

## Resolving issues of statutes not compiled in the Indiana Code

The Indiana Code was most recently recodified in 1976 and 1989. Each recodification was accompanied by language repealing all statutes not in the Indiana Code, with certain specific exceptions.

In the past 24 years, however, no such “housekeeping” process has been applied to the post-1984 statutory provisions that, for one reason or another, were enacted into law but were not made amendatory of the Indiana Code.

Thus, many laws or parts of laws enacted from 1985 forward are not in the Indiana Code, and are inaccessible for all practical purposes to most Indiana citizens, including many lawyers. This problem was the focus of two articles, published in the May and October 2008 issues of *Res Gestae*, titled “Can You Rely on the Indiana Code? Parts I and II.”<sup>1</sup>

### Operation of the blanket repealer

In 1976, the recodification bill encompassed the entire Indiana Code, and its repealer provided:

All acts enacted before the 1976 regular session of the Indiana general assembly are repealed, except that this repeal does not include the following: ...

What followed was a list of specific citations, all but two referencing “acts of incorporation enacted before the 36th session of the general assembly, and their amendments ...” This language and list of exceptions may be found in the current Indiana Code, at I.C. §1-1-1-2.<sup>2</sup>

In 1989 the General Assembly again updated the Indiana Code, this time by repealing all laws that had been enacted after 1975 and before 1985, “and not compiled in the Indiana Code,” with certain specific exceptions. That language, including the list

of excepted statutes, may be found at I.C. §1-1-1-2.1.<sup>3</sup> The exceptions are identified by specific citation and are additionally grouped into four specific categories: (1) provisions concerning judicial proceedings; (2) appropriation provisions; (3) special provisions; and (4) transitional provisions. And because the 1989 law applies only to the pre-1985 provisions, there is also a fifth, unnamed category, all noncode statutes enacted from 1985 to 1989. These are not identified by citation.

### Some progress toward dealing with 25 years of noncode statutes

At a meeting of the permanent interim legislative commission, the Indiana Code Revision Commission,<sup>4</sup> held Oct. 27, 2008, the commission authorized the Legislative Services Agency’s code revision staff (LSA) to proceed with the staff’s proposal to deal with noncode provisions enacted since 1984, and to bring the legislative draft to the December meeting for review and approval.

Several days prior to the Dec. 9 meeting, a bill draft (PD 3770)<sup>5</sup> was posted on the commission’s Web page. At that meeting, the LSA explained that the draft represented only Phase I, and that the recodification would be performed in two phases. Phase I would be accomplished by passage of PD 3770 in the upcoming 2009 session. The work for Phase 2 would be carried out during the interim between the 2009 and 2010 sessions.

What follows is the LSA presentation, set out in some detail because it contemplates an approach unlike that taken with the prior recodifications.

#### LSA presentation – Phase I

John Stieff, director of the code revision section of LSA, explained that in the latter part of 2008 three

LSA attorneys had gone through all noncode provisions since 1984 and tried to decide which provisions should be placed in the Indiana Code. The following criteria were used:

A. Is the provision substantively different from what is in the Code?

B. Will a large number of people use the provision?

C. Do substantive rights and obligations flow from the enactment of the provision?

D. Can an expiration date be placed in the provision?

E. Is the provision transitional or self-terminating?

F. How long is the provision going to be in effect? More than five years – put it in the Code.

Stieff said they found that most of the statutes had expiration provisions which had already passed. They decided that the way to deal with these would be to write Indiana Code provisions to deal with expired provisions the same way that repealed provisions are handled. This language is set out in SECTIONS 1-7 of PD 3770. (This draft has now been introduced as S.B. 346.)<sup>6</sup>

The remainder of the bill, SECTIONS 8-33, sets out current noncode sections that are to be added to the Indiana Code this year. SECTION 34 is a repealer that repeals the noncode versions of the provisions to be added to the Code via 8-33.

Stieff said several categories were not in the current bill, the one to be introduced in 2009.

**Medicaid waivers.** First, he said, were Medicaid waivers statutes. He said several legislators had voiced strong dissent to those provisions being placed in the Indiana Code, so they were not

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included to keep the bill from being controversial. These will be introduced in a separate bill.

### **Applicability provisions.**

Second, he said, noting that they probably made up the biggest category, were applicability provisions. (Such as a SECTION stating: “This act only applies to insurance contracts entered into after the

effective date of this act.”) He said consideration of how to deal with them would take more time.

To be considered: On the one hand, placing the applicability provision in the Code makes it easier to find and research all the law in one place. On the other hand, placing applicability

provisions in the Code is going to clutter up the Code.

For instance, the murder statute has been amended nine times since the current statute was put in the Code in 1976. Placing the applicability provisions in the Code may make the text much longer, harder to comprehend and harder to use.

Also, he said, the decision on how to carry out this balance will have a profound effect on the way we draft legislation.

### **Tax, finance and budget.**

This is a group of about 250 statutes. They need to be reviewed by the tax and finance attorneys, budget office, etc., before a final decision is made as to how each is to be treated.

**Blanket repealer.** One last thing, said Stieff, is the blanket repealer of the rest of the noncode sections. In 1971, 1976 and 1989, we had provisions that repealed all noncode sections except those specifically designated. Once we have the final decisions re the other provisions, he said, we’ll be in a position to do the blanket repealer.

### **LSA presentation – Phase II**

Once the 2009 session is over, Stieff said, LSA would undertake five things:

1. Decide how to deal with applicability provisions.
2. Have the tax, finance and budget provisions reviewed by the appropriate experts.
3. Look through the 2007, 2008 and 2009 noncode acts, as most of their 2008 analysis ended with 2006.
4. Look at the statutes preserved in Title 1 (*i.e.*, I.C. §§ 1-1-1-2 and 2.1), and see if any of them may be repealed.
5. Lastly, prepare another preliminary draft for Code Revision

Commission approval, to deal with the noncode statutes – placing some in the Indiana Code, repealing the vast majority, and preserving some of them as noncode statutes as was done in 1976 and 1989.

### LSA presentation – more about this year’s bill

Next, Robert Rudolph of LSA went through this year’s bill draft. SECTIONS 1-7 of PD 3770 make revisions intended to make the expiration of a statute have the same effect as the repeal of a statute. SECTION 8 would add a number of noncode legislative study committees to the Indiana Code. SECTION 33 would add to the Indiana Code a massive currently noncode act that sets the terms of many county officials. SECTION 34 repeals the noncode versions of statutes added to the Indiana Code by this bill.

Finally, SECTIONS 9-32 would add some other currently noncode provisions to the Indiana Code. Rudolph said they had originally prepared a draft with 200 sections, but had picked those in 9-32 to do first. 175 are left.

### LSA presentation – commission discussion

Rep. Ralph M. Foley, Martinsville, asked about the impact of the recodification bill on other legislation pending during the session. Some discussion followed.

Rep. Foley also said that he thought that all the law should be in the Indiana Code.

Jon B. Laramore, Indianapolis, noted that although it had been said that tax- and budget-type legislation would be left for next year, there were several tax-related provisions in SECTIONS 9-32 of the draft bill and asked what criteria had been applied.

Cynthia A. Baker, Indianapolis, asked about the defibrillator requirement mentioned in one of the *Res Gestae* articles – was this an applicability provision?

Laramore said he had some thoughts about the criteria to apply going forward. He said he had already stated his general bias as a practicing lawyer toward having everything possible in the Indiana Code, as the most accessible place to look, but now he had some specific comments on the criteria Stieff had laid out.

**Anticipated usage** – whether a large number of people would use a provision or not, as a reason for including it in the Indiana Code. Laramore said that was pretty subjective, and it might require knowledge that is obscure. It is not necessarily obvious how many people are going to use a particular provision. But he actually thought there was

some reason to be more apt to codify provisions that fewer people use. In Indiana there are real estate lawyers, and divorce lawyers, and other specialists, who know there is something in a noncode provision that is going to affect their practice, and it is common knowledge among the specialists. But if it is a really obscure provision, it is unlikely that others will think about tracking down the bills that enacted every amendment to a Code provision they are looking at to see what noncode provisions might be there that would affect their issue. So that is one criterion to which Laramore proposed some thought should be given.

**“Temporary” provisions.** Laramore continued that the five-year rule (*i.e.*, don’t codify any provision that would expire within

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five years) is also something to which more thought should be given because for that five years (or whatever period) the provision is the law one should be able to open up a Code book and find it, or go to the Internet and find it. Back in the days when only books were published, and they would only come out every few years,

then it might have been more of a concern that some of the temporary laws expired before the books were revised. But if the source is the Internet, it is very easy to make something go away when it is time for the provision to expire.

**Applicability provisions.**  
As for applicability provisions, Laramore said he thought the bias

should be toward including them. Stieff gave the example – this provision only applies to insurance contracts after a certain date, but that is a noncode provision – but if I look in the Code book or on the Internet, I don't see that, all I see is the substantive provision. I have to go to another place to look it up, and there's no signal to me that I have to look that up, and I could very easily make a mistake by not knowing that the insurance contract only applies to insurance contracts entered into after a certain date.

I understand, he continued, that it makes the Code more cumbersome, but I would suggest you err on the side of inclusion.

The commission chair, Sen. Sue Landske, Cedar Lake, asked Stieff whether it would be possible to work on some of these issues as the bill moved through the session. Stieff responded that right now, the bill didn't make any substantive changes at all. As for applicability provisions, he said that sometimes it just was not practical to place the applicability provisions within the Code, but that they would proceed with a heightened degree of sensitivity. He said the

standard to which he was leaning would be to place applicability provisions within the Code whenever practicable.

Baker asked whether there could be some sort of signal if the applicability sections were not in the Code. Stieff responded that, going forward, they could look at how other states deal with applicability provisions.

### LSA presentation – public discussion

The public was invited to comment. Marcia J. Oddi, Indianapolis, said that she had had more comments prepared before LSA's announcement today that the draft bill was only Phase I – as a result she hadn't really put all the steps together yet. But she said the longer the process was spread out, the more issues that would arise, conflicts with other legislation, etc. She said one thought she had, especially since the proposed process outlined today was not entirely clear, was to do everything at once, on the November opening day.

Oddi said that, like others who had testified, she was concerned with the application of the criteria, which seemed very subjective. She said that as an attorney on the outside, she might read a provision in the Code and not know whether something else was not in the Code because of reasons X, Y or Z, when she did not know what X, Y and Z were, or how they had been applied. She said there did not currently appear to be a consistent set of tests.

She was quite concerned about the 250 tax, finance and budget statutes that the staff had said were not in the Code and would be considered next year because if you are a lawyer and don't know about a statute because it is not in the Code, you may end up in trouble.

Finally, she said, a lot of what had been discussed tied in with how bills are written, so revising the bill drafting manual, especially with regard to applicability sections, ought to be done in a coordinated way with the recodification.

Laramore suggested to Oddi that she had the best platform, going forward, to explain to the public what would happen next, via the Indiana Law Blog and *Res Gestae*.

### LSA presentation – commission action

There being no other comments, the commission voted to approve the draft for submission to the General Assembly, to be designated as a Code Revision Commission bill.

### Concerns about the planned approach

The approach and the legislative proposal approved by the Code Revision Commission on Dec. 9, 2008, likely means that issues raised at the meeting about the criteria will not be addressed during the

current session of the General Assembly.

• The 2009 Phase I bill adds 25 noncode acts or parts of acts to the Indiana Code and repeals their noncode versions. According to the LSA testimony, hundreds of additional provisions need to be resolved.

Only a few of the many noncode examples identified in the two *Res Gestae* (*Parts I and II*) articles are addressed in the proposed legislation, notably the adverse possession statute that was Example 1 in *Part II* and the lengthy law setting uniform dates for county offices, that was Example 6 in *Part II*. These will become a part of the Indiana Code by virtue of SECTIONS 30 and 33 of the draft bill (which has been introduced as S.B. 346).

• At the December meeting LSA staff reported that “Medicaid waivers” (which are Example 4 in *Part II*) would be added to the Indiana Code via a separate bill because several legislators had voiced strong dissent to those

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provisions being placed in the Indiana Code. I have subsequently learned that in fact there will be no bill to make these Medicaid laws part of the Indiana Code.

(What exactly are “Medicaid waivers”? These statutes would be more properly described as laws authorizing the State’s application for specified waivers to its Medicaid program, establishing parameters and conditions, etc. A quick search of the Indiana Code turns up numerous statutory references to “Medicaid waivers” in Title 12 of the Indiana Code.)

SECTION 1-7 of the 2009 bill draft appear to be unnecessary in light of the LSA staff’s announced plan to include a blanket repealer in the 2010 bill draft, that would repeal all past, expired noncode provisions. Expiration provisions in the future could be drafted as self-repealing provisions. Rather than:

This SECTION expires July 1, 2015.

The provision would be drafted:

This SECTION is repealed July 1, 2015.

This would alleviate potential unanticipated consequences resulting from making the major changes currently proposed by SECTION 1-7, which adds an entirely new class, “expiration,” to statutes historically dealing only with the interpretation of the repeal of laws. The proposal has no definitions and gives no indication of whether the change is to operate only prospectively.

Obviously, within the 24-years’ worth of substantive non-code statutes, there are many laws that are no longer in effect by virtue of their specific expiration dates. Beyond those, however, several commission members voiced their opinions that if a provision is the law, it should be in the Indiana Code. I expect that most Indiana attorneys, legislators and other users of the Indiana Code would echo this opinion.

Implementing this goal would mean adding back to the Indiana

Code now, and making a part of the Indiana Code in future years, statutes that the LSA staff has indicated in its testimony it likely would exclude from recodification, including: provisions that may not be anticipated to be used by a large number of people; statutes with future expiration dates; applicability sections; and statutes that one or several legislators might not want made a part of the Indiana Code.

Finally, any criteria used to justify keeping substantive law out of the Indiana Code must be objective, not subjective, so that no question may exist among future users of the Indiana Code (as there is now) that there may be other Indiana statute law “out there” on an issue that is not readily accessible because it is not part of the Indiana Code. ☺

1. “Can you rely on the Indiana Code? Part II – More noncode provisions, some recommendations,” 52 *Res Gestae* 2 (October 2008), pp. 12-23. “Can you rely on the Indiana Code? Part I – Noncode sections,” 51 *Res Gestae* 9 (May 2008), pp. 20-28. Both articles are available at: <http://indianalawblog.com/documents/publications.html>
2. <http://www.in.gov/legislative/ic/code/title1/ar1/ch1.html#IC1-1-1-2>
3. <http://www.in.gov/legislative/ic/code/title1/ar1/ch1.html#IC1-1-1-2.1>
4. <http://www.in.gov/legislative/interim/committee/crsc.html>
5. <http://www.in.gov/legislative/interim/committee/prelim/CRSC02.pdf>
6. <http://www.in.gov/apps/lsa/session/billwatch/billinfo?year=2009&request=getBill&docno=346>

*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 ([indianalawblog.com](http://indianalawblog.com)) to create a shared warehouse of legal news and other information valuable to Indiana attorneys and judges.*