

## 7/30/07 DRAFT

### Assuring authentic legal information in the digital age Part II – The Indiana Register and the Indiana Administrative Code

#### *Introduction*

*Part I – The Acts of Indiana and the Indiana Code*, published in the June issue, focused on Indiana statute law. The enrolled acts are published at the end of each session in that year's volume of the Acts of Indiana. The session's Acts are also used to perform the annual update to the Indiana Code. The article detailed the authentication process followed in the preparation of the print version of these two official legal resources.

Part I stressed the point, made in a recent American Association of Law Libraries Report (AALL), that:

The fixed nature of the print medium, coupled with the paper publication's multiple copies and wide distribution, ensures that the print *official* legal resource, as "governmentally mandated or approved by statute or rule," is an *authentic* resource. An online *official* legal resource offers no such automatic assurance.<sup>1</sup>

Part I weighed the current *online* Acts of Indiana and Indiana Code against the standards set out in the AALL report for trustworthiness of state-level primary legal resources on the Web:

Are they official?

Are they authentic?

Are they permanently accessible?

Are they secure?

The conclusion was: Current online Indiana statutory resources do not satisfy the trustworthiness criteria.

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<sup>1</sup> <http://www.aallnet.org/aallwash/authenreport.html>

This Part II will look at how well the *Indiana Register* and the *Indiana Administrative Code*, which as of July 1, 2006 are only available online (the print versions having been terminated), meet the trustworthiness criteria.

Part III will examine the problems of authentication in court of electronic evidence of the most basic sort – that of Indiana's primary legal resources, the statutes and rules

As the keynote speaker at the April 20-21 AALL National Summit on Authentic Legal Information in the Digital Age, Robert Berring, Walter Perry Johnson Professor of Law at Boalt Hall, has written in a recap of his presentation, "Losing the Law: A Call to Arms"<sup>2</sup>:

States are making the transition from paper to digital publication of primary legal authority without thinking through what they are doing. The various state agencies know that the move from paper to digital information saves money. They also know that moving to web-based production of primary source materials caters to the desires of citizens who want search engine driven access to the law. ...

What could be wrong with this picture? The problem is that not one state has thought through the implications of abandoning paper copies. Not one state has put in place a system that authenticates and preserves the new digital information. Some states have even completely stopped printing administrative regulations and deemed the online version to be the official publication of the state's information without providing for authentication or preservation of it.<sup>3</sup>

### ***Background on Indiana Administrative Rulemaking***

In order to have the force and effect of law, a proposed rule in Indiana must strictly comply with the procedural requirements set out in IC 4-22-2 or, in the case of environmental rules, with both the applicable provisions of IC 4-22-2, and with IC 13-14-9. The statutes require publication in the *Indiana Register* of at least proposed and final rules and, in the case of the environment boards, publication of additional notices and opportunities for comment, to assure that the public has due opportunity to participate in the rulemaking process.

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<sup>2</sup> 10 Green Bag 2d 279 (2007); <http://www.aallnet.org/summit/GreenBag-LosingtheLaw.pdf>

<sup>3</sup> That would be Indiana.

Since 1978 when Indiana administrative rules were codified for the first time and when monthly publication of the *Indiana Register* began, proposed rule documents, final rules, executive orders of the governor, and other significant executive branch legal documents have been made available to the public via the monthly, paperbound publication, the *Indiana Register*, and codified in an annually updated Indiana Administrative Code, similar to the *Federal Register*/Code of Federal Regulations model.

Administrative rules, like statutes, have the force and effect of law.<sup>4</sup> Rules<sup>5</sup> are frequently lengthy, technically complex, and govern everything from ageing and community services to the air regulations under which Indiana industry operates, to labor and insurance, to local government finance and state taxation, water pollution control and worker's compensation.

**Elimination of the *Indiana Register*.** The Indiana General Assembly began reducing the availability of printed copies of the monthly *Indiana Register* a few years ago, ultimately limiting distribution to legislators and federal depository libraries. To replace this availability, the several hundred page publication was posted online each month in PDF format.<sup>6</sup>

As detailed in an earlier *Res Gestae* article,<sup>7</sup> the phase-out was completed with the publication of the final issue of the *Indiana Register* on July 1, 2006, marking the end of the monthly, paged, serial *Indiana Register*, in both print and online.

The monthly issues of the *Indiana Register* were replaced by an online database, still identified as the "Indiana Register." Individual documents are posted online by the General Assembly's Legislative Services Agency (LSA) staff, some on a daily basis, some on a monthly basis.

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<sup>4</sup> IC 4-22-2-3.

<sup>5</sup> The term "rule" is used exclusively in this article; Indiana's rulemaking statutes refer only to "rules" and "rulemaking"; the term "regulation" is not used at the Indiana state level, but is used at the federal level.

<sup>6</sup> I've been told that many law librarians printed out and bound the monthly *Indiana Register*, as insurance in the event the online versions at some point were no longer available.

<sup>7</sup> "The General Assembly's Role in Making the Indiana Rules and Statutes Available to the Public," 50 *Res Gestae* 1 (July/August 2006), pp. 19-26.

My earlier article points to many problems resulting from this change. These problems continue to exist and must be addressed. The purpose of this current article, however, is to look at the trustworthiness of the online *Indiana Register* database, and of the online Indiana Administrative Code.

### ***Trustworthiness of the Indiana Register and Indiana Administrative Code***

Using the criteria applied earlier to the Acts and Indiana Code, the same questions must be posed in examining the trustworthiness of the *Indiana Register* and the Indiana Administrative Code as they currently exist: Are they official? Are they authentic? Are they permanently accessible? Are they secure?

The analysis is more urgent here, because there is no longer an official print version to fall back on. Further, no private publisher produces parallel or annotated editions of the *Register* or Indiana Administrative Code. The online *Indiana Register* and the Indiana Administrative Code are *the* primary legal resources and the only record.

**Are they official?** Yes, the General Assembly has declared them to be official at IC 4-22-8, by providing that the Legislative Services Agency shall publish the online *Indiana Register* and the Indiana Administrative Code. The online *Users Guide* states that "The LSA is the official publisher of the *IR* and *IAC*."

**Are they authentic?** No. We saw in Part I that in earlier years the enrolled acts, which had been individually certified by the Speaker and President, were delivered under guard to the contract printer by the State Police, to assure chain of custody in the printing of the Acts of Indiana. We saw that the official volume of the Acts and the edition of the Indiana Code produced each year bears a certification signed by the Speaker and President Pro Tempore stating that that the volumes have been compared with the enrolled acts from which they were taken and found to be correctly printed.

The General Assembly passes its laws during an *annual* legislative session that adjourns in the spring of each year. Once an enrolled act is signed into law, it may not be altered

except by a subsequent act of the General Assembly. Once the Indiana Code is updated each year, it is "frozen in time" until the next annual update.

A significant difference is that administrative rules are adopted, amended and repealed throughout the year, and by a multitude of different state entities. Additionally, unlike an enrolled act, a rule "final adopted" by an agency head or board, and signed off on by the agency head or board representative who has authority, may be "reformatted" and "corrected" by the LSA, prior to its publication as a final rule document.<sup>8</sup> Thereafter, it may be "corrected" through a simple filing, at any time in its life, even after it has been codified in the current edition, or even a past edition, of the Indiana Administrative Code.<sup>9</sup>

So how is the authenticity of a rule currently certified? There appears to be no comparable requirement in the Indiana statutes that the agency head or other entity with rulemaking authority certify the authenticity of a rule document. There appears to be no chain of custody standing behind what is posted online.

An advisory memo from the Governor's Office dated June 30, 2006<sup>10</sup> (the eve of the change-over from the monthly *Indiana Register*) appears to have attempted to address this problem:

Rule Signature Page: Previously, all rules were accompanied by a signature page on the last page of each submission. This page indicated and tracked not only the actual approval of the relevant authority, but also the dates on which rules were physically approved.

However, due to the nature of electronic submission, signature sheets will no longer be possible in the same format. They will not be attached directly to the individual

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<sup>8</sup> See IC 4-22-8-4 and IC 4-22-8-6. The "publisher" is elsewhere defined as LSA.

<sup>9</sup> See IC 4-22-2-38. For an example, see this "agency correction" at <http://www.in.gov/legislative/iac/20061206-IR-326060557ACA.xml.pdf>, which did the following: In 326 IAC 6-2-2(b), after "in", delete "326 IAC 2-3(d)." and insert "326 IAC 2-3-2(f).".

This may be particularly confusing when taken in combination with IC 4-22-9-6, which provides that "A reference to the Indiana Administrative Code (IAC) in the form of an IAC citation shall be construed to include all amendments as of the date the reference is written, unless accompanied by a reference to a specific edition or supplement of the Indiana Administrative Code."

<sup>10</sup> Found in the "User's Guide to the -IR- Database," at pp. 37-40 of the newest, 7/9/07 edition. (Note that this is at least the third version of the User's Guide posted since July 1, 2006. New editions are posted without notice and with no indication of what changes have been made. The earlier versions are not archived.)

rules themselves. The statute does not specify any specific method for approval or acknowledgement. As such, in agreement with the Office of Attorney General and the Legislative Services Agency, the Office of the Governor is requiring all agencies to submit in the binder a Rule Signature Page (as referenced above) to track the progress of rules and ensure that each agency complies with the statutory time periods.

However, there is nothing akin to the certification of the final language of an enrolled act by the leaders of the two houses of the General Assembly.

As rules adding new provisions to the Indiana Administrative Code, or amending or repealing existing provisions, become final, their language is merged into the existing "current" version (the "latest update")<sup>11</sup> of the official online Indiana Administrative Code.

This means that, unlike the online Indiana Code, which is not intentionally altered once it has been updated each year, the current online edition of the Indiana Administrative Code is continually undergoing revision until the cut-off date each year. At that point the "current version" is archived. For instance, the archived "2007 Edition of the Indiana Administrative Code"<sup>12</sup> is current through December 31, 2006.<sup>13</sup>

**Are they permanently accessible?** There is no assurance of permanence in the laws governing the *Indiana Register* and Indiana Administrative Code. The current edition of the Indiana Administrative Code is online and, as a result of the entreaties of Indiana law librarians and others, the earlier, superseded Indiana Administrative Code editions going back to 2003 have also been posted at this time.<sup>14</sup> An archive of *Indiana Registers* going back to Volume 24 (Oct 2000-Sep 2001) has also been made available.<sup>15</sup> But because there is no legal mandate, these resources could be removed at any time, as is currently the practice with the Acts of Indiana and Indiana Code, where only the most current editions are maintained.

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<sup>11</sup> Found at [http://www.in.gov/legislative/iac/iac\\_title](http://www.in.gov/legislative/iac/iac_title)

<sup>12</sup> Found at [http://www.in.gov/legislative/iac/iac\\_title?iacv=iac2007](http://www.in.gov/legislative/iac/iac_title?iacv=iac2007)

<sup>13</sup> Generally if you want to see what a rule said before its amendment, you can look the prior year's edition of the IAC. However, if the rule has been amended more than once in a year, this effort may prove problematic.

<sup>14</sup> Find them at: <http://www.in.gov/legislative/iac/iacarchive.htm>

<sup>15</sup> Find them at: <http://www.in.gov/legislative/iac/showIRArchive>

**Are they secure?** No, they are not secure. With the statutes, the question is – once they the Acts (or Indiana Code) of a specific year have been authenticated and made accessible online, how can they be made secure?

The gold standard may be the Government Printing Office's Future Digital System (FDsys).<sup>16</sup> Other favored methodologies include digital signatures, trusted (digital) time-stamping, cryptographic checksums (hash values), public key infrastructure (PKI).

With a current edition of the Indiana Administrative Code, insuring security will be infinitely more difficult, because: (1) documents posted have not been authenticated in the manner of the Acts and Indiana Code, and (2) systems designed to insure that the documents posted have not been subsequently altered will fail in a setting where the documents are being constantly altered by amendments and corrections.

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To conclude, neither the Indiana Code nor the *Indiana Register* and Indiana Administrative Code meet requirements for trustworthy state-level primary legal resources on the Web. How then may a statute or rule downloaded from these electronic databases be relied upon or accepted into evidence in court without initial proof that the electronic record has been authenticated prior to posting, and that the record has not since been modified. Part III will look at some recent cases on admissibility of electronic evidence.

The table accompanying this article provides an overview of Parts I and II, the trustworthiness of Indiana's primary legal resources.

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<sup>16</sup> See: <http://www.gpo.gov/projects/fdsys.htm>.

## Trustworthiness of Indiana's Primary Legal Resources

	Acts of Indiana	Indiana Code	Indiana Register	Administrative Code
<b>Are They Official?</b>				
<b>Printed Publication</b>	YES <sup>1</sup>	YES <sup>2</sup>		
<b>Online Version</b>	YES <sup>3</sup>	NO	YES <sup>4</sup>	YES <sup>5</sup>
<b>Are They Authenticated?</b>				
<b>Printed Publication</b>	YES <sup>6</sup>	YES <sup>7</sup>		
<b>Online Publication</b>	YES <sup>8</sup>	NO	NO	NO
<b>Are They Permanently Accessible?</b>				
<b>Printed Publication</b>	YES	YES		
<b>Online Publication</b>	NO <sup>9</sup>	NO <sup>9</sup>	YES <sup>10</sup>	YES <sup>10</sup>
<b>Are They Secure?</b>				
<b>Printed Publication</b>	YES	YES		
<b>Online Publication</b>	NO	NO	NO	NO

1. Preface to the Acts states that they are published "by authority."

2. Foreword states it is the official edition, and "the text of the law is printed exactly as enacted without grammatical or spelling deviation."

3. The Preface in the printed Acts is of course reproduced in the online PDF file.

4. See online Users Guide, p. 2 - "The LSA is the official publisher of the IR and the IAC." See also IC 4-22-8-2.

5. See online Users Guide, p. 2 - "The LSA is the official publisher of the IR and the IAC." See also IC 4-22-8-5.

6. Certification in back of volume that the Public Laws have been compared with the enrolled acts from which they were taken and have been found to be correctly printed. Signed by Speaker and President Pro Tem. See IC 2-6-1.5-4(b).

7. Certification in back of edition that the text of the Code as presented in this edition has been compared with the 1976 Code and all laws subsequently affecting the Code and has been found to be accurate, correct, and complete. Signed by Speaker and President Pro Tem.

8. The certification in the printed Acts is of course reproduced in the online PDF file.

9. Only the current year's version of the Acts and Indiana Code are available online; there is no archive.

10. Yes, so long as the General Assembly maintains them online. There is no legal mandate -- they could be deleted at any time, much as is the practice with the Acts and Indiana Code, where only the current edition is maintained

**Note:** The CD-Rom is considered to be a transitional medium and is not included in this Table.