-2003, SECTION 70 (HEA 1001), which expired Aug. 1, 2004.]

Many of the above examples are "Medicaid waivers" that have been written as noncode provisions since at least the date of the current legislative bill drafting manual – 1999. I'm told that the practice was begun when the waivers were for much shorter periods of time, and that the Legislative Services

Agency is now reevaluating the practice and may draft future waivers as Code provisions. However, many similar noncode provisions, from this and earlier years, remain in effect.

Example 5 – noncode provisions establishing applicability of amendatory language

Consider this noncode provision from PL 41-2008 (HEA 1113):

SECTION 2. IC 16-37-1-12, as amended by this act, applies only to crimes committed after June 30, 2008.

"Why is the language of SECTION 2 even necessary?" would likely be a first question. Here is SECTION 1 of the Act:

IC 16-37-1-12 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 12. A person who, with intent to defraud: * * * commits a ~~Class A misdemeanor.~~ Class D felony.

The change takes effect July 1, 2008. Offenses after that date are Class D felonies. Our Constitution does not permit *ex post facto* laws. Why, then, is SECTION 2 even

necessary, much less why should it be in the Indiana Code?

Compounding the problem, once the amendment to IC 16-37-1-12 is integrated into the Indiana Code, the stricken type and bold-face are eliminated, so the language of SECTION 2, if read with the Code provision, would make little sense because the reader would not know what the 2008 amendment was.

All this serves to indicate that the 2008 amendment was poorly drafted. Rather, the last line might have been written to provide:

* * * commits a Class A misdemeanor, if the actions were committed before July 1, 2008, or a Class D felony if the actions were committed on or after July 1, 2008.

This rewriting would make the noncode SECTION 2 unnecessary.

Here are some similar examples from 2008:

PL 94-2008, SECTION 66. IC 7.1-5-7-8, as amended by this act, applies only to offenses committed after June 30, 2008.

PL 126-2008, SECTION 13. IC 9-26-1-1, IC 9-26-1-2, IC 9-26-1-6, IC 9-26-1-8, IC 9-26-1-9, IC 9-30-5-3, IC 9-30-5-10, and IC 35-50-1-2, all as amended by this act, apply only to crimes committed after June 30, 2008.

Contrast with the above several other examples from 2008. These are noncode SECTIONS that are indeed unnecessary and, unlike the previous examples, could be repealed with no harm and with no rewriting. The reason is that the provisions to which they refer do not amend existing language, but instead add new provisions, and the reader will be able to determine that fact simply by glancing at the history line of the provision as it appears in the Indiana Code.

PL 68-2008, SECTION 2. IC 35-45-19-3, as added by this act, applies only to offenses committed after June 30, 2008.

PL 126-2008, SECTION 14. IC 9-26-1-1.5, as added by this act, applies only to crimes committed after June 30, 2008.

But what to make of this noncode provision? PL 48-2001 (SEA 80):

SECTION 2. The amendments to IC 35-41-4-2 made by this act apply to all crimes regardless of whether the crime was committed before, on, or after July 1, 2001.

This example goes to show why one might want to look at the entire act before jumping to a conclusion. The digest of this 2001 Act provides an explanation of the “before, on, or after” aspect of the amendment, but this does not alleviate the need to rewrite the language of the amendment to make the applicability language part of the Indiana Code.

Identification of offenders with DNA. Allows a prosecution for a

Class B or Class C felony that would otherwise be barred by the statute of limitations to be commenced within one year of the date that the offender is first identified with DNA evidence. Allows a prosecution to be brought before July 1, 2002 if the offender was first identified with DNA evidence after the date on which prosecution was barred by the statute of limitations and before July 1, 2001.

And, finally, what of this language, from a civil statute?

SECTION 3. (a) IC 32-20-3-2, as amended by this act, applies only to determinations of marketable record title (as defined in IC 32-20-2-2) after June 30, 2008.

This was Example 2 in the May 2008 *Res Gestae* article. As noted there, the only way for readers to understand the amendment would be to have drafted the bill differently, so that the change would be evident without having to refer

back to the enrolled act with its stricken and underlined text.

Example 6 – uniform dates for beginning the terms of county offices

In 2005 the General Assembly passed PL 88 (SEA 308) to implement Article 6, Section 2(b) of the Constitution of the state of Indiana to provide for a uniform date for beginning the terms of county offices. The noncode language begins on page 13. It was drafted to expire after 13 years, on Jan. 1, 2018.

The introductory provision, SECTION 19 on page 13 of this 47-page, 93-section bill provides:

(a) As used in this SECTION, “county office” has the meaning set forth in IC 36-1-8-15, as added by this act.

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(b) The general assembly finds the following:

(1) That due to events that occurred at different times in Indiana's history, the beginning of the terms of certain elected county offices vary from a uniform date due to changes in the dates of general elections, vacancies in offices, and other events * * *

(c) The general assembly enacts SECTIONS 20 through 93 of this act to:

(1) provide a rule applicable to each county office whose term of office deviates from a uniform date as of June 30, 2005; and

(2) implement Article 6, Section 2(b) of the Constitution of the state of Indiana to provide for a uniform date for beginning the terms of county offices described in Article 6, Section 2(a) of the Constitution of the state of Indiana.

(d) This SECTION expires Jan. 1, 2018.

The remaining 73 SECTIONS of PL 88-2005 cover offices of the individual affected counties. For instance, SECTION 63, dealing with Martin County:

SECTION 63. (a) As used in this SECTION, "clerk" refers to the clerk of the circuit court of Martin County.

(b) Notwithstanding any other law concerning terms of office, the following apply:

(1) The individual elected to the office of clerk at the November 2002 general election is entitled to serve in the office until Jan. 1, 2008.

(2) The individual elected to the office of clerk at the November 2006 general election is entitled to:

(A) take office Jan. 1, 2008, if the individual qualifies; and

(B) serve in the office until Jan. 1, 2011.

(3) The individual elected to the office of clerk at the November 2010 general election is entitled to:

(A) take office Jan. 1, 2011, if the individual qualifies; and

(B) serve in the office until Jan. 1, 2015.

(c) This SECTION expires Jan. 1, 2016.

This 2005 noncode law actually tripped me up a while back. I had been writing in **The Indiana Law Blog** (ILB) about a long-running dispute between the judge and the county clerk in Martin County, a county with only one judge. The previous clerk had resigned; a new one had been appointed to take the clerk's place; and the judge felt, according to reports in the *Washington Times-Herald*, that "the clerk's office was making it impossible for the court to function." According to an ILB entry from Sept. 27, 2006, "the current, appointed clerk was beaten in the May primary, but because of the timetable will serve all [of] 2007. It won't be until January 2008, when the new clerk, a former deputy, will take over."

I looked in the Indiana Code at the time and did not see how this could be so, and said so. A reader in Martin County wrote in explanation:

The position of Clerk of the Martin Circuit Court has been a "hold over" office for many, many years. As a result, although elected in November, 2002, Mrs. Christmas' term actually ran from Jan. 1, 2004, through Dec. 31, 2007.

Mr. Hunt was appointed as Clerk Pro Tempore and will serve the remainder of the term to which Debra Christmas was elected during the November 2002 general election. The General Assembly recently passed a law to put this election back on track, as a result the person who

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is elected Clerk this November will serve a three-year term. The term will run from Jan. 1, 2008, through Dec. 31, 2010.

It was this 2005 law, that continues in effect until 2016, but is not in the Indiana Code, that “put the election back on track.”

Example 7 – new courts and selection of judges and prosecutors

Laws creating new courts also apparently are not to be found in the Indiana Code.

It is too long to set out here, but if you go to IC 33-33, the Code article dealing with “Court System Organization in Each County,” and turn to Chapter 78, Switzerland County, you may be totally confused.

The chapter has 14 sections. There is an “a” and a “b” version of each section. Each “a” section

has text, followed by the notation: “*This version of section effective until 1-1-2009. See also following repeal of this section, effective 1-1-2009.*” Each “b” section, except Sec. 2, indicates that it has been repealed by PL 127-2008, SECTION 21 and has the notation: “*This repeal of section effective 1-1-2009. See also preceding version of this section, effective until 1-1-2009.*”

So as of Jan. 1, 2009, IC 33-33-78, Switzerland County, will read in its entirety:

Sec. 2. (a) Switzerland County constitutes the ninety-first judicial circuit.

(b) The Switzerland circuit court has a standard small claims and misdemeanor division.

As added by P.L. 98-2004, SEC. 12. Amended by P.L. 127-2008, SEC. 19.

The details of the new Switzerland County circuit court, including the elections of the initial judge and prosecutor, are to be found only in the noncode SECTIONS of PL 127-2008 (HEA 1096), and particularly SECTION 26, a two-page provision that took effect July 1, 2008 and that expires Jan. 2, 2015.

Example 8 – some other examples, mentioned only in passing

Here are some other examples, all of which happen to be from 2007, which I will point out but not discuss in detail.

PL 75-2007 (SEA 155), and duplicated in PL 221-2007 (HEA 1192)

SECTION 3. (a) An underground storage tank system that contains fuel composed of greater than 15 percent alcohol is considered to comply with IC 13-23-5-1(b), as added by this act, if either of the following applies: * * *

(b) Replacement tanks or ancillary equipment installed in existing underground storage tank systems storing or dispensing alcohol blended fuels must meet the standards contained in additional rules adopted by the solid waste management board as described in subsection (a)(2) only if the installation occurs after the adoption of those rules.

PL 101-2007 (SEA 207)

SECTION 6. Any information that is confidential under IC 16-40-4, as added by this act, remains confidential after the chapter expires or is repealed.

PL 101 added a new chapter on “Patient Safety Programs,” to which the noncode SECTION 6 apparently was intended to be supplemental and to remain effective even if IC 16-40-4 later expired or was repealed. But the new chapter has been renumbered IC 16-40-5 in the Code. IC 16-40-4 is the “Health Care Quality Indicator Data Program,” enacted in 2005.

PL 218-2007 (HEA 1678)

SECTION 62. (a) There is annually transferred from the state general fund to the Indiana tobacco use prevention and cessation trust fund established by IC 4-12-4-10 \$1,200,000 * * *. There is annually appropriated to the Indiana tobacco use prevention and cessation executive board \$1,200,000 from the state general fund for the purpose of tobacco education, prevention, and use control. * * *

This SECTION took effect July 1, 2007, and there is no expiration date. These appropriations have been drafted as noncode, although the 1999 legislative bill drafting manual provides:

A continuing appropriation is an annual and continuing appropriation or an appropriation that exceeds five years. This type of appropriation should be drafted as a Code provision.

HAS THE USE OF NONCODE PROVISIONS INCREASED OVER THE YEARS?

It certainly appears so, but a “best guess” is all I can do.

The General Assembly has placed online a resource labeled “Noncode Acts.” It is located at: <http://www.in.gov/legislative/ic/noncode>. It is not accompanied by any explanation of the contents. For instance, it is unclear whether noncode provisions, later repealed, have been retained or eliminated in the resource.

This resource is not useful, for instance, for checking to determine whether a provision you are reading in the Indiana Code is impacted by any noncode provisions. And it does not appear to be comprehensive – for instance, I could not locate the 2001 jurisdictional language I cited in Example 2. It also does not appear to contain the biennial budget bills from the earlier years.

Taking those qualifications into account, I counted the number of pages of noncode acts that appear in the PDF versions of the online resource, from 1973 through 2008. Keep in mind, when looking at the table on the next page, that odd-numbered years are budget years, and much of the budget bill, although noncode, simply lists the appropriations for the biennium. These biennial appropriations have never been included in the Indiana Code. Occasionally, a supplemental budget is passed in the following, even year.

All in all, it can be seen from the table that the number of pages of noncode law has increased over the years, starting in the decade of the '90s. And although some of the noncode provisions have expired by their own terms, much of this noncode law is cumulative,

meaning that the total amount of statute law not in the Indiana Code has been increasing, year-by-year.

RECOMMENDATIONS RE: THE INDIANA CODE

Several recommendations are presented below, dealing with the recodification of individual Code Titles, the education of lawyers and

law students, and giving more authority to the Indiana Code Revision Commission. But the two main recommendations deal with revising the legislative bill drafting manual and correcting the Indiana Code.

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Session Year	Pages of noncode law	Session Year	Pages of noncode law
1973	1	1974	–
1975	–	1976	1
1977	2	1978	–
1979	1	1980	2
1981	–	1982	–
1983	1	1984	1
1985	76	1986	11
1987	104	1988	22
1989	125	1990	–
1991	153	1992	25
1993	156	1994	50
1995	222	1996	115
1997	224	1998	28
1999	215	2000	36
2001	172	2002	58
2003	201	2004	79
2005	244	2006	77
2007	196	2008	91

Revise the legislative bill drafting manual

A comparison of the current, 1999 bill drafting manual, and the original, 1971 manual, shows two big differences, two new major categories of law that are now to be drafted as noncode.

The first is the Medicaid waiver agreement

I’ve been told the Legislative Services Agency plans to draft such bills as amendatory of the Indiana Code in the future.

The second is the ‘temporary’ law

According to the 1999 bill drafting manual currently in use by the Legislative Services Agency:

If a provision has a general application, but is not permanent law, it is considered “temporary” legislation and may be drafted as a noncode provision. Generally, temporary provisions include those that:

- (a) contain a specific termination date that is within five years of the date of passage of the act;
- (b) provide for transitional or implementary matters in an otherwise permanent act; or

(c) terminate by implication when their purpose is fulfilled or ceases to exist.

The drafter should not place a temporary, transitional, or self-terminating provision in the Indiana Code unless there are compelling articulable reasons (including time constraints during critical points during the legislative session) for doing so.

In short, so-called “nonpermanent” laws are to be left out of the Indiana Code. This rationale explains the omission from the Indiana Code of laws creating new courts (Example 7), the law establishing uniform dates for the terms of county offices (Example 6), and countless other provisions over the years. But exclusion of a law from the Code has the practical effect of making the law invisible, unindexed and unsearchable, as numerous examples in this article have shown – for instance, Example 1, where the opposing lawyer, and perhaps the judge also, believed that “if it is not in the Code, it is not the law,” and Examples 1 and 2, where the recodifications of Titles 32 and 33 overlooked operative noncode provisions.

Contrast this with the 1971 manual that considered

a temporary provision to be: (1) a nonsubstantive provision, that (2) by its terms expired in less than two years. Study committees were the prime example.

I believe it is essential to return to the two-year, nonsubstantive-language-only standard for noncode temporary provisions. And I believe the same presumption should be in the future that as was followed with the 1971 recodification: **If in doubt, put the language in the Indiana Code.**

Bill drafting practices

In addition, some drafting practices, not condoned in the current manual, should be modified. One is the practice, illustrated in Example 5, of using noncode language to establish the applicability of amendments. Another is the inconsistent use of “effective date” language. Example 4 from the May article, regarding defibrillators, illustrates the problems that can arise.

This, and perhaps other changes, may resolve the noncode issue going forward. But what about past years? That leads to the second main recommendation.

Correct the Indiana Code

The 1852 codification was not attempted again for 116 years. The expectation of the 1971 Indiana Code Commission was that future recodifications of the entire Indiana Code (which would include repealing all statute law either not in the Code or not specifically exempted) would be done much more frequently, perhaps as often as once every five years. That was 37 years ago, and the only subsequent recodification of the Indiana Code was in 1975, necessitated by a Supreme Court decision.

Individual Titles of the Code have been separately recodified over the years. Every year or so the Legislative Services Agency staff prepares a recodification of an individual Title of the Indiana Code. The arrangement of provisions may be changed, long sections are broken up, but the intent is that no substantive change is made. The resultant bill for the Title recodification repeals the existing content of the Title, replacing it with the recodified content, newly numbered. But noncode provisions are not affected.

By my rough count, based on the online “Noncode Acts” resource, there are nearly 2,700 pages of noncode law outstanding as of the end of the 2008 session. This body of law needs to be dealt with, immediately.

My recommendation would be that the noncode law resource first needs to be reviewed against the Acts of past years to make certain it is comprehensive. Then legislation should be prepared that would incorporate within the framework of the Indiana Code all noncode substantive provisions still in effect, and all noncode temporary provisions with a remaining life of more than two years. Finally, the legislation should be drafted to specifically repeal all other noncode law.

Every provision enacted since 1971 should be accounted for.

Additional recommendations

Because of the length of the article, I will only briefly list several other recommendations.

Recodifications, legislative history and tables

Important historical information is lost every time a Code Title is recodified. I will write about this at length at a later date.

Education of attorneys and law students

How a bill becomes a law, in all its detail, is no longer a part of many Indiana lawyers’ toolboxes. Total reliance on online resources, without any questioning of the source or accuracy of the data, may account in part for this. Education, or reeducation, may be in order.

Strengthening the Code Revision Commission

Procedures have changed a lot since the days when the Acts and Indiana Code were printed and distributed throughout the state,

and anyone could review the Code and Acts for the current and past years at the local library or courthouse. Much information is now online, but often not in the most useable form. And a good deal of essential information is no longer accessible (if you even know to look for it) without traveling to a resource such as the Indiana State Library or Supreme Court Library. A legislative entity charged with improving the General Assembly’s outreach to the public could work to remedy this situation. ♪

Marcia J. Oddi, a 1969 graduate of I.U. School of Law-Indianapolis, directed the project that led to the enactment of the Indiana Code of 1971. In the early 1970s she served as Indiana’s first Reviser of Statutes and as Director of the Public Law Division of the Indiana Legislative Services Agency. Nearly 40 years later, Marcia concentrates her practice in legislative and regulatory matters, and operates a legal research and publishing business. In 2003 she started the respected Indiana Law Blog to create a shared warehouse of legal news and other information valuable to Indiana attorneys and judges.