

- 1. Sunday, November 30, 2008
  - 1.1. Environment - "At the Last Minute, a Raft of Rules"
  - 1.2. Ind. Law - Still more on "Approving a proposed constitutional amendment that would put limits on property-tax bills, so it can be put on the ballot for ratification in 2010"
  - 1.3. Ind. Decisions - More on Indiana's Little Hatch Act
  - 1.4. Ind. Decisions - "Jeffersonville annex could go to high court"
- 2. Saturday, November 29, 2008
  - 2.1. Law - "Victory for wine lovers sours as Michigan tries again to ban direct shipping"
  - 2.2. Ind. Courts - "Local judicial posts in question in Obama administration"
- 3. Friday, November 28, 2008
  - 3.1. Environment - "EPA, Interior Dept. Chiefs Will Be Busy Erasing Bush's Mark"
  - 3.2. Environment - "'Clean coal' plant rises amid ill winds"
  - 3.3. Environment - Landowners in the West forming cooperative associations to deal with wind power developers
  - 3.4. Law - "Pro Se Litigants: On the Rise and Mucking Things Up"
- 4. Thursday, November 27, 2008
  - 4.1. Ind. Courts - "Lake County spent bulk of state grant on uncertified interpreters"
- 5. Wednesday, November 26, 2008
  - 5.1. Courts - James Bopp Jr. to represent newly elected Wisconsin Supreme Court Justice
  - 5.2. Ind. Decisions - Court of Appeals issues 5 today (and 25 NFP)
  - 5.3. Ind. Courts - Still more on: God and prayer continue in Indiana headlines
  - 5.4. Courts - RI paper asks high court to make juror questionnaires public
  - 5.5. Ind. Decisions - "Judge gives reprieve to Hoosier Energy"
  - 5.6. Ind. Decisions - "Casino worker loses round: Flea bites suffered while she was dealer"
  - 5.7. Ind. Courts - In Indiana the judiciary is held – publicly and appropriately – to a high standard.
- 6. Tuesday, November 25, 2008
  - 6.1. Ind. Courts - Supreme Court suspends Marion County Superior Court Judge Grant W. Hawkins with pay [Updated]
  - 6.2. Ind. Courts - Court posts video for people considering representing themselves in family law cases
  - 6.3. Ind. Decisions - Tax Court issues one
  - 6.4. Ind. Courts - "IU Center for Urban Policy and the Environment to study court reform"
  - 6.5. Ind. Decisions - Transfer list for week ending Nov. 21, 2008
  - 6.6. Law - Still more on: "Lawyers worry about liability if banks holding client trust accounts fail"
  - 6.7. Ind. Decisions - Court of Appeals issues 5 today (and 9 NFP)
  - 6.8. Ind. Decisions - One Indiana decision today from the 7th Circuit
  - 6.9. Ind. Courts - "Girl sues IHSAA to play baseball"
  - 6.10. Law - "Grinches target Light Up Louisville"
- 7. Monday, November 24, 2008
  - 7.1. Ind. Decisions - Transfer list for week ending Nov. 21, 2008
  - 7.2. Ind. Decisions - COA ruling in "In God We Trust" case changed to "for publication"
  - 7.3. Ind. Law - Still more on: Other mayors' races still at issue?
  - 7.4. Ind. Decisions - Still more on: Terre Haute paper loses \$1.5 million defamation suit
  - 7.5. Ind. Decisions - One today from 7th Circuit
  - 7.6. Ind. Courts - Judge Kirsch honored
  - 7.7. ind. Courts - Court's FY 2009-2011 request to the State Budget Committee
  - 7.8. Ind. Decisions - Upcoming oral arguments this week
- 8. Sunday, November 23, 2008
  - 8.1. Ind. Courts - Yet more on: Robert Cantrell found guilty on all charges
  - 8.2. Ind. Courts - "Retiring Clark County judges were tough but caring"
  - 8.3. Ind. Decisions - Even more on: Another New twist on Terre Haute mayorial race dispute

- 8.4. Legislative Benefits - "Miller to seek lobbying curbs again"
- 8.5. Ind. Gov't. - "Troubled by Toll Road investments"
- 8.6. Ind. Courts - Yet more on: God and prayer continue in Indiana headlines
- 9. Saturday, November 22, 2008
  - 9.1. Ind. Courts - Mishawaka attorney accused of misconduct
  - 9.2. Ind. Courts - "Ceremony marks construction of new federal courthouse"
  - 9.3. Ind. Courts - Still more on recommendation for Marion County Superior Court Judge Grant W. Hawkins removal
  - 9.4. Ind. Decisions - Still more on: Another New twist on Terre Haute mayorial race dispute
  - 9.5. Ind. Courts - More on: Allen County Judge Scheibenberger to be suspended for three days
- 10. Friday, November 21, 2008
  - 10.1. Ind. Courts - More on recommendation for Marion County Superior Court Judge Grant W. Hawkins removal
  - 10.2. Ind. Courts - Supreme Court on improper use of subpoena
  - 10.3. Ind. Courts - Allen County Judge Scheibenberger to be suspended for three days
  - 10.4. Ind. Decisions - 7th Circuit decides one Indiana case
  - 10.5. Ind. Decisions - Court of Appeals issues 0 today (and 2 NFP)
  - 10.6. Ind. Law - "Maybe state is asking too much of license plates "
  - 10.7. Ind. Law - More on: Other mayors' races still at issue?
  - 10.8. Ind. Decisions - More on: Another New twist on Terre Haute mayorial race dispute
  - 10.9. Ind. Courts - Still more on: God and prayer continue in Indiana headlines
  - 10.10. Ind. Gov't. - More on: IU's legal bills for Sampson issues are \$203K so far
- 11. Thursday, November 20, 2008
  - 11.1. Ind. Decisions - Court of Appeals issues 0 today (and 9 NFP)
  - 11.2. Ind. Decisions - Two today from 7th Circuit
  - 11.3. Ind. Law - More on: Recodifications, legislative histories, and tables
  - 11.4. Ind. Decisions - "Loveless' bid to toss prison term denied"
  - 11.5. Ind. Decisions - More on "Third John Doe denied by judge"
  - 11.6. Ind. Courts - More on: God and prayer continue in Indiana headlines
- 12. Wednesday, November 19, 2008
  - 12.1. Ind. Law - Other mayors' races still at issue?
  - 12.2. Ind. Law - "Recordings detail alleged voter fraud in Jeffersonville" mayor's race
  - 12.3. Law - "'You take the house!' 'No, You take the house.' 'I don't want it, you take it.'"
  - 12.4. Ind. Decisions - Court of Appeals issues 1 today (and 9 NFP)
  - 12.5. Ind. Courts - More on: Steuben County Council to cut supplemental salaries from judicial positions
  - 12.6. Ind. Decisions - 7th Circuit issues one today, re Indiana employment at will
  - 12.7. Ind. Decisions - Ind. Decisions - Even more on: Court of Appeals nullifies 2007 mayoral election
  - 12.8. Ind. Courts - God and prayer continue in Indiana headlines
  - 12.9. Ind. Courts - "Case of the mysterious parking placard solved"
- 13. Tuesday, November 18, 2008
  - 13.1. Ind. Decisions - Another New twist on Terre Haute mayorial race dispute
  - 13.2. Law - More on "Workers' Religious Freedom vs. Patients' Rights"
  - 13.3. Court - How many of us learned the word "Romanette" last week alongside CJ Roberts? [Updated]
  - 13.4. Ind. Decisions - Court of Appeals issues 1 today (and 4 NFP)
  - 13.5. Law - "Administration Moves to Protect Key Appointees: Political Positions Shifted To Career Civil Service Jobs"
  - 13.6. Ind. Decisions - New twist on Terre Haute mayorial race dispute
  - 13.7. Ind. Decisions - More on "Court upholds "God" license plate judgment"
  - 13.8. Ind. Courts - Another story on 'Salacious' affidavit results in jail time for client Hinds, attorney Denney"
  - 13.9. Ind. Gov't. - "Laura Bush will speak at Lincoln birthplace today"
  - 13.10. Law - "Caught in the legal recession? - ABA Journal Survey"
- 14. Monday, November 17, 2008

- 14.1. Ind. Courts - Court seeks a Business Continuity Planner and a Court Archives Specialist
- 14.2. Ind. Decisions - "Court upholds "God" license plate judgment" [Updated]
- 14.3. Ind. Decisions - Court of Appeals issues 1 today (and 9 NFP); including "In God We Trust" plates challenge
- 14.4. Ind. Decisions - Transfer list for week ending Nov. 14, 2008
- 14.5. Ind. Law - "It's the law" today examines Indiana Dunes National Lakeshore and Indiana Dunes State Park rules
- 14.6. Ind. Decisions - Upcoming oral arguments this week
- 15. Sunday, November 16, 2008
  - 15.1. Ind. Law - ISP to ticket golf carts driven on city streets of Madison
  - 15.2. Ind. Law - "Surveyors seek to re-establish Mich.-Ind. border"
  - 15.3. Ind. Law - "Gun ruling unlikely to affect cases in Indiana"
  - 15.4. Ind. Law - "Gary cops waging court fight over residency"
  - 15.5. Environment - More on - "President of Wabash Environmental Technologies charged with environmental crimes"
  - 15.6. Ind. Decisions - "Judge tells city of New Albany: Pay the lawyers"
- 16. Saturday, November 15, 2008
  - 16.1. Ind. Courts - Steuben County Council to cut supplemental salaries from judicial positions
  - 16.2. Courts - Kentucky Jury weighs case of Amish men [Updated]
  - 16.3. Courts - More on "McDonald's sanctioned in strip-search case"
  - 16.4. Ind. Courts - "Judge rules she will stick with hospital zoning suit"
  - 16.5. Ind. Decisions - Still more on: Court of Appeals nullifies 2007 mayoral election
  - 16.6. Law - More on "Kentucky Tests State's Reach Against Online Gambling"
  - 16.7. Ind. Courts - Jurists honor Judge Jonathan J. Robertson II
- 17. Friday, November 14, 2008
  - 17.1. Courts - More on "U.S. Supreme Court Is Asked to Fix Troubled West Virginia Justice System" [Updated]
  - 17.2. Law - Cloak of executive powers may follow Bush out of office
  - 17.3. Ind. Courts - "Officer Tasered by Noblesville court suspect"
  - 17.4. Law - Hoosier native named as Biden's top aid
  - 17.5. Ind. Decisions - Appeals court reduces ex-stripper's prison sentence
  - 17.6. Environment - "U.S. undercuts clean-air rule"
  - 17.7. Ind. Decisions - Court of Appeals issues 4 today (and 19 NFP) [Corrected]
  - 17.8. Ind. Law - Still more on "ACORN followed law on suspect voter registrations"
  - 17.9. Ind. Decisions - More on: Court of Appeals nullifies 2007 mayoral election
  - 17.10. Law - More on "Democrats Eye Bush Midnight Regulations"
- 18. Thursday, November 13, 2008
  - 18.1. Ind. Decisions - Two today from Supreme Court
  - 18.2. Ind. Decisions - Court of Appeals issues 3 today (and 12 NFP)
  - 18.3. Ind. Decisions - 7th Circuit issues debt collection opinion
  - 18.4. Ind. Decisions - Court of Appeals nullifies 2007 mayoral election
  - 18.5. Ind. Courts - Even more on "'Salacious' affidavit results in jail time for client Hinds, attorney Denney"
  - 18.6. Ind. Decisions - More on "Court voids pair's rights as parents of boy, 9"
  - 18.7. Ind. Courts - Still more on "'Salacious' affidavit results in jail time for client Hinds, attorney Denney"
  - 18.8. Ind. Decisions - "Molesting plea can't be altered"
  - 18.9. Ind. Courts - "Judge tells prosecutor to repay \$18,000"
- 19. Wednesday, November 12, 2008
  - 19.1. Ind. Courts - "Longtime Marion Co. judge Deiter dies" [Updated]
  - 19.2. Environment - IDNR deputy director told Shelby County officials that he also had some "fence mending" to do with officials with IDEM
  - 19.3. Ind. Decisions - Court of Appeals issues 0 today (and 5 NFP)
  - 19.4. Ind. Decisions - Supreme Court issues two today
  - 19.5. Ind. Courts - Approximately 72% of the voters statewide asked that the three

- justices be returned to the bench
- 19.6. Courts - U.S. Supreme Court Denies Secret Litigation Challenge
- 20. Tuesday, November 11, 2008
  - 20.1. Law - "Fed Defies Transparency Aim in Refusal to Disclose" [Updated twice]
  - 20.2. Courts - Speculation over the Supreme Court may be premature
  - 20.3. Ind. Law - More on "Approving a proposed constitutional amendment that would put limits on property-tax bills, so it can be put on the ballot for ratification in 2010"
  - 20.4. Law - "Democrats Eye Bush Midnight Regulations"
  - 20.5. Ind. Courts - More on "Park ban on sex offenders challenged: Man can't watch son play baseball"
  - 20.6. Ind. Courts - Legislative panel advises against electing judges
- 21. Monday, November 10, 2008
  - 21.1. Courts - Still more on: Confrontation clause case re admissibility of crime lab report
  - 21.2. Courts - "Supreme Court Posts Video in Victim Impact Case"
  - 21.3. Courts - More on: Confrontation clause case re admissibility of crime lab report
  - 21.4. Ind. Decisions - Court of Appeals issues 0 today (and 1 NFP)
  - 21.5. Ind. Decisions - 7th Circuit ruling interprets Rule 25(a) of the Federal Rules of Civil Procedure
  - 21.6. Ind. Decisions - Transfer list for week ending Nov. 7, 2008
  - 21.7. Law - "Obama Lawyers Ready Their Plan for DOJ"
  - 21.8. Ind. Decisions - Upcoming oral arguments this week
- 22. Sunday, November 09, 2008
  - 22.1. Courts - Confrontation clause case re admissibility of crime lab reports
  - 22.2. Ind. Law - "Approving a proposed constitutional amendment that would put limits on property-tax bills, so it can be put on the ballot for ratification in 2010"
  - 22.3. Law - "Foreclosures Pick Pockets of Homeowners Associations"
  - 22.4. Courts - "Citing Workload, Public Lawyers Reject New Cases"
  - 22.5. Courts - "The Career of Linda Greenhouse: A Dialogue"
- 23. Saturday, November 08, 2008
  - 23.1. Courts - Judge Diane Wood on C-SPAN tonight
  - 23.2. Ind. Gov't. - Lake County Officials may borrow up to \$2M to settle lawsuit
  - 23.3. Environment - "Rules for big livestock farms"
  - 23.4. Ind. Courts - More on "'Salacious' affidavit results in jail time for client Hinds, attorney Denney"
  - 23.5. Courts - Still more on "Kentucky Prosecutor says plea deal punishes philanthropist Robert Clarkson in DUI case"
  - 23.6. Ind. Courts - More on: Panel recommends Marion County Superior Court Judge Grant W. Hawkins removal
- 24. Friday, November 07, 2008
  - 24.1. Ind. Courts - More on: Frustration with the Appellate Clerk's Office Operations
  - 24.2. Ind. Decisions - Court grants three transfers this week
  - 24.3. Ind. Law - Non-code "Legislative changes affect several county term times"
  - 24.4. Law - "Push to Expand Voter Rolls and Early Balloting in U.S. " [Updated]
  - 24.5. Ind. Decisions - Court of Appeals issues 1 today (and 7 NFP)
  - 24.6. Ind. Decisions - 7th Circuit rules on Illinois "Choose Life" License Plate Issue
  - 24.7. Ind. Courts - Panel recommends Marion County Superior Court Judge Grant W. Hawkins removal
  - 24.8. Ind. Courts - "Speculation on U.S. attorney pick swirls"
  - 24.9. Ind. Law - "Voter ID law confusion persists"
  - 24.10. Courts - "Judicial Races: Lots of Cash, Lots of Negativity, Lots of Change"
  - 24.11. Law - Still more on "Neb. Officials: Parents Misusing Infant Drop-Off Law"
  - 24.12. Courts - "New Jersey Judge Faces Ethics Charges for DWI Antics With Chapstick and Penny"
  - 24.13. Ind. Courts - "'Salacious' affidavit results in jail time for client Hinds, attorney Denney"
  - 24.14. Ind. Courts - Paul Buchanan Jr. dies at 90 [Updated]
  - 24.15. Ind. Decisions - "Court voids pair's rights as parents of boy, 9"

- 25. Thursday, November 06, 2008
  - 25.1. Ind. Courts - 2007-2008 Annual Report of the Indiana Supreme Court
  - 25.2. Ind. Courts - An Order today in a Vanderburgh County case
  - 25.3. Ind. Courts - Making sense of court fees
  - 25.4. Ind. Courts - Supreme Court receives international award for information systems
  - 25.5. Ind. Decisions - Court of Appeals issues 2 today (and 3 NFP)
  - 25.6. Law - "An Early Line on Legal Slots in Obama Administration "
  - 25.7. Ind. Courts - Frustration with the Appellate Clerk's Office Operations
  - 25.8. Environment - Pollution Dilution; New EPA CAFO Rules; Other EPA Action
- 26. Wednesday, November 05, 2008
  - 26.1. Law - SEC's Division of Enforcement issues a 122-page Enforcement Manual
  - 26.2. Ind. Gov't. - AG issues official opinion on public bidding of school roof repair work
  - 26.3. Courts - "Miss. Voters Unseat Three High Court Justices"; Alabama race
  - 26.4. Courts - More on: "An 'Orgy of Negativity' in Michigan Judicial Race"
  - 26.5. Ind. Decisions - Court of Appeals issues 5 today (and 9 NFP)
  - 26.6. Ind. Courts - Voters Retain All Indiana Supreme Court, Court of Appeals, and Tax Court Judges on the November Ballot
  - 26.7. Ind. Law - "Lake County sees climb in provisional ballots Tuesday" [Updated]
  - 26.8. Law - Social issues on the ballot
  - 26.9. Ind. Courts - Reports on some local court races
  - 26.10. Ind. Gov't. - "Zoeller wins state's attorney general post"
  - 26.11. Ind. Courts - "Indiana high court retained by voters"
- 27. Tuesday, November 04, 2008
  - 27.1. Courts - "An 'Orgy of Negativity' in Michigan Judicial Race"
  - 27.2. About this Blog - Notable items concerning the ILB
  - 27.3. Ind. Gov't. - 5-year Mitchell City Council member may never have lived in the city
  - 27.4. Ind. Law - "Impact of Photo Identification at the Polls Through an Examination of Provisional Ballots"
  - 27.5. Law - "As Building Projects Collapse, Suits Pile Up"
  - 27.6. Law - "Online Law Grads: Older, No Slackers"
  - 27.7. Courts - "Justices Agree to Consider DNA Case"
  - 27.8. Ind. Courts - "Challenged absentee ballots should be set aside for later review, high court finds"
- 28. Monday, November 03, 2008
  - 28.1. Ind. Courts - No last word yet in Marion County early voting case?
  - 28.2. Ind. Courts - Yet more on Marion County early voting case
  - 28.3. Courts - "Juror in Stevens Case: My Father is not Dead"
  - 28.4. Ind. Courts - Still more on Marion County early voting case
  - 28.5. Courts - "Supreme Court Hears Case Involving Drug Labels" [Updated]
  - 28.6. Ind. Courts - More on Marion County early voting case [Updated]
  - 28.7. Ind. Law - "It's the law" today examines election laws
  - 28.8. Ind. Decisions - Transfer list for week ending Oct. 31, 2008
  - 28.9. Ind. Decisions - Upcoming oral arguments this week
- 29. Sunday, November 02, 2008
  - 29.1. Law - "Was There a Loan It Didn't Like?"
  - 29.2. Ind. Courts - "LaGrange farm sued over heifers: Manager says Ohio company knew cows it bought were sterile"
  - 29.3. Ind. Courts - "Judgment call: 3 justices are on the ballot"
  - 29.4. Not law but - "JG editorial staff 'best in show'"
- 30. Saturday, November 01, 2008
  - 30.1. Ind. Courts - Documents in: "Marion Co. GOP seeks ballot scrutiny" [Corrected]
  - 30.2. Ind. Courts - Answers to questions on the JTAC case management system
  - 30.3. Law - More on: Judge orders Michigan to Allow Wine Shipping by Out-of-State Retailers
  - 30.4. Ind. Courts - Still more on: "Marion Co. GOP seeks ballot scrutiny"

# The Indiana Law Blog

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## 1. [Sunday, November 30, 2008](#)

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### 1.1. [ENVIRONMENT - "AT THE LAST MINUTE, A RAFT OF RULES"](#)

[This lengthy story today](#) in the **Washington Post**, reported by R. Jeffrey Smith and Juliet Eilperin, gives good background on the procedural issues relating to pushing federal rules through at the end of a term. Here is how it begins:

In a burst of activity meant to leave a lasting stamp on the federal government, the Bush White House in the past month has approved 61 new regulations on environmental, security, social and commercial matters that by its own estimate will have an economic impact exceeding \$1.9 billion annually.

Some of the rules benefit key industries that have long had the administration's ear, such as oil and gas companies, banks and farms. Others impose counterterrorism security requirements on importers and private aircraft owners.

The rules cover obscure as well as high-profile social and economic issues: spelling out what kinds of records must be kept by sexually explicit performers and publications, exempting hobbyists' rocket motors from federal explosives controls, expanding the collection of DNA samples from federal prisoners.

In most cases, the new regulations are meant to spell out precisely how federal employees and private citizens must comply with laws passed by Congress. But the language in those laws often had ambiguities -- reflecting lawmakers' uncertainties or disagreements -- that gave Bush's appointees broad discretion to follow their policy preferences. Similar "midnight regulations" were approved by previous presidents.

In the environmental area, the latest rules indicate that the Bush administration wants to lend a final assist to industries that feel burdened by looming pollution controls or wilderness-protection laws. A rule approved by the White House three days after the presidential election, for example, would ease constraints on environmentally damaging oil shale development throughout the West, despite objections from Colorado Gov. Bill Ritter (D) and a majority of the state's congressional delegation.

On Nov. 17, Ritter called the decision "not just premature, it's hasty and I would even argue reckless." The Interior Department published it in the Federal Register Nov. 21, and it will take legal effect in 60 days from that date, or shortly after Congress reconvenes with a larger Democratic majority.

Top officials are still finishing work on other industry-friendly measures, including a regulation inhibiting the ability of Congress to halt logging, mining, and oil and gas extraction on public lands. Another rule would allow federal agencies to proceed with development projects without undergoing independent scientific review under the Endangered Species Act.

The Bush administration's impetus for hurrying to approve and publish so many of these regulations in the Federal Register is that those deemed to have a major economic impact -- defined by the Office of Management and Budget (OMB) as more than \$100 million a year -- take legal effect after 60 days.

That means Nov. 21 was an important political deadline to ensure they become effective before President-elect Barack Obama's Jan. 20 inauguration. Less significant regulations, including many still in final stages of preparation, can take effect in 30 days or less.

Once the new rules take the form of law, Democrats can undo them only by three complicated means: through a new regulatory rulemaking that would probably take years; through congressional amendments to underlying laws; or through special, fast-track resolutions of disapproval approved by the House and

Senate within a few months after the start of the new congressional session on Jan. 6.

Such a quick congressional rebuke has occurred only once before, in 2001, when a Republican-controlled Congress with President Bush's backing blocked a workplace safety regulation completed in the Clinton administration's final months. But recently, spokesmen for Senate Majority Leader Harry M. Reid (Nev.) and House Speaker Nancy Pelosi (Calif.) said Democrats were prepared to use that regulatory reversal power in consultation with Obama.

Posted by Marcia Oddi on [Sunday, November 30, 2008](#)

Posted to [Environment](#)

## [1.2. IND. LAW - STILL MORE ON "APPROVING A PROPOSED CONSTITUTIONAL AMENDMENT THAT WOULD PUT LIMITS ON PROPERTY-TAX BILLS, SO IT CAN BE PUT ON THE BALLOT FOR RATIFICATION IN 2010"](#)

Updating [this Nov. 9th entry](#) quoting a story by Lesley Stedman Weidenbener of the **Louisville Courier Journal**, and an entry from [Nov. 11th](#) quoting an editorial from the **Fort Wayne Journal Gazette**, today we have another Weidenbener article, plus an editorial from the **Indianapolis Star**.

*"Property tax battle turns to timing of vote: Some want to wait to see effects"* is the heading of [today's LCJ story](#), that begins:

When it comes to timing, it doesn't matter whether the Indiana General Assembly approves a proposed constitutional amendment limiting property tax bills in 2009 or 2010.

Either way, the question would appear on the ballot for voter ratification in 2010.

Yet whether lawmakers should tackle the amendment next year could prove one of the most contentious debates of the upcoming session.

Republican leaders say the vote should take place in 2009 because it's a continuation of a larger property tax package passed this year, a sort of promise they feel they made to voters and one that they're not willing to ignore.

"I'm not convinced -- when I think about how upset people were with their property tax bills before we did this reform and the level of concern and outright suspicion that these were only going to be temporary fixes -- that we can afford to backslide on the issue," said Senate Appropriations Chairman Luke Kenley, R-Noblesville.

But local officials and Democratic lawmakers favor waiting until 2010 so they can better gauge how the limits will reduce revenue for many local governments and schools. They'll get their first glimpse of that impact next year, as the limits -- which have already been written into state law -- are phased in.

"We're going to have an experimentation with property tax caps," House Speaker Pat Bauer, D-South Bend, said about the phase-in.

"We'll see what happens," he said. "Experience is a great teacher."

Starting next year, homeowners' bills can be no more than 1.5 percent of assessed values -- unless local voters have agreed to spend more through a referendum. That means the annual tax bill for a \$100,000 house could be no higher than \$1,500.

For the owners of rental and agricultural property, the limit will be 2.5 percent of assessed value. For businesses, it will be 3.5 percent.

In 2010, the law requires that the limits be lowered to 1 percent for homeowners, 2 percent for landlords and farmers, and 3 percent for businesses. For a \$100,000 house, the bill could then be no higher than \$1,000.

Gov. Mitch Daniels and some lawmakers are concerned that future legislatures might eliminate or adjust the limits if they exist only in state law. So as part of the larger tax package, the General Assembly earlier this year took the first step to put the limits in the Indiana Constitution.

But in Indiana, amendments must be passed by two, consecutively elected legislatures before they can be placed on the ballot for ratification. That means lawmakers must approve the same amendment in either 2009 or 2010 to make it eligible for voter consideration in the next general election. There is no 2009 general election.

Daniels -- who pushed for the tax caps -- plans to ask lawmakers to approve the amendment next year rather than wait another year.

"The public wants it. The public wants a chance to vote," Daniels said. "It's really a matter of trusting the people."

But Bauer seems just as vehement that lawmakers wait. He wants to see how the caps affect communities because when property owners hit their limits, local governments and schools collect less money.

*"Wait for shake-out before setting tax caps in stone"* is the headline to [today's Indy Star editorial](#):

Gov. Mitch Daniels is right when he argues that Hoosiers need a permanent fix in the state's approach to property taxes, a system that has frustrated homeowners and their elected leaders for decades.

But amending the state constitution should be done carefully and slowly to ensure that proposed changes don't give rise to unintended consequences that would be difficult to repair.

It's partly for that reason that the authors of the constitution set up a multiyear process that requires two separately elected legislatures to approve a proposed amendment before the state's voters are given a chance to voice their assent.

The proposed property tax amendment, which would make permanent a three-tiered system of caps, cleared the first stage this year, winning the General Assembly's initial approval. The measure will return for a second vote in the Statehouse in the weeks ahead and could go before voters in 2010.

Yet, the newly enacted caps are still being rolled out, with the top rate on homeowners fixed at 1.5 percent next year and set to drop to 1 percent in 2010. Eventually, the cap will rest at 2 percent for rental properties and at 3 percent for businesses.

The phase-in means that the potential consequences of the caps won't be felt fully until after the current timetable for the amendment plays out.

The fast-track scenario worries local government and business organizations, including the state Chamber of Commerce.

"Of course there's a sense of urgency from homeowners and businesses to put the caps into the constitution. Who wouldn't want to have that kind of cost savings?" Matt Greller, executive director of the Indiana Association of Cities and Towns, told The Star's Bill Ruthhart. "But I think it's urgency without knowing the full picture."

Which is precisely why lawmakers should be cautious about pushing the amendment onto a statewide ballot before all of the consequences are known.

Daniels acknowledges that critics have a point about waiting to gather more information, but he argues that voters should be trusted to make a sound decision about the amendment's fate.

That sounds noble. The problem, however, is that because of the phase-in voters in 2010 likely would not know the full consequences of the caps before casting their ballots.

Daniels and other supporters of the amendment are certainly correct when they point to a long history of supposed property tax solutions that were wrecked by subsequent decisions made by the General Assembly and local governments. An amendment likely will be needed at some point to secure the permanency that the governor and others want.

For now, however, it's better to wait for all the consequences of the caps to play out. Adjustments may be needed, without having to endure the prolonged process of fixing an amendment once it's grafted into the constitution.

Hoosiers are understandably fed up with high property taxes. They demanded -- and the governor and the General Assembly delivered -- a solution, one that appears fair, despite the concerns of certain business interests.

But appearances can be misleading and consequences often emerge over time.

Prudence is in order any time a change in the constitution is considered. That's especially true when addressing an issue as complex and far-reaching as property taxes.

Posted by Marcia Oddi on [Sunday, November 30, 2008](#)

Posted to [Indiana Law](#)

### 1.3. [IND. DECISIONS - MORE ON INDIANA'S LITTLE HATCH ACT](#)

Updating what is now [a very long list of ILB entries](#) quoting stories relating to the Little Hatch Act and the Court of Appeals [decision Nov. 13th](#) in the case of *Kevin D. Burke v. Duke Bennett*, Thomas B. Langhorne of the **Evansville Courier and Press** has two stories today on the topic.

[The first](#), headed "*Little Hatch Act losing focus*," begins:

Applying the Little Hatch Act to employees of nonprofit agencies means perspective has been lost, says a national consultant who blogged about the Vanderburgh County case. [*ILB - see note at end of this entry*]

Mike Burns, a partner in the nonprofit management and governance consulting firm of Brody Weiser Burns, said he felt compelled to speak out after reading about Republican lawsuits challenging the eligibility to seek office of Democratic Commissioner-elect Steve Melcher. Brody Weiser Burns has offices in New Haven, Conn., and just outside Washington, D.C.

"There's a huge difference between a federal employee who's not supposed to be engaged in partisan political activity and someone who works for a nonprofit, even if that nonprofit is doing work for the federal government," Burns said.

County Commissioners President Jeff Korb dropped his lawsuit days after filing it. As Korb had, the GOP contends the Little Hatch Act made Melcher ineligible to challenge Korb because Melcher is facilities manager for the Community Action Program of Evansville, a not-for-profit agency that runs a federally funded Head Start program.

The cases were filed after the Indiana Court of Appeals' finding that Terre Haute Mayor Duke Bennett, a Republican, was ineligible to run for that office in 2007. Bennett was director of operations from 2005 until 2007 at the Hamilton Center, a not-for-profit community behavioral health services center that operates a federally funded Head Start program.

That case, which is expected to be appealed to the Indiana Supreme Court, inspired the suits challenging Melcher's eligibility to run.

In his "Nonprofit Board Crisis" blog, which examines relationships between government and nonprofit agencies, Burns blasted the appeals court for its ruling in the Bennett case.

"Private nonprofit organizations are just that: private," Burns wrote. "Yes, they may be doing work for the U.S. government and therefore their employees are doing such work, but that does not make them employees of the government."

But the Office of Special Counsel, the federal agency charged with investigating and prosecuting Hatch Act and Little Hatch Act cases, says it uses its power judiciously and recognizes that not all employees of nonprofit agencies that receive federal funds are violating the law.

"We look at the individual employee's job duties and what his responsibilities are, and we look at the Head Start funding, what programs it's funding and how the money is being used, if the employee has duties in connection with Head Start," said Erica Hamrick, deputy chief of the OSC's Hatch Act unit.

In Bennett's case, the Office of Special Counsel issued an advisory opinion after his election that the law prohibited

[The second](#), headed "*Rule treads muddy waters*," begins"

Don Schneider still isn't sure exactly what he was supposed to have done that was against the law.

Schneider, an employee of the Charlevoix County (Mich.) Sheriff's Department, was elected sheriff without opposition on Nov. 4. But Schneider, a Republican, says he got all the opposition he could ever want from Hatch Act enforcers.

Among its other restrictions, the 70-year-old federal law forbids employees of the federal government's executive branch from running in partisan elections. The Little Hatch Act covers employees of state and local government and other agencies who work with federal funds or programs fully or partially financed by them. Full-time incumbent officeholders are exempt from the candidacy prohibition.

Like pending cases in Vanderburgh County and Terre Haute, Ind., Schneider suspects his case was called to the Office of Special Counsel's attention by a political opponent.

In the Vanderburgh County case, the local GOP and Republican County Commissioner Jeff Korb seek to reverse the election of Democrat Steve Melcher. And the Terre Haute case centers on the Indiana Court of Appeals' Nov. 13 finding that Mayor Duke Bennett was ineligible to run for that office in 2007.

"There are people who are using the Hatch Act against their opponents," Schneider said. "It's being abused."

In a case that was publicized widely in northern Michigan, Schneider told the Courier & Press he had to go through an arduous, monthslong negotiation with the U.S. Office of Special Counsel just to be cleared to run. The Washington, D.C.-based federal agency is charged with investigating and prosecuting Hatch Act and Little Hatch Act cases.

**Note:** The ILB has located [the blog of Mike Burns](#), mentioned above. But I could not immediately locate any entries about the Hatch Act or the Vanderburgh County case.

Posted by Marcia Oddi on [Sunday, November 30, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

#### 1.4. [IND. DECISIONS - "JEFFERSONVILLE ANNEX COULD GO TO HIGH COURT"](#)

The Court of Appeals decision August 15th in the case of *Bruce Herdt, Louis Evans and Charlie Milburn v. City of Jeffersonville, Indiana and Common Council for Jeffersonville, Indiana* (see [ILB summary here](#), 6th case; see [list of entries here](#)), is the subject of [a story today](#) in the **Jeffersonville / New Albany News & Tribune**. David A. Mann reports in a long story that begins:

Plaintiffs in remonstrance of last year's annexation of the Oak Park Conservancy District have asked the Indiana Supreme Court to hear their case.

That's after the Clark County Circuit Court and the Indiana Court of Appeals dismissed the case earlier this year.

According to Bruce Herdt, lead plaintiff in the remonstrance, the petition to the Indiana Supreme Court was made Nov. 21. There is no deadline by which the court has to decide to hear the case or not.

The protest relates to a 2007 annexation by the Jeffersonville City Council, which — according to the fiscal plan that passed with it — took in 7,806 acres of land and an estimated 3,360 households north and east of the old city limits. Herdt and others dispute the number of households.

The annexation was done in six tracts, four of which were made final earlier this year. Two areas — known legally as area B and area E — were protested. The case on which the courts have been deciding isn't on the annexation itself, but on the legal procedure of the protest.

Under state law, a remonstrance to an annexation has to be filed within 90 days and signatures of 65 percent of those affected by the annexation have to be included with the legal complaint.

Derrick Wilson, the attorney representing those remonstrating, filed paperwork on the 90th day of the period without the signatures. They were filed as an amendment to the original complaint a few days later.

Earlier this year, former Clark Circuit Judge Daniel F. Donahue granted a motion to dismiss from the city, which argued that the needed materials weren't filed on time.

Wilson argued that the amendment containing the signatures related back to the original filing.

Both the trial court and the appeals court sided with the city.

Posted by Marcia Oddi on [Sunday, November 30, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

## [2. Saturday, November 29, 2008](#)

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### [2.1. LAW - "VICTORY FOR WINE LOVERS SOURS AS MICHIGAN TRIES AGAIN TO BAN DIRECT SHIPPING"](#)

Updating [this long list of ILB entries](#) on wine shipping, including this most recent [entry from Nov. 1st](#) headed "*Judge orders Michigan to Allow Wine Shipping by Out-of-State Retailers*," Dawson Bell [reports today](#) for the **Detroit Free Press**:

LANSING -- Joe Chess, an orthopedic surgeon from Kalamazoo, said his passion for fine wine is deep.

Deep enough that he regularly seeks hard-to-find varieties in remote places, and deep enough to get him into a lawsuit fighting Michigan regulations stopping him from buying wine from out-of-state retailers. Two months ago, Chess won the suit when a federal judge in Detroit ruled that the state couldn't ban out-of-state retailers from shipping wine directly to customers while allowing Michigan firms to do it.

So why doesn't Chess feel like a winner?

On Nov. 11, Lansing lawmakers introduced a bill to solve the problem by banning all direct wine shipments by retailers, whether they're Michigan merchants or those in another state. The bill was approved in committee the next day and could sail through the Legislature in the lame-duck session beginning Tuesday and be on the governor's desk before Christmas.

"That's crazy," Chess said last week. "The state loses a lawsuit, and they respond by punishing consumers and retailers. It seems to me Michigan can ill afford to be hurting businesses right now."

State regulators, some legislators and the Michigan Beer and Wine Wholesalers Association, the powerful lobby for beer and wine distributors, said it's not crazy at all. All they're trying to do, they said, is preserve an orderly system that dates pretty much from the repeal of prohibition. The system was designed to keep

tight control over who gets to buy and sell alcoholic beverages. Michigan Liquor Control Commission spokesman Ken Wozniak said the system actually helps some in-state business by protecting them from competition.

Opening up Michigan's consumer market to outsiders would "turn it upside-down ... wide open," Wozniak said.

Money also is a factor. The LCC is the nominal distributor of liquor in Michigan and reaps more than \$200 million a year in revenue. Wozniak said the state wants to limit shipments from out of state out of "self-interest."

Attorneys for Chess dispute the notion that the government would collect less in fees and taxes by opening up the market. Michigan could impose the same rules on outsiders that are imposed on Michigan retailers, said Alex Tanford, an Indiana University law professor engaged in an effort to open up the market for alcoholic beverages around the country.

"They can pretty much engage in any regulation they want," Tanford said. "They just can't impose different regulations on out-of-staters."

The Legislature authorized shipments by in- and out-of-state wineries three years ago after losing another court case. How much traffic would be generated in an open market for direct shipment is unclear.

Chess said he believes it is relatively small, mostly confined to people like him who are interested in buying hard-to-find, high-end wine. But the attitude of the beer and wine wholesalers group suggests its members are concerned about serious erosion of market share. The group intervened in the lawsuit to defend the so-called three-tier system, which gives its members monopoly distribution rights within specific territories.

Posted by Marcia Oddi on [Saturday, November 29, 2008](#)

Posted to [General Law Related](#)

## 2.2. [IND. COURTS - "LOCAL JUDICIAL POSTS IN QUESTION IN OBAMA ADMINISTRATION"](#)

Dan Hinkel [reports today](#) in the **NWI Times**:

A presidential nomination of a Hammond-based judge to a federal appeals court has died in Congress.

That nomination's resurrection or burial could serve as an early test of President-elect Barack Obama's approach to shaping the judiciary.

Hammond-based U.S. District Court Judge Philip Simon was nominated by President George W. Bush in September to an open seat on the 7th Circuit Court of Appeals in Chicago. That nomination will expire without a hearing, said Andy Fisher, a spokesman for Indiana Sen. Dick Lugar.

Meanwhile, Senate Democrats are preparing for their chance to influence judicial nominations. By custom, the president considers the recommendations of his party's senators when nominating judges. That should mean increased influence for Democratic Sens. Evan Bayh, of Indiana, and Dick Durbin, of Illinois.

"We expect President-elect Obama to continue this practice," said Eric Kleiman, Bayh's spokesman.

A staff member for Judge Simon -- a two-time Bush nominee for the federal bench -- said White House officials have asked Simon not to talk about the nomination.

Would Obama renominate a judge twice nominated by Bush? Curt Levey, executive director of the Committee for Justice, a Washington, D.C.-based conservative advocacy group, noted that bipartisan cooperation on federal judges is not unprecedented.

"I'd point out that Bush, very early in his first term, appointed two Clinton nominees," Levey said.

Levey also said, however, that partisan nomination blocking reached a "very high level" under Bush. Recent news reports have indicated Republicans might be preparing to block Obama's judicial nominations.

Speculation abounds on who might replace Simon if he is renominated and confirmed. Also in question is the future of acting U.S. Attorney David Capp, a Democrat who has served under Republicans in the Hammond branch of the federal office. U.S. attorneys frequently are tapped for federal judgeships. Obama also will get to fill an opening in South Bend-based district court.

Posted by Marcia Oddi on [Saturday, November 29, 2008](#)

Posted to [Indiana Courts](#)

### [3. Friday, November 28, 2008](#)

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#### [3.1. ENVIRONMENT - "EPA, INTERIOR DEPT. CHIEFS WILL BE BUSY ERASING BUSH'S MARK"](#)

The **Washington Post** today has two stories on prospects for heads of EPA and Interior. See them [here](#) and [here](#).

Posted by Marcia Oddi on [Friday, November 28, 2008](#)

Posted to [Environment](#)

#### [3.2. ENVIRONMENT - "CLEAN COAL' PLANT RISES AMID ILL WINDS"](#)

Updating [a long list of earlier ILB entries](#) on the Edwardsport plant, Rick Callahan of the [AP has this lengthy report today](#), subheaded "*Indiana site faces rising costs, future greenhouse curbs,*" that begins:

In the heart of southwestern Indiana's coal country, Duke Energy Corp. crews are building what the company's chief executive calls the power plant of the future -- a \$2.35 billion complex where coal will be turned into a gas, stripped of pollutants, then burned to generate electricity.

The project, one of the "clean coal" technologies supported by President-elect Barack Obama, will become by far the nation's largest coal-gasification plant when it goes online in 2012, generating enough power to light more than 200,000 homes.

But opponents suing to halt the 630-megawatt plant near Edwardsport call it a colossal waste of money that will saddle the utility's Indiana customers with years of rate increases and release tremendous amounts of carbon dioxide, a greenhouse gas tied to global warming.

"Once you do all the cost assessments, the fact is this is going to gouge ratepayers. The cost of this just continues to skyrocket," said Bruce Nilles, a Madison, Wis.-based attorney for the Sierra Club, which is suing to stop the plant.

Indiana regulators approved the project a year ago, even though utilities nationwide have pulled the plug on 65 coal power plants since early 2007 amid rising construction costs and expectations that Congress will limit greenhouse gas emissions.

Just this week, Indiana Gasification withdrew its application with the Indiana Utility Regulatory Commission for permission to build a coal gasification plant near Rockport, about 25 miles east of Evansville.

The U.S. Department of Energy in January yanked funding for the FutureGen coal plant in Mattoon, Ill., after its price ballooned to \$1.8 billion, nearly double the original cost. And in July, NRG Energy's CEO canceled a coal-gasification plant in New York, declaring it had become too costly and was "ahead of its time."

Posted by Marcia Oddi on [Friday, November 28, 2008](#)

Posted to [Environment](#)

### [3.3. ENVIRONMENT - LANDOWNERS IN THE WEST FORMING COOPERATIVE ASSOCIATIONS TO DEAL WITH WIND POWER DEVELOPERS](#)

Following on [a list of earlier ILB entries](#) on the development of wind power, the **NY Times** has [a long story today](#) by Felecity Barringer titled "*A Land Rush in Wyoming Spurred by Wind Power.*" Some quotes:

WHEATLAND, Wyo. — The man who came to Elsie Bacon's ranch house door in July asked the 71-year-old widow to grant access to a right of way across the dry hills and short grasses of her land here. Ms. Bacon remembered his insistence on a quick, secret deal.

The man, a representative of the Little Rose Wind Farm of Boulder, Colo., sought an easement for a transmission line to carry his company's wind-generated electricity to market. His offer: a fraction of the value of similar deals in the area. As Ms. Bacon, 71, recalled it: "He said, 'You sure I can't write you out a check?' He was really pushy."

A quiet land rush is under way among the buttes of southeastern Wyoming, and it is changing the local rancher culture. The whipping winds cursed by descendants of the original homesteaders now have real value for out-of-state developers who dream of wind farms or of selling the rights to bigger companies.

The next line is my favorite part:

But as developers descend upon the area, drawing comparisons to the oil patch "land men" in the movie "There Will Be Blood," the ranchers of Albany, Converse and Platte Counties are rewriting the old script.

Ms. Bacon did not agree to the deal from the Little Rose representative, Ed Ahlstrand Jr. Instead, she joined her neighbors in forming the Bordeaux Wind Energy Association — among the new cooperative associations whose members, in a departure from the local culture of privacy and self-reliance, are pooling their wind-rich land.

This allows them to bargain collectively for a better price and ensures that as few as possible succumb to high-pressure tactics or accept low offers. Ranchers share information about the potential value of their wind.

Posted by Marcia Oddi on [Friday, November 28, 2008](#)

Posted to [Environment](#)

### [3.4. LAW - "PRO SE LITIGANTS: ON THE RISE AND MUCKING THINGS UP"](#)

That is the heading to this **WSJ Law Blog** [entry today](#), written by Jennifer Forsyth. She references [this AP story](#) by Margery A. Gibbs, dated Nov. 24. Some quotes from the Gibbs story:

The number of people serving as their own lawyers is on the rise across the country, and the cases are no longer limited to uncontested divorces and small claims. Even people embroiled in child custody cases, potentially devastating lawsuits and bankruptcies are representing themselves, legal experts say. \* \* \*

The trend has resulted in court systems clogged with filings from people unfamiliar with legal procedure. Moreover, some of these pro se litigants, as they are known, are making mistakes with expensive and long-lasting consequences — perhaps confirming the old saying that he who represents himself has a fool for a client.

Paul Merritt, a district judge in Lancaster County, Neb., said he knows of cases in which parents lost custody disputes because they were too unfamiliar with such legal standards as burden of proof.

"There is a lot on the line when you have a custody case," Merritt said. "There are a lot of things that judges take into consideration in determining what's in the best interest of the child, and if you're a pro se litigant, the chances that you will know what those things are, and that you will present evidence of all those issues, are really small."

While the fees lawyers charge vary widely, the average hourly rate ranges from around \$180 to \$285 in the Midwest, and from \$260 to more than \$400 on the West Coast, according to legal consultant Altman Weil Inc.

Tim Eckley of the American Judicature Society in Des Moines, Iowa, said no national figures are kept on how many people represent themselves, "but I don't think anybody who's involved in the courts would deny that this is a growing trend in the last 10 to 15 years."

In California, about 80 percent represent themselves in civil family law cases — such as divorce, custody and domestic violence cases — according to the Self-Represented Litigation Network. In San Diego alone, the number of divorce filings involving at least one person not represented by a lawyer rose from 46 percent in 1992 to 77 percent in 2000.

In Nebraska in 2003, 13,295 people represented themselves in civil cases in state district courts. By 2007, the number had risen to 32,016, or 45 percent.

The result?

"Courts are absolutely inundated with people who do not understand the procedures," Talia said. "It is a disaster for high-volume courts, because an inordinate amount of their clerks' time is spent trying to make sure that the procedures are correctly followed." \* \* \*

Many states offer self-help Web sites or desks at court offices that offer standard legal forms for such things as simple divorces. In some states, volunteer lawyers are made available to give legal advice to those who cannot afford an attorney.

The legal profession may not like the trend but realizes it is here to stay, and has gotten behind the effort. The American Bar Association is encouraging states to set up self-help desks and adopt standard forms.

Also, a majority of states have amended their attorney ethics rules to promote a growing practice known as "unbundling," in which a lawyer handles just part of a contract, lawsuit, divorce or other litigation for a small fee, rather than taking on the entire case.

The ethics rules have been changed to make it clear that lawyers can do this without being held responsible for the entire case. That can ease their fears of being sued for malpractice.

Related is an announcement from our Supreme Court, reported in [this ILB entry](#) from Nov. 25th titled "*Ind. Courts - Court posts video for people considering representing themselves in family law cases.*"

Posted by Marcia Oddi on [Friday, November 28, 2008](#)

Posted to [General Law Related](#)

#### [4. Thursday, November 27, 2008](#)

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##### [4.1. IND. COURTS - "LAKE COUNTY SPENT BULK OF STATE GRANT ON UNCERTIFIED INTERPRETERS"](#)

So reports Marisa Kwiatkowski in [this story today](#) in the **NWI Times**:

CROWN POINT | Certified Spanish interpreter David Araujo said he doesn't want justice lost in translation.

Lake County has relied heavily on uncertified interpreters for its criminal court proceedings.

It spent the bulk of its state-funded grant money on uncertified interpreters, a Times review of grant spending shows. Indiana started its certified interpreter program in 2004.

About 14.2 percent of the grant money Lake County spent this fiscal year into November was paid to certified interpreters, data shows. The state requires 60 percent of the grant be spent on certified

interpreters unless a waiver is given.

"That's not due process," Araujo said.

But Lake County Court Administrator Marty Goldman said by his count, 51.5 percent of the grant money spent so far has been approved by the state.

Nationwide, there have been "widespread breakdowns in due process and equal protection for non-English speaking litigants who appear before the courts," according to the National Center for State Courts.

Many hitches to the justice system on a national level were caused by improperly trained and unqualified interpreters, the center said.

Araujo said he has seen studies in which an average of 40 percent of what's happening in a trial is not interpreted.

"That's not enough," he said. "You're left with a huge void if everything isn't being conveyed to the defendant."

Araujo and certified Spanish interpreter Guillermo Romo said they have struggled to break into interpreting for the Lake County court system. The two said they have been passed over in favor of uncertified interpreters.

But one Lake County judge said certified isn't always better.

Lake Criminal Court Judge Salvador Vasquez admitted he preferred to use the services of a Spanish interpreter who, until recently, was not certified. The interpreter, Gloria Lupo, passed the certification test in September, and is waiting for her criminal background check to be completed.

"I speak Spanish, and her interpretation orally is phenomenal," Vasquez said.

Vasquez said Lupo and another interpreter also reduced their fees, saving taxpayers money.

He said he will make a concerted effort to use the rest of the grant money on certified interpreters.

Posted by Marcia Oddi on [Thursday, November 27, 2008](#)

Posted to [Indiana Courts](#)

## 5. [Wednesday, November 26, 2008](#)

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### 5.1. [COURTS - JAMES BOPP JR. TO REPRESENT NEWLY ELECTED WISCONSIN SUPREME COURT JUSTICE](#)

**The Capital Times**, from Madison Wisconsin, [reports today](#):

[Newly elected Wisconsin Supreme Court Justice Michael Gableman], who is facing charges that he violated the Wisconsin Judicial Code of Conduct during his spring race against incumbent Justice Louis Butler, is being represented by prominent Republican attorney James Bopp Jr. who serves as counsel to the National Right to Life Committee and the James Madison Center for Free Speech.

Posted by Marcia Oddi on [Wednesday, November 26, 2008](#)

Posted to [Courts in general](#)

### 5.2. [IND. DECISIONS - COURT OF APPEALS ISSUES 5 TODAY \(AND 25 NFP\)](#)

**For publication opinions today (5):**

In [Patricia Popovich v. John R. Danielson, M.D.](#), a 12-page opinion, Judge May writes:

Patricia Popovich appeals the dismissal of her complaint against Dr. John R. Danielson. Because the Medical Malpractice Act governs three of Popovich's claims, she needed to obtain an opinion from a medical review panel prior to filing her complaint, and the trial court properly determined it lacked jurisdiction over those claims. Popovich's fourth claim, for fraud, was insufficiently specific for us to determine whether it falls under the Malpractice Act; as such it did not meet the pleading requirement of Trial Rule 9(B). Accordingly, the trial court properly dismissed that portion of her complaint, and we affirm. \* \* \*

Because a medical review panel needed to first review Popovich's claims of assault and battery, defamation, and "contractual obligation to accurately and correctly report necessary medical findings and observations in medical records," the trial court properly dismissed them without prejudice. The court also properly dismissed without prejudice her claim of fraud, as that claim was insufficiently specific to meet the requirements of Trial Rule 9(B).

In [In Re: The Paternity of A.M.P.](#), an 8-page opinion, Judge Robb writes:

In this Title IV-D proceeding, the State appeals the trial court's order granting the State's motion to correct error. Although the trial court's order was technically favorable to the State, it contained a provision that prevented the State from withholding additional amounts from the Title IV-D obligor's paycheck to satisfy an arrearage unless the State successfully moved the trial court to enter an additional order authorizing such withholding. On appeal, the State contends this provision is inconsistent with federal and state laws governing Title IV-D income withholding procedures. Concluding that the State is not statutorily required to seek judicial authorization under such circumstances, we reverse. \* \* \*

We conclude Indiana Code section 31-16-15-2.5(f) does not permit the trial court to limit the State's authority to increase the weekly withholding amount to satisfy an arrearage. Thus, the State has demonstrated that the trial court's interpretation of that statute was prima facie error.

[Frank P. Barbera v. AIS Services](#) - "Frank P. Barbera, pro se, appeals from the trial court's judgment confirming an arbitration award in favor of AIS Services, LLC, as assignee of MBNA America, N.A. ("AIS"). Barbera presents a single issue for review: whether the trial court erred when it refused to vacate the arbitration award for insufficient service of process. We reverse."

In [Save the Valley, Inc., Thomas and Jae Breitweiser, et al v. David Ferguson, Daveco Farms, et al](#), a 5-page opinion, Judge Riley writes:

The Residents raise three issues on appeal. However, we address the following dispositive issue: whether the trial court lacked subject matter jurisdiction over a private claim for declaratory and injunctive relief arising from activity regulated by the Indiana Department of Environmental Management ("IDEM"). \* \* \*

From these statutes, it is clear that the Indiana General Assembly has charged IDEM with the responsibility of regulating potential harm from the operation of CFOs.

Our Supreme Court addressed a very similar claim in *Town Board of Orland v. Greenfield Mills, Inc.*, 663 N.E.2d 523 (Ind. 1996). Orland applied for an IDEM permit to construct a municipal sewage treatment facility. While the application was pending, nearby landowners filed suit to enjoin the construction. As here, there was no claim for monetary damages. The *Orland* Court held that the trial court lacked subject matter jurisdiction to consider the complaint. [Quoting *Orland*: "If landowners included in their complaint a request for monetary damages for any taking, trespass, or nuisance caused by discharge from the sewage treatment project, the case might well present issues for ultimate determination by the trial court following completion of the permitting process (including administrative and judicial review thereof)."] \* \* \*

We follow the dispositive precedent of *Orland*, affirm the trial court's dismissal of the Residents' complaint, and remand with instructions to vacate the existing orders and to enter an order dismissing the complaint

for lack of subject matter jurisdiction.

[Randell R. Rhodes, Jr. v. State of Indiana](#) - " In light of the nature of the offense and the character of the offender, Rhodes has not convinced this Court that his advisory sentence of thirty years is inappropriate. "

#### **NFP civil opinions today (6):**

[Christine \(Tisdale\) Bolick v. Raymond C. Tisdale \(NFP\)](#) - " Concluding that the trial court's determination of Father's income was not clearly erroneous and that the trial court did not abuse its discretion in awarding an additional parenting time credit to Father, we affirm. "

[Haag Trucking Co. and Rose Maxine Haag v. Mark E. Haag and Perfect Pallets, Inc. \(NFP\)](#) - " This litigation concerns a family's battle over the pieces of three Indianapolis- based family businesses left behind after the 2003 death of Robert Haag. Rose Maxine Haag ("Maxine"), Robert's widow and one of the plaintiffs below, appeals from the trial court's judgment against her personally for a breach of fiduciary duty as a shareholder of Perfect Pallets, one of the three businesses. Mark Haag, Robert's and Maxine's son and one of the defendants below, cross-appeals the trial court's judgment that he was not frozen out as a shareholder of Haag Trucking, another one of the family businesses. Concluding that the trial court's decision regarding Maxine is not clearly erroneous and that the trial court's decision regarding Mark is not contrary to law, we affirm. "

[City of Gary, Gary Police Civil Service Commission, Nathaniel Brannon and Anthony Stanley v. Thomas Pawlak and Ronald Pineda \(NFP\)](#) - "Therefore, the Appellants have not established inexcusable delay or implied waiver, nor have they identified any evidence of prejudice. The trial court did not err by granting the preliminary injunction."

[Joshua L. Overton v. Review Board, and Brad A. Renfro \(NFP\)](#) - "Under the circumstances, we conclude that Overton's continued unexcused and unexplained absences, despite a prior warning about such practices, justified his termination for just cause. The determination of the Board is affirmed. "

[Janeen L. Mathes v. Joseph W. Mathes \(NFP\)](#) - a 2-1 opinion reversing the trial court's division of the marital estate.

[In the Matter of D.A. \(NFP\)](#) - "The Crawford County Department of Child Services (CCDCS) appeals the trial court's judgment denying its petition to terminate T.G.'s (Mother) parental rights to her children. In so doing, CCDCS alleges that the trial court's findings and conclusions are not properly supported by the evidence and that the trial court impermissibly subordinated the children's interests to those of Mother. We affirm."

#### **NFP criminal opinions today (19):**

[Joshua Borden v. State of Indiana \(NFP\)](#)

[Bert E. Black v. State of Indiana \(NFP\)](#)

[Tyrone Mathis v. State of Indiana \(NFP\)](#)

[Robert Earl Gent v. State of Indiana \(NFP\)](#)

[John A. Tate v. State of Indiana \(NFP\)](#)

[David Drew v. State of Indiana \(NFP\)](#)

[Rodney L. May v. State of Indiana \(NFP\)](#)

[Gregory L. Saylor v. State of Indiana \(NFP\)](#)

[Thomas K. Miller v. State of Indiana \(NFP\)](#)

[Benjamin Claunch v. State of Indiana \(NFP\)](#)

[Gerald Rickert v. State of Indiana \(NFP\)](#)

[Tricia M. Pingilley v. State of Indiana \(NFP\)](#)

[Bert E. Black v. State of Indiana \(NFP\)](#)

[Kirk Isom v. State of Indiana \(NFP\)](#)

[Alberta J. Otto v. State of Indiana \(NFP\)](#)

[David D. Foster v. State of Indiana \(NFP\)](#)

[Michael Baker v. State of Indiana \(NFP\)](#)

[Tommy P. Sanders, Jr. v. State of Indiana \(NFP\)](#)

[Donald Mallard v. State of Indiana \(NFP\)](#)

Posted by Marcia Oddi on [Wednesday, November 26, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

### [5.3. IND. COURTS - STILL MORE ON: GOD AND PRAYER CONTINUE IN INDIANA HEADLINES](#)

Updating [this ILB entry](#) from Nov. 20th, where the head of the BMV defended "the BMV's new policy that bars references to religion or a deity" in a license plate, the **Indianapolis Star** has [a story today](#) headed "*God once again welcome on license plates.*" Mary Beth Schneider's report begins:

Ron Stiver, commissioner of the Bureau of Motor Vehicles, said Tuesday he is reversing a recently adopted agency policy that had barred the mention of religion or a deity, ending a monthlong controversy that had resulted in a lawsuit.

The short-lived policy was "well-intended and legally defensible," Stiver said. "At the end of the day, it comes down to what makes the most common sense."

The answer, he said, was to revert to the previous policy, in which a committee of BMV employees weighs each request for a personalized license plate, deciding whether the plate "carries a connotation offensive to good taste and decency or would be misleading."

That wording, he said, "sufficed before; it should suffice now."

Posted by Marcia Oddi on [Wednesday, November 26, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

### [5.4. COURTS - RI PAPER ASKS HIGH COURT TO MAKE JUROR QUESTIONNAIRES PUBLIC](#)

[An interesting story](#) from the **Providence Rhode Island Journal**, reported by Mike Stanton. Some quotes from the lengthy story:

Two years after 421 prospective jurors filled out questionnaires eliciting their opinions about the tragic Station nightclub fire that claimed 100 lives, The Providence Journal's fight to open those records is bound for the Rhode Island Supreme Court.

In a case with implications for the openness of the jury-selection process, the newspaper has challenged a lower-court ruling denying access to the 32-page questionnaires, which were filled out in anticipation of the trial of former Station owner Michael A. Derderian. The case never went to trial, as Derderian and his brother Jeffrey Derderian entered into plea agreements, but lawyers for The Journal argue that the issue remains relevant to determining what kind of access the public and the press can expect in future cases.

The Supreme Court has scheduled oral arguments for Dec. 8.

In recent years, judges have used written questionnaires to weed out biases of potential jurors and

streamline the selection process in high-profile corruption cases here in Rhode Island and nationally.

But while oral questioning of potential jurors is open, the written questionnaires have not been released. Even though they carried the disclaimer that the answers were not confidential, and "may be included in the public record," Superior Court Judge Francis P. Darigan denied The Journal's request to see them. Although the press and the public have "the presumptive right" to see jury questionnaires, Darigan cited "uniquely compelling situations" in sealing them in the Station fire case.

The **ILB** has reported on the juror questionnaire issue before, in this entry from [March 28, 2006](#), headed "*Courts - Juror problems in federal trial of former Illinois Governor Ryan; thoughts on Indiana jurors*," and in this entry from [April 7, 2004](#), headed "*Indiana Law - More on Juror Secrecy*." Both **ILB** entries quote from a 2004 **Fort Wayne Journal Gazette** editorial, which included this:

Why should anyone care about this issue? The new jury privacy decree affects journalists, historians, advocates, researchers and anyone else who may want to ask jurors how a decision was reached. It is conceivable that jury tampering or a previously unknown connection between a juror and key player may not be revealed until an outside investigator lifts the veil. Undoing private deceit brings about reform and keeps down public cynicism and apathy.

**[More at 11:10 AM]** A reader writes:

Interesting issue on juror questionnaires. Had a friend on a jury a couple months ago, a trial on "precursor to meth" and "conspiracy to manufacture" charges. She called me after the trial to see if the questionnaires were made available to the defendant, since he had scared several of the jurors by the way he looked at them during the trial. I assured her that he might have looked over the info to help in choosing jurors, but would not have "access" to them. I confirmed with the attorney for the def. that this was accurate before telling her.

I think the rights of jurors have to be weighed in with the other rights you and other reporters/editors list. Home addresses, work addresses and questions about family members who are police might be of too much interest to a disappointed criminal defendant.

Good point. Here is more from the RI story:

It is important for the Supreme Court to set guidelines, said Journal lawyer Kristin E. Rodgers, citing a case that followed Darigan's ruling, in which Superior Court Judge Edward C. Clifton destroyed questionnaires used to select a jury in the sexual-assault trial of a longtime East Providence councilman.

Furthermore, lawyers for the newspaper argue in court papers that Darigan and the attorney general "wholly ignore" the explicit instructions on the front of the questionnaire to mark sensitive questions as "personal" and circle them. The newspaper is not seeking unfettered access, but asking that the judge balance the privacy interests of certain information that might be too personal against the public interest of other information contained in the questionnaires.

Lynch counters that it's not practical to redact all of the personal information scattered throughout the questionnaires, even to innocuous questions regarding family, friends and neighbors.

The Journal counters that Darigan, by withholding the questionnaires, "has unnecessarily closed the criminal justice system from public view, thereby frustrating the broad public interest in knowing that laws are being enforced and the courts and the criminal justice system are functioning."

[Here are the Indiana juror rules](#), see particularly Rule #10.

Here are [123 questions](#) from a 24-page California juror questionnaire in 2002. (I had no idea why it is on an Indiana TV station's webpage.) Here is a [general juror questionnaire](#) from Washington County Superior Court in Salem, IN.

Here is the Indiana Judicial Center's "[Jury Rules FAQ](#)," including specifically [Rule 10](#).

Posted by Marcia Oddi on [Wednesday, November 26, 2008](#)

Posted to [Courts in general](#)

### 5.5. [IND. DECISIONS - "JUDGE GIVES REPRIEVE TO HOOSIER ENERGY"](#)

John Russell of the **Indianapolis Star** [reports today](#) on the SD Ind. decision yesterday in the case of *Hoosier Energy v. John Hancock Life Ins.* Access the [37-page opinion here](#). Some quotes from the story:

Customers of rural electric cooperatives in Indiana will not face immediate rate increases, as some had feared, after a federal judge agreed Tuesday to grant their key power provider a preliminary reprieve in a tangled financial deal with an insurance company.

But the judge had harsh words for nearly everyone involved in the deal, which he called "a sham" and "a case study of some of the worst aspects of modern finance." \* \* \*

In 2002, Hancock put together a deal under which it bought the generating station and leased it back to Hoosier. The utility received a \$20 million fee, and Hancock was able to take a tax deduction from owning an industrial property.

"Despite the reams of paper and the circular flow of hundreds of millions of dollars, the transaction appears to have been a sham, without economic substance," the judge wrote in his ruling.

He said the court "will face some challenging problems" in crafting a remedy. Yet he said allowing Hancock to demand \$120 million immediately would produce an unfair result by letting the insurer walk away "with the windfall of fraudulent tax benefits."

"The more prudent, risk-minimizing course at this point is to grant injunctive relief to prevent irreparable harm and to sort out later the difficult terms of final equitable relief," Hamilton wrote.

Posted by Marcia Oddi on [Wednesday, November 26, 2008](#)

Posted to [Ind Fed D.Ct. Decisions](#)

### 5.6. [IND. DECISIONS - "CASINO WORKER LOSES ROUND: FLEA BITES SUFFERED WHILE SHE WAS DEALER"](#)

The Court of Appeals decision yesterday in the case of *RDI/Caesars Riverboat Casino Inc. and M/V Glory of Rome v. Tina Conder* (see [ILB summary here](#)) is the subject of [a story today](#) by Grace Schneider in the **Louisville Courier Journal**. Some quotes:

The Indiana Court of Appeals has rejected a former casino dealer's attempt to win compensation under federal maritime law for alleged injuries she suffered while working aboard the Harrison County riverboat.

In a ruling yesterday, the court said Tina Conder of Clarksville doesn't qualify as a maritime worker because the former Caesars Indiana boat where she dealt cards is primarily used for gambling, not navigation.

The court left open the possibility that Conder could recoup some workman's compensation benefits for serious medical complications that her lawyers said stemmed from flea bites she received while dealing poker. \* \* \*

Conder's lawyer, Karl Truman of Jeffersonville, said he intends to ask the Indiana Supreme Court to consider the case and, if necessary, may go to the U.S. Supreme Court.

"It seems the (appeals) court relied heavily on what Caesars said their intent was with the boat," Truman said. \* \* \*

Conder sued the casino in 2005 in Harrison Circuit Court seeking unspecified damages for medical

expenses, legal fees and pain and suffering from a disabling condition caused by flea bites to her legs, arms, head and torso.

Conder's doctors blamed the bites for triggering a serious blood disorder. She also suffered two heart attacks from massive doses of steroids used to suppress the reaction.

Harrison County health department records showed the casino had battled a flea infestation during the time Conder said she was bitten. Her lawyers asserted that the casino had been negligent for failing to maintain a seaworthy vessel as required by the Jones Act.

The 1920 law was enacted to ensure that maritime workers were fairly compensated for injuries while facing the heightened risks posed by serving aboard ships and towboats.

A year ago, Harrison Circuit Judge H. Lloyd "Tad" Whitis ruled that Conder was a Jones Act seaman and therefore was eligible for the far more generous compensation for medical expenses and lost wages than is usual under workman's compensation.

Casino lawyers responded by appealing the Jones Act portion of the ruling to the appeals court.

Chief Justice John G. Baker wrote for the appeals court that Whitis erred in denying Caesars' motion to dismiss the Jones Act count. He cited a 7th U.S. Circuit Court of Appeals ruling that said a casino boat that was indefinitely moored no longer qualified as a vessel in navigation.

Conder is not "the type of employee that the Jones Act is intended to cover and protect," Baker wrote.

But Truman said federal appeals courts have been split on what types of workers the Jones Act covers, making the issue worthy of U.S. Supreme Court review.

Posted by Marcia Oddi on [Wednesday, November 26, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

#### [5.7. IND. COURTS - IN INDIANA THE JUDICIARY IS HELD – PUBLICLY AND APPROPRIATELY – TO A HIGH STANDARD.](#)

That is the conclusion of [this editorial today](#) in the **Fort Wayne Journal Gazette**. Some quotes:

An Allen Superior Court judge's hearing scheduled for today before a special disciplinary panel is not taking place because his case was settled last week. Much to the credit of the Indiana Supreme Court and the state's judiciary in general, that out-of-court settlement is available for all Hoosiers to see, weeks after the court made public details of the judge's actions. \* \* \*

The Supreme Court decided that the judge should be punished but should not be removed from the bench. That decision more appropriately rests with Allen County voters, who can decide for themselves – if the judge faces any opposition when he runs for re-election in 2010. Some voters may believe his action should not be forgiven, while others may well empathize with the circumstances: The judge berated – but did not shout at – a man he believes sold drugs to Scheibenberger's son, whose death last year was drug-related. \* \* \*

The incident is the latest in which the state's highest court has made clear that judges who act inappropriately will face public discipline. Scheibenberger's actions certainly did not rise to the level of a Marion Court judge who recently appeared before the same type of disciplinary panel Scheibenberger was to face.

On Tuesday, the Indiana Supreme Court suspended Marion Superior Court Judge Grant Hawkins and is weighing removing him from the bench permanently for dereliction of duty. Hawkins, the panel and a state judicial commission decided, was derelict in his duty for allowing a man to remain in prison for two years after DNA tests cleared him of a rape.

The public may believe that judges generally cover for one another, that they are allowed to get away with mistakes anyone else would pay for. That is not the case in Indiana, where the judiciary is held – publicly and appropriately – to a high standard.

Posted by Marcia Oddi on [Wednesday, November 26, 2008](#)

Posted to [Indiana Courts](#)

## 6. [Tuesday, November 25, 2008](#)

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### 6.1. [IND. COURTS - SUPREME COURT SUSPENDS MARION COUNTY SUPERIOR COURT JUDGE GRANT W. HAWKINS WITH PAY \[UPDATED\]](#)

Updating [this ILB entry](#) from Nov. 21st, wherein the Indiana Commission on Judicial Qualifications asked the Court to immediately suspend Judge Hawkins with pay pending the Court's decision, the Court has now issued this [Order Suspending Judge With Pay](#).

In addition, the Court has issued an [Order Appointing Judge Pro Tempore](#) -- Judge James B. Osborn, to be effective at the close of business today, Nov. 25th, and to continue until further order to the Court.

**[Updated at 5 PM]** Jon Murray of the **Indianapolis Star** has posted [this story](#) that reports:

The court's justices today appointed Judge-elect James B. Osborn to sit in for Hawkins during his suspension. Osborn, newly elected this month, is set to take the bench in another court in January but will preside in Hawkins' major-felony court as a pro tem judge in the meantime.

Posted by Marcia Oddi on [Tuesday, November 25, 2008](#)

Posted to [Indiana Courts](#)

### 6.2. [IND. COURTS - COURT POSTS VIDEO FOR PEOPLE CONSIDERING REPRESENTING THEMSELVES IN FAMILY LAW CASES](#)

[From a release](#) just issued by the Supreme Court:

The Indiana Supreme Court's Division of State Court Administration has released an informational video for people considering representing themselves in family law cases. The video is available online and will be distributed in DVD format across the state. To watch the video visit [courts.IN.gov/webcast](#).

"Family Matters: Choosing to Represent Yourself in Court" was developed by the Supreme Court's Family Court Project to help people make informed decisions regarding legal representation. It provides important information about the legal process and the responsibilities that a person takes on when they decide to appear in court without an attorney.

The video runs 46 minutes and is divided into short segments. Each segment is designed to provide viewers with information about different stages of a case. For example, there is a section on general responsibilities and another on preparing for court. The video also provides resources for viewers who decide against self-representation and are interested in finding an attorney. \* \* \*

The video was produced in partnership with the Indiana Bar Foundation by Innovative, an Indianapolis production company. In addition to the online posting, more than 500 DVDs will be distributed to all Indiana public library districts, law schools, pro bono districts, and other legal aid organizations.

Posted by Marcia Oddi on [Tuesday, November 25, 2008](#)

Posted to [Indiana Courts](#)

### 6.3. [IND. DECISIONS - TAX COURT ISSUES ONE](#)

In [U-Haul Co. of Indiana, Inc. v. Indiana Dept. of State Revenue](#), a 14-page opinion, Judge Fisher writes:

Evidence of the routine practice of an organization is relevant to prove that the conduct of the organization on a particular occasion was in conformity with the routine practice. See Ind. Evidence Rule 406. See also, e.g., *Morphew v. State*, 672 N.E.2d 461, 463-64 (Ind. Ct. App. 1996) (finding that the Indiana Bureau of Motor Vehicles' evidence of its routine business practices could have led a jury to reasonably conclude that it timely mailed notice of a suspension of driving privileges to a defendant), trans. denied. The Court therefore finds and concludes that the Department's designated evidence leads to the reasonable inference that it timely mailed the 1999 proposed assessment. Accordingly, the issue as to whether the 1999 proposed assessment was timely mailed to U-Haul Indiana is reserved for trial. \* \* \*

[As to] Whether the Department's retroactive imposition of gross income tax, based on its admitted change in interpretation of that tax, was proper [the Court concluded that] this theory does not support the Department's change in position and retroactive imposition of gross income tax. Accordingly, U-Haul Indiana's motion for summary judgment as to this issue is GRANTED.

For the above stated reasons, the Court DENIES U-Haul Indiana's motion for summary judgment as to Issue I. As a result, the issue of whether the Department timely mailed the 1999 proposed assessment is reserved for trial. The Court, however, GRANTS U-Haul Indiana's motion for summary judgment as to Issue II. The Department's cross-motion for summary judgment is therefore DENIED. The Court shall set a case management conference to discuss the remaining matters for trial by separate order.

Posted by Marcia Oddi on [Tuesday, November 25, 2008](#)

Posted to [Ind. Tax Ct. Decisions](#)

#### **6.4. [IND. COURTS - "IU CENTER FOR URBAN POLICY AND THE ENVIRONMENT TO STUDY COURT REFORM"](#)**

From [an IU press release](#) dated Nov. 24:

INDIANAPOLIS -- The Indiana University Center for Urban Policy and the Environment (CUPE) will work with the Indiana Supreme Court's Division of State Court Administration to study ways to make the state's system of trial courts more equitable and efficient.

The Division of State Court Administration plans to use the court system study to assess the viability of one of the many reforms called for in the extensive report issued last year by the Indiana Commission on Local Government \* \* \*

CUPE will partner with the Indiana University School of Law-Indianapolis Program on Law and State Government to analyze Indiana's current system and assess the ways other states manage and fund court operations. The study will pay particular attention to governing, budgetary and personnel issues. Next summer, the center plans to present its findings to the Supreme Court's Division of State Court Administration, along with a series of options to consider for coordinating and streamlining Indiana's court system.

"This study will take a critical look at how other states have approached managing and paying for their local courts," said CUPE Director John Krauss. "Our goal is to identify ways Hoosiers can be assured equal access to services from the courts and that they're being funded in the most cost-effective way."

Krauss and his team of researchers last year staffed the Indiana Commission on Local Government Reform. Their work included organizing community meetings across the state to gather testimony and data, and assisting in drafting the commission's final report.

Posted by Marcia Oddi on [Tuesday, November 25, 2008](#)

Posted to [Indiana Courts](#)

## 6.5. IND. DECISIONS - TRANSFER LIST FOR WEEK ENDING NOV. 21, 2008

[Here](#) is the just issued transfer list for the week ending Nov. 21, 2008. It is 3 pages long.

No transfers were granted last week.

Among the cases denied transfer, *Lauth Indiana Resort & Casino v. Lost River Development, et al.*, summarized in [this ILB entry](#) from July 15th.

**Over 4.5 years of Transfer Lists:** For other weekly transfer lists (going back to Feb. 2, 2004), check "Indiana Transfer Lists" under "Categories" below, or in the right column.

Posted by Marcia Oddi on [Tuesday, November 25, 2008](#)

Posted to [Indiana Transfer Lists](#)

## 6.6. LAW - STILL MORE ON: "LAWYERS WORRY ABOUT LIABILITY IF BANKS HOLDING CLIENT TRUST ACCOUNTS FAIL"

Updating earlier ILB entries, the most recent [here](#), Marcia Coyle of **The National Law Journal** is reporting, [in a story](#) to appear next Monday:

WASHINGTON — The Federal Deposit Insurance Corp. (FDIC) has announced that, effective immediately, client funds deposited in Interest on Lawyer Trust Accounts (IOLTA) — regardless of amount — are eligible for full deposit insurance coverage under the Temporary Liquidity Guarantee Program (TLGP) through June 30, 2009.

The American Bar Association, state and federal lawmakers, community and consumer groups, law firms and individual lawyers had mounted a nationwide campaign to persuade the FDIC to include IOLTA funds in the expanded insurance program.

Posted by Marcia Oddi on [Tuesday, November 25, 2008](#)

Posted to [General Law Related](#)

## 6.7. IND. DECISIONS - COURT OF APPEALS ISSUES 5 TODAY (AND 9 NFP)

### **For publication opinions today (5):**

In [RDI/Caesars Riverboat Casino Inc. and M/V Glory of Rome v. Tina Conder](#), an 18-page opinion, Chief Judge Baker writes:

Here, we must decide whether a riverboat casino that is indefinitely moored to the shore is a “vessel in navigation” for the purpose of the federal Jones Act. 1 We hold that it is not. Appellants-defendants RDI/Caesars Riverboat Casino, Inc., and the M/V Glory of Rome (collectively, Caesars) appeal the trial court’s order granting appellee-plaintiff Tina Conder’s motion for partial summary judgment and denying Caesars’s motion to dismiss Conder’s complaint. Caesars argues that the trial court erred as a matter of law by concluding that an indefinitely moored, dockside casino was a “vessel in navigation” pursuant to the Jones Act and that Conder was a Jones Act Seaman. Finding that the Jones Act does not apply, we reverse in part and remand with instructions to dismiss Conder’s Jones Act claim and for further proceedings on her Sieracki seaman claim. \* \* \*

In sum, the Riverboat has been moored to the dock since 2002. It has had no transportation function since that time. It is joined to the land by a number of cables. It is connected to land-based utilities. Its owners intend that it remain stationary for the foreseeable future. Thus, the Riverboat’s operations are gaming-related, rather than maritime in nature, and that has been the case since 2002. Conder, as a table games dealer for the Casino, is simply not an employee who is regularly—or at all—exposed to “the special hazards and disadvantages to which they who go down to sea in ships are subjected.” McDermott, 498

U.S. at 354. Under these circumstances, we cannot conclude that the Riverboat is a vessel in navigation or that Conder is the type of employee that the Jones Act is intended to cover and protect. We find, therefore, that the trial court erred as a matter of law by granting Conder's motion for partial summary judgment and denying Caesars's motion to dismiss the Jones Act count of Conder's complaint.

In [Bernice M. Reedy, b/n/f Mentoria Headdy v. Indiana Family and Social Services Administration](#), a 10-page opinion, Judge Barnes writes:

Bernice Reedy appeals the trial court's affirmation of the decision by the Indiana Family and Social Services Administration ("FSSA") denying Reedy's request to include her out-of-pocket payments to her nursing facility as an allowable spend-down expense. We reverse.

Issue. Reedy raises one issue, which we restate as whether the trial court properly affirmed the FSSA's decision not to include Reedy's nursing facility payments as an allowable spend-down expense. \* \* \*

For these reasons, the FSSA's determination that Reedy's nursing facility expenses cannot be credited toward her spend-down is contrary to law. Accordingly, the trial court erred in affirming the FSSA's decision.

In [the Matter of the Paternity of E.C.](#) - "Matthew Cole ("Father") filed a petition to modify his child support obligation in Johnson Circuit Court due to his incarceration. The trial court denied his petition. Father appeals pro se and argues that his incarceration has resulted in a substantial change in his income, and therefore, he is entitled to a reduction of his child support obligation. We reverse and remand for proceedings consistent with this opinion. \* \* \*

"Because we conclude that Father has established prima facie error, and that the trial court abused its discretion when it denied his motion to modify his child support obligation, we reverse and remand for proceedings consistent with this opinion. "

In [Kevin M. Weldon v. Asset Acceptance](#), a 15-page, 2-1 opinion, Judge Baker writes:

Appellant-defendant Kevin M. Weldon appeals the trial court's orders denying his motion to vacate an arbitration award and for summary judgment and entering summary judgment in favor of appellee-plaintiff Asset Acceptance, LLC (Asset Acceptance). Finding that Weldon failed to file his motion to vacate within the three-month deadline set forth by the Federal Arbitration Act<sup>1</sup> and that under the circumstances presented herein, the trial court was required to confirm the arbitration award, we affirm. \* \* \*

MATHIAS, J., concurs.

BROWN, J., dissents with opinion. [*which begins*] I respectfully dissent. The majority holds that Weldon waived his argument that the FAA's three-month time limit does not prevent a party from challenging the validity of the award at any time. The majority then addresses Weldon's argument, waiver notwithstanding, and concludes that "the arbitrator properly assumed jurisdiction over the arbitration proceedings." I disagree with the majority's conclusions that Weldon waived his argument regarding jurisdiction and that Weldon assented to the terms of the credit agreement.

[Royal Amos v. State of Indiana](#) - "Royal Amos was convicted after a jury trial of two counts of murder,<sup>1</sup> four counts of attempted murder,<sup>2</sup> each as a Class A felony, one count of burglary<sup>3</sup> as a Class B felony, and one count of carrying a handgun without a license<sup>4</sup> as a Class A misdemeanor, and he was sentenced to an aggregate sentence of 271 years executed. He appeals, raising the following issues: I. Whether the trial court abused its discretion when it admitted hearsay statements of one of the victims into evidence based on the present sense impression exception; II. Whether the trial court abused its discretion when it submitted questions to a witness that had been posed by the jury; and III. Whether sufficient evidence was presented to support Amos's convictions. We affirm."

#### **NFP civil opinions today (1):**

[Charles W. Marlowe v. Katherine D. Marlowe \(NFP\)](#) - "Appellant-Respondent Charles W. Marlowe ("Father") appeals from the trial court's order determining Father's college-expense arrearage for his two sons, B.M. and D.M. to be \$10,780.50. Father contends that the trial court abused its discretion in imposing a retroactive support order and

imposing a 50-50 shared expense standard on all prior college education expenses despite the court's findings that the Mother's income accounted for roughly seventy percent of the parties' net income. We reverse and remand to the trial court with instructions. "

#### **NFP criminal opinions today (8):**

[Kevin Dean Stanifer v. State of Indiana \(NFP\)](#)

[Melvin Muhammad v. State of Indiana \(NFP\)](#)

[Gregory S. Taylor v. State of Indiana \(NFP\)](#)

[David Kist v. State of Indiana \(NFP\)](#)

[Jason L. Becraft v. State of Indiana \(NFP\)](#)

[Timothy L. Wilson v. State of Indiana \(NFP\)](#)

[Thurman Lee v. State of Indiana \(NFP\)](#)

[Theodore Suel v. State of Indiana \(NFP\)](#)

Posted by Marcia Oddi on [Tuesday, November 25, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

#### **6.8. [IND. DECISIONS - ONE INDIANA DECISION TODAY FROM THE 7TH CIRCUIT](#)**

In [Kelly, et al v. Med-1 Solutions](#) (SD Ind., Judge Barker), a 15-page opinion, Judge Flaum writes:

Med-1 Solutions, LLC ("Med-1") is a debt-collector that filed lawsuits in Indiana state small claims court to collect hospital charges owed by debtors to its client, St. Vincent Carmel Hospital, Inc. ("St. Vincent"). Med-1 filed these suits in its own name. Med-1 demanded and received attorney fees in these proceedings. Debtors then sued in federal district court, contending that Med-1, its owner, and its in-house lawyers violated the Fair Debt Collection Practices Act ("FDCPA") when they demanded attorney fees in the small claims proceedings. The district court dismissed the case for lack of subject matter jurisdiction based on the *Rooker-Feldman* doctrine. For the reasons discussed below, we affirm. \* \* \*

The *Rooker-Feldman* doctrine derives its name from two Supreme Court decisions, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). It "precludes lower federal court jurisdiction over claims seeking review of state court judgments . . . no matter how erroneous or unconstitutional the state court judgment may be." *Brokaw v. Weaver*, 305 F.3d 660, 664 (7th Cir. 2002) (citing *Remer v. Burlington Area Sch. Dist.*, 205 F.3d 990, 996 (7th Cir. 2000)). The doctrine applies not only to claims that were actually raised before the state court, but also to claims that are inextricably intertwined with state court determinations. See *Feldman*, 460 U.S. at 482 n.16. A state litigant seeking review of a state court judgment must follow the appellate process through the state court system and then directly to the United States Supreme Court. See *GASH Assocs. v. Village of Rosemont, Ill.*, 995 F.2d 726, 727 (7th Cir. 1993).

The Supreme Court recently revisited the doctrine in *Exxon Mobil Corp. v. Saudi Basic Industries*, 544 U.S. 280, 284 (2005). The doctrine previously had been applied expansively. See *Exxon Mobil*, 544 U.S. at 283 (describing how lower courts at times had interpreted the doctrine "to extend far beyond the contours of the *Rooker and Feldman* cases"). In *Exxon Mobil*, the Court explicitly limited the doctrine. The *Rooker-Feldman* doctrine now "is a narrow doctrine, 'confined to cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.'" \* \* \*

Even in light of the Supreme Court's narrowing of *Rooker-Feldman* in *Exxon Mobil*, we conclude we are

still barred from evaluating claims, such as this one, where all of the allegedly improper relief was granted by state courts. \* \* \*

Because of plaintiffs' opportunities to raise their FDCPA claims in state court upon transfer of their cases to the plenary docket, we conclude that plaintiffs in this case had reasonable opportunities to raise their claims in state court. \* \* \*

The "reasonable opportunity" exception was developed during a time when federal courts applied *Rooker-Feldman* much more expansively. Post-*Exxon Mobil*, the "reasonable opportunity" exception to the *Rooker-Feldman* doctrine is of questionable viability.

Conclusion. We AFFIRM the district court's holding because the *Rooker-Feldman* doctrine applies and there is no federal subject matter jurisdiction in this case. Therefore, we need not address defendants' arguments related to res judicata and collateral estoppel.

Posted by Marcia Oddi on [Tuesday, November 25, 2008](#)

Posted to [Ind. \(7th Cir.\) Decisions](#)

## 6.9. [IND. COURTS - "GIRL SUES IHSAA TO PLAY BASEBALL"](#)

Charles Wilson of the **Associated Press** has [this story](#) this morning. Some quotes:

Being a girl hasn't kept Logan Young from playing baseball with the boys for nine years, and she and her parents don't think that should change now that she's in high school.

The 14-year-old and her family have filed a federal lawsuit over an Indiana High School Athletic Association rule that prohibits the Bloomington South freshman from trying out for the high school baseball team because she is female.

"In this day and age, a girl should have the opportunity to participate on an equal footing with the boys in high school sports, and the IHSAA precludes that," Fishers attorney Tae Sture said Monday.

"Our feeling is, quite frankly, there's no rational reason for it," he said.

An IHSAA rule prohibits girls from trying out for baseball if their school has a softball team on the basis that the sports are comparable. But the lawsuit filed Friday in U.S. District Court in Indianapolis argues that baseball and softball aren't really the same sport, so girls should be able to try out for baseball.

The suit seeks to have the IHSAA rule thrown out based on the equal protection clause of the 14th Amendment to the Constitution and Title IX, the federal law that mandates equal educational opportunities for boys and girls. \* \* \*

Her family contacted the IHSAA in May to see whether Logan could participate in baseball during the 2008-09 season. Commissioner Blake Ress said she couldn't because Bloomington South has a softball team, the lawsuit said.

Ress said Monday he had not seen the lawsuit but that the girl's family and the school had not applied for a waiver from the rule.

"Last spring we had a girl from Wabash and gave her a waiver to allow her to play," Ress said. "Our intent was, if we had others, we would do that. This (lawsuit) is kind of out of the blue to me."

The high school, which has a female kicker on its football team, supports Logan's desire to play and will seek a waiver so she can try out for baseball, said Bloomington South athletic director J.R. Holmes.

But the lawsuit argues that a waiver shouldn't be necessary.

"Softball and baseball are not the same sport, so she has the right to try out," said Sharon F. McKee, the

lead attorney in the case. Under current rules, a boy wanting to play softball also would have to seek a waiver, she said.

Precedent may be on Logan's side, according to McKee. The West Virginia Supreme Court ruled in a similar case in 1989 that baseball and softball are not substantially equal sports, she said, and 24 state athletic associations already allow girls to choose between softball and baseball.

Here is a copy of [the 15-page complaint](#).

Posted by Marcia Oddi on [Tuesday, November 25, 2008](#)

Posted to [Indiana Courts](#)

#### 6.10. [LAW - "GRINCHES TARGET LIGHT UP LOUISVILLE"](#)

The **Louisville Courier Journal** today has [this not surprising story](#). My first thought when I read the report was - whatever were they (the City of Louisville) thinking? The story begins:

Lawyers for the company that owns rights to the Dr. Seuss Christmas classic "How the Grinch Stole Christmas" have become real-life Grinches, threatening legal action unless Louisville cancels plans to use any part of the book for this year's Light Up Louisville holiday celebration.

"It appears these lawyers' hearts are two sizes too small," Mayor Jerry Abramson said in a news release.

DLA Piper, the law firm representing Dr. Seuss Enterprises, has sent a "cease and desist" letter to the Louisville Convention & Visitors Bureau.

The letter, dated Nov. 13, said the convention bureau "has not been authorized or licensed by Seuss to use its protected works. We therefore demand that the (bureau) immediately cease and desist from using any references to or images of Who-ville, the Grinch, or any other name or character from How the Grinch Stole Christmas."

Posted by Marcia Oddi on [Tuesday, November 25, 2008](#)

Posted to [General Law Related](#)

#### 7. [Monday, November 24, 2008](#)

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##### 7.1. [IND. DECISIONS - TRANSFER LIST FOR WEEK ENDING NOV. 21, 2008](#)

The **ILB** hasn't received any information yet for last week.

Posted by Marcia Oddi on [Monday, November 24, 2008](#)

Posted to [Indiana Transfer Lists](#)

##### 7.2. [IND. DECISIONS - COA RULING IN "IN GOD WE TRUST" CASE CHANGED TO "FOR PUBLICATION"](#)

The opinion in the case of *Mark Studler v. Indiana Bureau of Motor Vehicles and Ronald L. Stiver as Commissioner of the Indiana BMV (NFP)*, issued by the Court of Appeals on Nov. 17th, was designated "not for publication," as discussed in [this ILB entry](#) from that day.

Last Thursday, Nov. 20th, an order was issued re-designating the opinion as "For publication." I received information that the original designation was an oversight.

The Clerk's docket has now been updated with this information:

11/20/08 HAVING REVIEWED THE MATTER, THE COURT FINDS AND ORDERS AS FOLLOWS:

THIS COURT'S OPINION HANDED DOWN IN THIS CAUSE ON NOVEMBER

17, 2008, MARKED MEMORANDUM DECISION, NOT FOR PUBLICATION, IS NOW ORDERED PUBLISHED.

FOR THE COURT, JOHN G. BAKER, CHIEF JUDGE  
ROBB, BARNES, CRONE, J.J., CONCUR. KM

11/24/08 \*\*\*\*\* ABOVE ENTRY MAILED \*\*\*\*\*

The reclassification has also been added to the useful Court page, "*Memorandum Decisions Reclassified as For Publication*," [available here](#).

Posted by Marcia Oddi on [Monday, November 24, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

### **7.3. IND. LAW - STILL MORE ON: OTHER MAYORS' RACES STILL AT ISSUE?**

[This Nov. 21 ILB entry](#) promised the Special Judge's decision in the City of Anderson mayoral election dispute. [Here it is](#), dated March 3, 2008.

Also promised were the COA briefs in the challenge to the Muncie mayoral election. Here are the [Appellant's brief](#) and the [Appellee / Cross-Appellant Reply Brief](#), and the [Appellant's Reply Brief](#).

Posted by Marcia Oddi on [Monday, November 24, 2008](#)

Posted to [Indiana Law](#)

### **7.4. IND. DECISIONS - STILL MORE ON: TERRE HAUTE PAPER LOSES \$1.5 MILLION DEFAMATION SUIT**

Updating [earlier ILB entries](#), a press release today from the Society of Professional Journalists announces:

INDIANAPOLIS – The Society of Professional Journalists has joined other media organizations in an amicus brief initiated by the Hoosier State Press Association that defends the essential free press reporting rights of an Indiana newspaper.

On July 25, 2008, an Indiana jury awarded Clay County Deputy Sheriff Jeff Maynard \$1.5 million, reasoning the Terre Haute Tribune-Star libeled the officer by printing an article that reported misconduct allegations a woman had made against him. The allegations were later found to be false.

The newspaper is appealing the verdict to the Indiana Court of Appeals. By supporting the newspaper in the amicus brief, SPJ agrees with the newspaper's appeal that such a verdict fails to recognize the neutral reportage privilege. The privilege gives protection to journalists who neutrally report allegations between two parties, even if the allegations are later proven untrue.

"This situation is disturbing," SPJ President Dave Aeikens said. "You have a newspaper being sued because it accurately reported about a complaint against a law enforcement officer. It is critical to the public interest that journalists be able to report issues from the public record and be free from lawsuits."

By printing the allegations against the deputy, the Tribune-Star was following its watchdog role to monitor and report about citizens' interactions with public officials. The evidence at trial demonstrated that the news reports in question were not published with actual malice, a necessary standard in determining claims of libel and defamation. SPJ is confident the Court of Appeals will overturn the previous verdict once it realizes the importance of the neutral reportage privilege.

In addition to HSPA and SPJ, a number of other journalism organizations are supporting the Tribune-Star in its appeal, including the Indiana Broadcasters Association, the Associated Press, the American Society of Newspaper Editors and the Newspaper Association of America.

Posted by Marcia Oddi on [Monday, November 24, 2008](#)

Posted to [Ind. Trial Ct. Decisions](#)

## 7.5. [IND. DECISIONS - ONE TODAY FROM 7TH CIRCUIT](#)

[Christine In Sandage, et al. v. Bd. of Comm., Vanderburgh Co.](#) (SB Ind., Judge Barker), a 11-page opinion by Judge Posner begins:

The plaintiffs' decedents, Sheena Sandage-Shofner and Alfonzo Small, along with a third person, were murdered in Sandage-Shofner's apartment by a man named Moore, who then killed himself. Moore had been serving a four-year sentence, in the custody of the county sheriff, for robbery. But he was on work release, employed cleaning parking lots. It was while he was on work release that he committed the murders. Twice—once one month before the murders, the other time two days before—Sandage-Shofner had called the sheriff's department to complain that Moore was harassing her. \* \* \* The plaintiffs, in this suit under 42 U.S.C. § 1983 against county officials, claim that the department's failure to act on the complaint of harassment by revoking Moore's work-release privilege and reimprisoning him deprived their decedents of their lives without due process of law, in violation of the Fourteenth Amendment. The district judge dismissed the complaint for failure to state a claim. Fed. R. Civ. P. 12(b)(6).

We assume, given the procedural posture, that the defendants were reckless in failing to act on the complaint of harassment. (If they were merely negligent, the plaintiffs would have no case.) The judge was nevertheless right to dismiss the suit. There is no federal constitutional right to be protected by the government against private violence in which the government is not complicit. So the Supreme Court held in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), affirming a decision by this court, in which the principle was already well established. In *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982), for example, we had said that while "there is a constitutional right not to be murdered by a state officer, for the state violates the Fourteenth Amendment when its officer, acting under color of state law, deprives a person of life without due process of law, . . . there is no constitutional right to be protected by the state against being murdered by criminals or madmen . . . . The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order." See also *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983). There is a moral right to such services—protection against violence is the single most important function of government—and a government that fails in this duty invites well-deserved political retribution. But there is no enforceable federal constitutional right.

Posted by Marcia Oddi on [Monday, November 24, 2008](#)

Posted to [Ind. \(7th Cir.\) Decisions](#)

## 7.6. [IND. COURTS - JUDGE KIRSCH HONORED](#)

Judge James S. Kirsch was awarded the Paul H. Buchanan Jr. Award of Excellence at the Indianapolis Bar Association/Indianapolis Bar Foundation Recognition Luncheon held on November 20, 2008. [Read more here.](#)

Posted by Marcia Oddi on [Monday, November 24, 2008](#)

Posted to [Indiana Courts](#)

## 7.7. [IND. COURTS - COURT'S FY 2009-2011 REQUEST TO THE STATE BUDGET COMMITTEE](#)

The **ILB** has obtained a copy of the Indiana Court's biennial budget request to the State Budget Agency / State Budget Committee. As noted by the Court's representative:

To avoid confusion it should be made clear that the documentation being provided sets forth the Court's desired budget, but it probably will not match the initial budget presented to the legislature. Under the budget process, the Court's submission will be reviewed by the Budget Agency and will result in the submission of a recommended budget to the legislature. Typically, the recommended budget does not

include all of the funding requested by the Court. During the legislative session it is possible that funding not recommended by the Budget Agency will make its way back into the Court's budget.

Here, for those unfamiliar with the process, is the [outline of the state budget process](#) prepared by the SBA.

Here is the [26-page FY 2009-2011 initial budget request](#) prepared by the Court.

More interesting than the numbers to many will be the [15-page transmittal letter](#) from Chief Justice Shepard. Beginning on p. 11 is a section headed OBJECTIVES AND CHALLENGES IN THE NEXT BIENNIUM, focusing on the following:

- Providing cost-effective, legally effective indigent representation in a manner that relieves pressure on tire property tax system.
- Improving public safety through state financing of probation.
- Increasing "automated record keeping fee" from \$7 to \$10.
- Staff Needs; One new employee for Supreme Court Administration and twenty-five new employees (formerly contract workers) for JTAC.
- Microfilming and digitization of appellate court records.
- Technology needs for continuing appellate operations during times of disaster.
- Providing skilled interpreters for Spanish-speaking residents.

**Past ILB entries** of related interest:

["Making Sense of Court Fees"](#) posted Nov. 6, 2008.

This [ILB entry from Sept. 6th](#) discussing the Kernan-Shepard Report's Recommendation #7: Transfer the responsibility for all funding of the state's trial court system to the state, including public defenders and probation.

Posted by Marcia Oddi on [Monday, November 24, 2008](#)

Posted to [Indiana Courts](#)

## 7.8. [IND. DECISIONS - UPCOMING ORAL ARGUMENTS THIS WEEK](#)

**This week's oral arguments before the Supreme Court:**

None scheduled.

**This week's oral arguments before the Court of Appeals that will be webcast:**

None scheduled.

**This week's oral arguments before the Court of Appeals that will NOT be webcast:**

None scheduled.

Posted by Marcia Oddi on [Monday, November 24, 2008](#)

Posted to [Upcoming Oral Arguments](#)

## 8. [Sunday, November 23, 2008](#)

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### 8.1. [IND. COURTS - YET MORE ON: ROBERT CANTRELL FOUND GUILTY ON ALL CHARGES](#)

[This ILB entry from June 12th](#) quoted a story by Andy Grimm in the **Gary Post Tribune** headed "*Legal 'oversight' not likely to modify Cantrell's conviction.*"

[Today Grimm reports](#) under the headline "*New trial for Cantrell denied.*" Some quotes:

HAMMOND — Political power broker Robert Cantrell was in fact seated at the defense table throughout

his five-day fraud trial in May, U.S. Judge Rudy Lozano stated Friday in a ruling denying Cantrell's motion for a new trial.

Cantrell, who was convicted of 11 counts of honest services and mail fraud, had asked for a new trial, noting that no witnesses called to testify specifically identified him in the courtroom.

"At no time did any witness formally identify (Cantrell) sitting at the defense table with counsel as the person who committed the crimes charged in the indictment," Lozano wrote.

"Despite this lack of formal identification" Lozano continued, "nine witnesses testified about their interaction with 'the defendant, Robert Cantrell.'" Witnesses in criminal trials typically are asked by prosecutors if they know the defendant and if the defendant is present. Then, they often are asked to describe what the defendant is wearing, or to point the defendant out for the jury.

Prosecutors scrupulously asked the first two questions, but failed to ask the third — a fact pointed out by defense attorney Kevin Milner after the government rested its case, and in a motion for new trial. \* \* \*

In his 16-page opinion, Lozano included numerous excerpts from witness transcripts where Cantrell was identified as the defendant.

Cantrell also argued that the government failed to provide adequate evidence he was guilty of the charges. Lozano said the defense motion did not include legal citations or arguments explaining shortcomings in the prosecutors' case.

Cantrell, 66, is scheduled to be sentenced Feb. 19.

Here is [a copy of the ruling](#).

Posted by Marcia Oddi on [Sunday, November 23, 2008](#)

Posted to [Ind Fed D.Ct. Decisions](#)

## **8.2. [IND. COURTS - "RETIRING CLARK COUNTY JUDGES WERE TOUGH BUT CARING"](#)**

The **Louisville Courier Journal** has [a column today](#) by Dale Moss that begins:

Cecile Blau and Steve Fleece lock up criminals. Not many judges in Indiana do it more often.

They can throw the book like Peyton Manning throws the football.

Blau and Fleece leave the Clark County bench at year's end, though, proud to distinguish bad people from bad choices. Being tough mattered less than being fair. Judging is part social work, or it should be.

Blau and Fleece set up surely enduring programs less to punish people than to help them. These Superior Court judges survived politically, nonetheless. They retire, instead of being retired by voters.

Steve Stewart, the county prosecutor, agrees Blau and Fleece are right not to mete out justice as if they were cutting cookies. "It's a misconception that you can't be tough and caring at the same time," Stewart said.

Their backgrounds reflect the approach of Fleece and Blau on the bench. Fleece studied awhile to be a Roman Catholic priest and worked in the Clark welfare office when he went to law school. Blau was in the Peace Corps and then taught and coached at Providence High School.

The column ends:

Neither Blau nor Fleece signs off on all plea bargains. Each is known to add to sentences more than to reduce them. To assume them softies is to underestimate their determination to do whatever is right.

"It was a rare case I didn't think (the adjudication of) was harsh enough," Stewart said.

Blau, 63, and Fleece, 58, both seek the status of senior judge, which will allow them to fill in. They look forward to more family time -- especially a treat for Blau, whose four grandchildren live overseas. Not yet ready to kick back, the judges are open to new opportunities and grateful for the ones that came their way.

"The county can be proud of this crop of judges, I think," Blau said.

Posted by Marcia Oddi on [Sunday, November 23, 2008](#)

Posted to [Indiana Courts](#)

### **8.3. IND. DECISIONS - EVEN MORE ON: ANOTHER NEW TWIST ON TERRE HAUTE MAYORIAL RACE DISPUTE**

Updating earlier **ILB** entries, the most recent being [this one](#) from Nov. 22nd, Thomas B. Langhorne of the **Evansville Courier & Press** reports today [in a lengthy story](#) headed "*Election lawsuits examined*":

The recent Indiana Court of Appeals ruling that inspired three lawsuits last week contesting Vanderburgh County election results flies against precedent and "may very well" be reversed by the Indiana Supreme Court, said a local attorney who has argued before the court.

Cole Banks, an Evansville attorney and political science instructor at the University of Southern Indiana, said case law does not support the Court of Appeals' Nov. 13 finding that Terre Haute Mayor Duke Bennett was ineligible to run for that office in 2007.

In the 2-to-1 opinion, the appeals court decided Bennett was prohibited from seeking office under a federal law limiting the political activities of people whose jobs are funded at least in part by federal money.

Bennett was director of operations from 2005 until 2007 at the Hamilton Center, a not-for-profit community behavioral health services center that operates a federally funded Head Start program.

"I believe the Supreme Court will revisit all the issues involved (on appeal) and may very well reach a different conclusion," Banks said. "The ruling is contrary to prior case law. The basic principle that the courts operate on is, 'Wait a minute, these people have voted. There has to be a really good reason to throw out their votes.'"

Banks said state courts' traditional reluctance to overturn election results also should provide a stiff headwind against Republican County Commissioner Jeff Korb and the local GOP as they seek to reverse the election of Democrat Steve Melcher to Korb's seat and Ed Bassemier to an at-large County Council seat on the strength of similar claims.

In cases that Banks said will be watched by legal and political professionals across the state, Korb and the GOP separately seek hearings in Vanderburgh Circuit Court to declare Melcher and Bassemier disqualified from being candidates and ineligible to serve. \* \* \*

The appeals court cited a 1958 Indiana Supreme Court case, *Oviatt vs. Behme*, in which a losing candidate unsuccessfully challenged the winner's eligibility to run.

In a lengthy explanation of that case, the appeals court repeatedly cited the Supreme Court's finding that voters' ballots should not be discounted unless it can be shown that they were aware of a candidate's ineligibility and willfully disregarded it.

Support for Banks' argument can be found in the dissent filed by Appeals Court Judge Edward W. Najam, who also argued that the court disregarded the Oviatt case and other case law.

"For almost 150 years, our Supreme Court has consistently held that a successful post-election challenge cannot be maintained on the grounds of the winning candidate's ineligibility unless the voters knew of that ineligibility and wasted their votes accordingly," Najam wrote.

Here is [the initial ILB entry](#) on the Nov. 13th Court of Appeals decision In the case of *Kevin D. Burke v. Duke Bennett*.

Posted by Marcia Oddi on [Sunday, November 23, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

#### 8.4. [LEGISLATIVE BENEFITS - "MILLER TO SEEK LOBBYING CURBS AGAIN"](#)

The **Indianapolis Star's** "*Behind Closed Doors*" [column today](#) includes this item, headed "*Miller to seek lobbying curbs again*":

Sen. Patricia L. Miller, R-Indianapolis, once again will push for a cooling-off period for former lawmakers who want to lobby the General Assembly.

Last week, Miller filed a bill that would require retiring lawmakers to wait one year before lobbying.

Miller points to Gov. Mitch Daniels' rules that prohibit former executive branch employees from lobbying state agencies for at least one year after leaving the state.

Last session, Miller's bill failed to reach the Senate floor. She's hoping for a better result this time.

"Lobbyists are an important part of the legislative process because they are informed on particular and important issues," she said in a news release. "But having legislators sit out a year before taking on a lobbyist job is better public policy and can establish a better, more trusting relationship with Hoosiers."

The statement "Last session, Miller's bill failed to reach the Senate floor" doesn't begin to describe the brohaha that ensued when Senator Miller's bill, [SB 165](#), was "heard" in Senate Committee in January of 2008.

"*Legislator to Lobbyist' slowdown bill gets cold shoulder*" is the heading to [this ILB entry](#) from Jan. 17th. Several papers editorialize in favor of the bill in [this ILB entry](#) from Jan. 20th.

What came next, however, was this Jan. 27th entry, quoting [a front-page Star](#) story headed "*Insulted, senators kill legislator-to-lobbyist bill*": What followed was another round of editorials, quoted in [this Jan. 29th ILB entry](#).

Unfortunately, in the end, as reported above, "Miller's bill failed to reach the Senate floor" in 2008.

Posted by Marcia Oddi on [Sunday, November 23, 2008](#)

Posted to [Legislative Benefits](#)

#### 8.5. [IND. GOV'T. - "TROUBLED BY TOLL ROAD INVESTMENTS"](#)

Terese Ghilarducci, who, according to the **Indianapolis Star** identification at the end of the letter, "taught economics at the University of Notre Dame for 25 years, and is the Bernard and Irene Schwartz Chair of Economic Policy Analysis at the New School in New York," has [this letter to the editor](#) featured in today's **Star**:

Recently, we learned that \$1 billion of Indiana Toll Road lease proceeds was invested in corporate junk bonds and mortgage-backed securities. Since then, the Daniels administration has scrambled to convince Hoosiers that this is perfectly normal. As a former trustee of Indiana's public employee pension fund, an economics professor, and a trustee of national multibillion-dollar long-term funds, I take exception to the administration's attempt to paint its investment decisions in the best possible light.

At least four of the things I have heard from the administration are troubling. First, I do not agree that investing 22 percent of a major fund in a single type of security -- specifically, residential mortgage-backed securities issued by Fannie Mae and Freddie Mac -- represents a prudent balance of risk and return. To place this many of the state's funds in one basket is inconsistent with good practice in public finance.

Secondly, I am surprised that State Treasurer Richard Mourdock defended the state's holdings in corporate junk bonds -- worth about \$300 million -- as a low-risk investment. Junk bonds are investments

on par with stocks. In a press conference, he characterized the default rate on these bonds as less than 3 percent. This is no longer true in today's market. Many experts expect corporate junk bonds to default at rates several times those cited by the treasurer. Worse, the state holds more than \$42 million in bonds rated CCC or below -- the riskiest kind of speculative bond -- which one analysis recently predicted to default at a rate of more than 50 percent. If the labor and corporate trust funds I work with were seen investing in this way, it would raise red flags for possible policy violations.

Third, as a trustee of major pension and retiree health funds, I was surprised to learn that the Investment Policy Statement for the funds was not made accessible to the public until questions were raised. For a public fund this big, standard practice is to publish an extensive policy. The state's Public Employees' Retirement Fund, in contrast, is guided by a lengthy document, readily available on the Internet.

Last, Gov. Mitch Daniels has claimed that this is a technical matter housed completely within the treasurer's office. In my experience, any entity -- be it a government, a union or a corporation -- entrusted with a long-term fund this size, will regard that trust as one of its most important responsibilities. Accountability for its prudent management goes right to the top of the organization. That is the intent of the Sarbanes-Oakley legislation passed after the Enron debacle. CEOs take responsibility for management decisions.

The governor advanced Major Moves asking for a great deal of trust by the legislature and voters. He appealed to his experience as a corporate executive. The investment practices here were messy and should be fixed.

What does the Indiana constitution have to see about the duties of the Governor *vis-a-viz* the Treasurer?

**Article 5. Executive.** Sec. 1. The executive power of the State shall be vested in a Governor. He shall hold his office during four years, and shall not be eligible more than eight years in any period of twelve years. (*History: As Amended November 7, 1972*).

**Article 6. Administrative.** Sec. 1. There shall be elected, by the voters of the state, a Secretary, an Auditor and a Treasurer of State, who shall, severally, hold their offices for four years. They shall perform such duties as may be enjoined by law; and no person shall be eligible to either of said offices, more than eight years in any period of twelve years. (*History: As Amended November 3, 1970*)

Sec. 5. (a) The Governor, and the Secretary, Auditor, and Treasurer of State, shall severally keep the public records, books, and papers, in any manner relating to their respective offices, at the seat of government. (b) The Governor shall reside at the seat of government. (*History: As Amended November 3, 1998*)

**Article 10 - Finance.** Sec. 2. All the revenues derived from the sale of any of the public works belonging to the State, and from the net annual income thereof, and any surplus that may, at any time, remain in the Treasury, derived from taxation for general State purposes, after the payment of the ordinary expenses of the government, and of the interest on bonds of the State, other than Bank bonds; shall be annually applied, under the direction of the General Assembly, to the payment of the principal of the Public Debt.

**Article 11. Corporations.** Sec. 12. The State shall not be a stockholder in any bank; nor shall the credit of the State ever be given, or loaned, in aid of any person, association or corporation; nor shall the State become a stockholder in any corporation or association. However, the General Assembly may by law, with limitations and regulations, provide that prohibitions in this section do not apply to a public employee retirement fund. (*History: As Amended November 5, 1996*).

See also [this ILB entry](#) from Oct. 8th headed "*Indiana's Constitutional provisions guiding state investments.*"

Posted by Marcia Oddi on [Sunday, November 23, 2008](#)

Posted to [Indiana Government](#)

## 8.6. [IND. COURTS - YET MORE ON: GOD AND PRAYER CONTINUE IN INDIANA HEADLINES](#)

Updating [this ILB entry](#) from Friday, Nov. 21, here is [an interesting item](#) from the Niki Kelly and Benjamin Lanka authored Sunday column in the **Fort Wayne Journal Gazette**, "*Political Notebook*:"

Lost in the return of clergy-sponsored prayer at the Indiana Statehouse last week was a little-noticed rule change the House instituted that might help stave off future prayer lawsuits.

One of the reasons the American Civil Liberties Union of Indiana could present such a comprehensive recitation of all the Christian prayers when it unsuccessfully sued in 2005 was the videotape record of the prayers.

But House members changed the rules Tuesday during Organization Day so that video record might no longer exist.

In the past, the first order of business has been to call the house to order, which is the official start of the legislative session day – and the video recording.

Next were the prayer and the Pledge of Allegiance, followed by the roll call.

But under the new rule, the invocation will come first – before the House is called to order and the video is turned on. This makes the prayer less a part of official session business and also makes it voluntary, according to several Statehouse sources.

Unfortunately, the House Rules are not available online at the moment. [Go to this page](#), click "Senate Standing Rules" and you get the Senate Rules; click "House Standing Rules" and you get an error message. Hopefully the House Rules will return soon.

Another alternative would be to look at the House Journal for the opening day, which was Nov. 18th. However, if you go to [this page](#) and click "House Journals", you reach, at the moment, an empty page.

Posted by Marcia Oddi on [Sunday, November 23, 2008](#)

Posted to [Indiana Courts](#) | [Indiana Government](#)

## 9. [Saturday, November 22, 2008](#)

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### 9.1. [IND. COURTS - MISHAWAKA ATTORNEY ACCUSED OF MISCONDUCT](#)

Jeff Parrott [reports today](#) in the **South Bend Tribune** in a long story that begins:

State legal officials have accused a local attorney of continuing to practice law while he was suspended for misconduct, along with several acts that would be felony crimes if prosecuted in state and federal courts.

The Indiana Supreme Court Disciplinary Commission has filed the allegations against attorney Rodney P. Sniadecki.

The Supreme Court last fall suspended Sniadecki's law license for six months, effective Nov. 26, 2007, for violations that included lying to the commission about a sexual relationship he had with a woman whose divorce case he was handling, allowing a suspended attorney to work as a paralegal in his office, and representing a client despite having a conflict of interest.

In a 27-page complaint filed Thursday, the commission alleges that Sniadecki maintained a presence in his Mishawaka law office during his suspension and tried to conceal it, accepting and representing new clients, directing office employees and controlling money generated by the office.

The Supreme Court will next appoint a hearing officer, likely a trial court judge in the Michiana area, to determine whether the allegations are true. If misconduct is substantiated, the Supreme Court could reprimand, suspend or disbar him.

The **Tribune** also provides a link to the [27-page complaint](#) of the Indiana Supreme Court Disciplinary Commission, filed Nov. 20th.

Posted by Marcia Oddi on [Saturday, November 22, 2008](#)

Posted to [Indiana Courts](#)

### [9.2. IND. COURTS - "CEREMONY MARKS CONSTRUCTION OF NEW FEDERAL COURTHOUSE"](#)

Brian M. Boyce [reports today](#) in the **Terre Haute Tribune Star** in a story that begins:

TERRE HAUTE — A crowd huddled beneath a cold tent Friday afternoon on Ohio Street as officials said they hope a future courthouse will not only serve the community, but also will help with the city's development.

"For those of you who thought it would be a cold day in Terre Haute before they built another government building ... you were right," joked Judge Larry McKinney, U.S. District Court of the Southern District of Indiana, noting the cold temperatures.

McKinney and others participated in the groundbreaking ceremony for a new federal courthouse at 921 Ohio St. Officials hope to open the courthouse in July. \* \* \*

Tenants of the building will include the U.S. Bankruptcy Court and District Court, the U.S. Marshals, the U.S. Attorney and probation department.

Posted by Marcia Oddi on [Saturday, November 22, 2008](#)

Posted to [Indiana Courts](#)

### [9.3. IND. COURTS - STILL MORE ON RECOMMENDATION FOR MARION COUNTY SUPERIOR COURT JUDGE GRANT W. HAWKINS REMOVAL](#)

Updating [yesterday's ILB entry](#), Jon Murray of the **Indianapolis Star** reports today:

A Marion Superior Court judge whose court mishandled a ruling clearing a man of rape will be suspended after a state commission on Friday recommended his eventual removal from office.

The ultimate decision on Judge Grant Hawkins' fate lies with the Indiana Supreme Court. Until then, the action by the Indiana Commission on Judicial Qualifications triggers a suspension, with pay, under state judicial rules. \* \* \*

The commission's filing called Hawkins' oversight of his court "negligent and inexplicably casual." It backed an earlier recommendation for his removal by a panel of three judges appointed to hear the disciplinary proceeding.

"The general operation of his court caused a significant loss of liberty to Mr. Buntin, numerous violations of procedural due process to other petitioners, and a general breakdown of the public's trust," the commission says.

Retired Master Commissioner Nancy L. Broyles, who handled Buntin's case, earlier reached a settlement banning her from serving as a judge.

Hawkins, a former defense attorney, is well-regarded by many colleagues and received 90 percent approval in a 2006 Indianapolis Bar Association survey.

"He's been a terrific judge," Marion Superior Court Presiding Judge Gerald Zore said. "It's just a tragic situation."

A side-bar titled "*What's Next?*" reports:

Before the Indiana Supreme Court issues a disciplinary ruling, Judge Grant Hawkins has 20 days to submit a petition challenging the recommendation by the Indiana Commission on Judicial Qualifications that he be removed from office. The commission then may submit a reply within 10 days.

Posted by Marcia Oddi on [Saturday, November 22, 2008](#)

Posted to [Indiana Courts](#)

#### [9.4. IND. DECISIONS - STILL MORE ON: ANOTHER NEW TWIST ON TERRE HAUTE MAYORIAL RACE DISPUTE](#)

Updating [yesterday's ILB entry](#) about a "copy-cat" lawsuit in Evansville, based on the COA decision re the Terre Haute mayor's race, Thomas B. Langhorne [reports today](#) in the **Evansville Courier & Press**:

Days after Republican Vanderburgh County Commissioner Jeff Korb filed a petition arguing the Democrat who defeated him was ineligible to run, the local GOP filed a similar complaint against County Councilman-elect Ed Bassemier.

The party argues that Democrat Bassemier, safety director at Evansville Regional Airport since 2002, may have been ineligible to run for the County Council because of his employer's use of federal funds. \* \* \*

The Bassemier filing, and Korb's petition making similar claims about Democratic Commissioner-elect Steve Melcher, follow by days the Indiana Court of Appeals' finding that Terre Haute Mayor Duke Bennett was ineligible to run for that office in 2007 because he fell under the Little Hatch Act. The GOP also entered a filing against Melcher.

Posted by Marcia Oddi on [Saturday, November 22, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

#### [9.5. IND. COURTS - MORE ON: ALLEN COUNTY JUDGE SCHEIBENBERGER TO BE SUSPENDED FOR THREE DAYS](#)

Updating [yesterday's ILB entry](#), Jeff Wiehe of the **Fort Wayne Journal Gazette** has [a lengthy story today](#), under the headline "*Scheibenberger tirade nets 3-day suspension: Judge cursed at defendant's family while wearing robe.*" Some quotes:

Three days suspended with no pay.

That's what Allen Superior Court Judge Kenneth Scheibenberger will eventually receive for the obscenity-laced comments he made about another man in another judge's courtroom last year.

Scheibenberger reached an agreement this week with a state commission overseeing the ethical actions of judges as to what punishment should be meted out. The Indiana Commission on Judicial Qualifications, an arm of the state Supreme Court, filed formal disciplinary proceedings against Scheibenberger this summer claiming he committed judicial misconduct.

The Indiana Supreme Court accepted the terms, though it has not been decided when Scheibenberger will serve his suspension. He will also have to pay court costs, which have yet to be determined.

A statement from the court Friday called Scheibenberger a "grieving parent" when he sat in the gallery of another courtroom wearing his robe before he turned to the family of a man he believed sold drugs to his dead son and called that man a "a piece of (expletive)."

"I'm very sorry for what I did," Scheibenberger said. "I should not have gone into that courtroom under any set of circumstances." \* \* \*

The judicial commission's move to discipline Scheibenberger for such misconduct was a rare one and could have ended with him losing his job. The seven-member commission screens and investigates

allegations of judicial misconduct, sorting through hundreds of complaints each year with few resulting in any kind of formal reprimand or public admonishment, according to information from the commission.

In Scheibenberger's agreement to be suspended, the commission found he committed two of the four charges of misconduct against him. He failed to uphold the integrity of the judiciary and maintain high standards and also failed to avoid impropriety at all times or act in a manner promoting the public's confidence in the integrity of the judiciary, the commission ruled.

He did not commit conduct prejudicial to the administration of justice or commit willful misconduct while in office, according to Meg Babcock, an Indianapolis attorney representing the commission.

A hearing set for next week before a panel of other Indiana judges where Scheibenberger and the commission were to state their cases has been canceled.

"I'm satisfied that it's an appropriate punishment for what I did," Scheibenberger said.

The confrontation with Warren's family is not the first time Scheibenberger, appointed to the bench in 1991 then elected in 1992, has been on the receiving end of formal punishment.

In December 2002, the judge drew a public admonition from the judicial commission after he obtained the file for a criminal case against his son and made an entry to delay a hearing in the case, though he was not the judge overseeing the case.

The following July, Scheibenberger underwent treatment for alcohol addiction at an out-of-state treatment facility.

Posted by Marcia Oddi on [Saturday, November 22, 2008](#)

Posted to [Indiana Courts](#)

## 10. [Friday, November 21, 2008](#)

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### 10.1. [IND. COURTS - MORE ON RECOMMENDATION FOR MARION COUNTY SUPERIOR COURT JUDGE GRANT W. HAWKINS REMOVAL](#)

[On Nov. 7 the ILB posted](#) the 70-page "Master's Findings of Fact, Conclusions of Law, and Recommendations to the Supreme Court."

Today the Indiana Commission on Judicial Qualifications, by counsel, and with the Chief Justice and Commission member John Trimble not participating:

files its Response to the Masters' Report and its Recommendation.

1. The Commission concurs with the Report of the Masters, and asks the Court to adopt it in its entirety.
2. The Commission recommends to the Court that it remove Judge Grant W. Hawkins from office.
3. The Commission asks the Court to suspend Judge Hawkins immediately pursuant to Admission and Discipline Rule 25 V B, which provides, "A judicial officer shall be suspended with pay while there is pending before the Supreme Court a recommendation from the Commission... for the removal of the judicial officer."

WHEREFORE, the Indiana Commission on Judicial Qualifications, by counsel, and with the Chief Justice and Commission member John Trimble not participating, having no objections to the Masters' Report and recommending removal from office, asks the Court to immediately suspend Judge Hawkins with pay pending the Court's decision. If the Court adopts the Masters' and the Commission's recommendations and issues an Order of removal, the Commission asks the Court, at that time, to find him permanently ineligible for judicial office and to assess against him all costs of this proceeding.

Access the [Response](#) here.

And here is the 19-page [Memorandum in Support](#) of Commission's Recommendation of Removal. (Warning - this is 8 MB)

Posted by Marcia Oddi on [Friday, November 21, 2008](#)

Posted to [Indiana Courts](#)

## 10.2. [IND. COURTS - SUPREME COURT ON IMPROPER USE OF SUBPOENA](#)

In [In re Anonymous](#), a disciplinary case, the Supreme Court writes in a 4-page per curiam opinion:

We approve the parties' agreement that Respondent engaged in attorney misconduct by improperly using subpoenas before the commencement of litigation and that Respondent should receive a private reprimand.

Respondent represented an insurance company. A third person made a claim against the company, asserting that an insured had caused personal injury to him. Before any legal action had been filed, Respondent served the third person on three separate occasions with a subpoena duces tecum commanding the third person to appear for an examination under oath with specified documents. Each subpoena commanded production of the documents pursuant to "Indiana Trial Rule 45(B)" and purported to be issued "pursuant to the provisions of Trial Rule 34(C) and 45(A)(2) of the Indiana Rules of Procedure." The third party did not comply with any of the subpoenas.

The parties agree that Respondent had no authority to use subpoenas before litigation had commenced and that Respondent violated these Professional Conduct Rules \* \* \*

By using subpoenas, Respondent purported to issue orders on behalf of a court, rather than simply making requests on behalf of an insurance company. Respondent's improper use of subpoenas tended to give the third party (who apparently was unrepresented) the false impression that he could be held in contempt of court if he failed to appear and produce the documents requested.

An offense of this gravity would usually have warranted discipline more severe than a private reprimand, but in light of the lack of adverse consequences and Respondent's cooperation with the Commission, the Court approves the agreed discipline.

Conclusion. For Respondent's professional misconduct by improperly using subpoenas before the commencement of litigation, the Court imposes a private reprimand. The costs of this proceeding are assessed against Respondent. The hearing officer appointed in this case is discharged.

Posted by Marcia Oddi on [Friday, November 21, 2008](#)

Posted to [Ind. Sup.Ct. Decisions](#)

## 10.3. [IND. COURTS - ALLEN COUNTY JUDGE SCHEIBENBERGER TO BE SUSPENDED FOR THREE DAYS](#)

Updating this long [list of ILB entries](#), including the most recent [from Sept. 10th](#) headed "*Panel to rule on Allen judge's outburst*," the "parties have agreed that the appropriate sanction in this matter is a three-day suspension from office without salary."

[Here are the](#) Supreme Court's *Order Accepting Agreed Discipline* and the *Statement of Circumstances and Conditional Agreement for Discipline*.

Posted by Marcia Oddi on [Friday, November 21, 2008](#)

Posted to [Indiana Courts](#)

## 10.4. [IND. DECISIONS - 7TH CIRCUIT DECIDES ONE INDIANA CASE](#)

In [Dale v. Poston, et al](#) (SD Ind., Judge Barker), a 17-page opinion, Judge Evans writes:

Curtis Dale, a federal prisoner, filed this suit in 2002 against several prison employees claiming that they violated the Eighth Amendment by failing to protect him from an attack by another inmate. The case has gone back and forth with both Dale and the government going 2 for 4: a loss for Dale at the pleading stage, a win by Dale on appeal, a win by Dale before a jury on a threshold issue, and finally a loss for Dale on summary judgment. The last loss brings the case before us a second time. \* \* \*

Usually, we begin our discussion in a case like this by repeating the oft-stated rule that we review the facts in the light most favorable to the nonmoving party. In this case, however, the facts as we will soon go on to state them come from the government because the district court concluded that Dale's "Statement of Facts" violated the court's local rule. For reasons we will explain later, that little twist causes no concern as we proceed to recall the settled facts in some detail. \* \* \*

Dale cites scholarly materials to show that informants occupy the lowest rung in the prison hierarchy. See, e.g., Robertson at 461 ("The inmate code condemns snitching. Indeed, as an act of betrayal, it merits assault, sodomy, and even murder."). We do not doubt that. Nor do we doubt that protective custody is often necessary to ensure the safety of these inmates. However, that only proves the reasonableness of the defendants' actions—they offered to place Dale in protective custody. It's a shame he refused, but the defendants really can't be blamed. And even if they can, they were negligent at most. The Eighth Amendment requires more than that. *Duckworth v. Ahmad*, 532 F.3d 675, 679 (7th Cir. 2008).

The judgment of the district court is AFFIRMED.

Posted by Marcia Oddi on [Friday, November 21, 2008](#)

Posted to [Ind. \(7th Cir.\) Decisions](#)

## 10.5. [IND. DECISIONS - COURT OF APPEALS ISSUES 0 TODAY \(AND 2 NFP\)](#)

**For publication opinions today (0):**

**NFP civil opinions today (0):**

**NFP criminal opinions today (2):**

[Lamar Owens v. State of Indiana \(NFP\)](#)

[Wesley Ramirez v. State of Indiana \(NFP\)](#)

Posted by Marcia Oddi on [Friday, November 21, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

## 10.6. [IND. LAW - "MAYBE STATE IS ASKING TOO MUCH OF LICENSE PLATES "](#)

That is the headline to [a just-posted editorial today](#) in the **Fort Wayne News-Sentinel**. The subhead: "*God only knows what the next specialty-plate controversy will be.*" Here it is:

The state of Indiana has lately gotten itself into a God-awful mess over license plates. It no sooner won one lawsuit for its "In God We Trust" plates than it had to change its mind to get rid of another suit filed by a woman who was refused a "BE GODS" vanity plate. Maybe it's time for the state to rethink this whole specialty-plate business.

The "In God We Trust" plates have been a huge hit with motorists. The trouble is that the state hasn't charged the \$15 administrative fee it does for most specialty plates. That plate, said the lawsuit brought by the ACLU, constitutes a "private religious message" and should be subject to the same fee on most advocacy group plates. Not so, said a three-judge panel of the Indiana Court of Appeals: "We are not

convinced that 'In God We Trust,' our national motto, can be categorized as a purely private message since the license plate can be construed to express either a public or private sense of national citizenship or patriotism in addition to a private expression of religious belief," wrote Judge Margret Robb.

If only the story ended there. The state would have looked reasonable. It was just accommodating the people's desire to express their religious sentiments in a way that harmed no one else or the society at large.

But then came the lawsuit from Liz Ferris. For years, she had "BE GODS" vanity plates. But this year, she ran afoul of new Bureau of Motor Vehicle rules classifying vanity plates as "limited public forums" from which all references to religion, politics, gender and sexual orientation are banned. The state relented and grandfathered her plates in, but not before a contradiction became painfully apparent:

The state can approve a religious sentiment as a specialty plate, but a citizen can't have one as a vanity plate? What real difference is there between "In God We Trust" and "BE GODS"? If Indiana were trying to prove the point that it wants to set up a state-approved religion, it couldn't have done a better job.

Letting people express personal sentiments on license plates seems like a reasonable idea, and directing some of the money raised to worthy groups is hard to argue with. But look how messy - and time-consuming - it becomes in reality. Maybe the state should go back to one boring license plate that just identifies the car and collects money for the privilege of driving.

Posted by Marcia Oddi on [Friday, November 21, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

#### **10.7. [IND. LAW - MORE ON: OTHER MAYORS' RACES STILL AT ISSUE?](#)**

On Nov. 19th [the ILB posted this entry](#), asking whether the mayoral races in Anderson and Muncie were still at issue.

I've received a response from Bill Groth, Fillenwarth Dennerline Groth & Towe, LLP, who writes:

Marcia: Regarding your post querying the status of the mayoral disputes in Anderson and Muncie, I am/was involved in both and here's the latest:

Anderson: I represented mayor-elect (now Mayor) Kris Ockomon in this case. The Special Judge from Henry County dismissed former Mayor Kevin Smith's lawsuit early last Spring, holding that Smith and the other Plaintiffs had failed to state a cognizable claim for quo warranto since Smith, as the candidate receiving by far the fewest votes, was unable to prove a superior title to the office of Anderson mayor and was basing his claim solely on the alleged weakness of Mayor Ockomon's title to that office (Smith and his fellow Republicans claimed Ockomon had failed to meet the 1-year residency requirement). I argued that the Court should never overturn the results of an election absent a showing that the voters knowingly had voted for an unqualified candidate citing, inter alia, *Oviatt v. Behme*. Interestingly, that case played a prominent role in the COA's decision last week in the Terre Haute mayoral case. I can have my office forward you a copy of the Special Judge's decision if you're interested. Former mayor Smith, et al. filed a motion to correct error, which the SJ denied, but then never perfected an appeal.

Muncie: I represent the Democratic nominee for mayor, Jim Mansfield, in this case. It is far from over and still very much alive. As of last week the appeal is now fully briefed. You may want to take a look at the COA's electronic docket to see how the appeal has progressed. We are claiming on appeal that the special judge from Jay County erred when he dismissed Democratic Party candidate Mansfield's contest petition on timeliness grounds. Mansfield you may recall was first certified as the winner, only to fall behind by 13 votes after a recount tossed out 19 absentee ballots because they weren't initialed by the Republican clerk. The contest petition seeks a special election in the precinct from which those ballots came on the ground that the ballots were distributed by mistake, and alleges that this error in the distribution of ballots makes it impossible to determine which candidate received the highest number of votes from legitimate voters. Even though Mansfield had no basis for filing it within the 14 day period after

the election (because he was the certified winner) the SJ dismissed it as untimely even though Mansfield had filed his contest within a few days after the recount commission certified his opponent, McShurley, as the new winner. We are also claiming that the trial court again erred when it later dismissed Mansfield's amended quo warranto complaint, which also seeks a special election based on the distribution of these flawed absentee ballots. We expect a decision in the case in the next 2-4 months. Again, I would offer to email you the briefs if you'd like to read and/or post them.

I replied yes, the **ILB** would be pleased to post both the Special Judge's decision in the Anderson case, and the briefs in the Muncie case. When they arrive, I will insert the links in the above.

Posted by Marcia Oddi on [Friday, November 21, 2008](#)

Posted to [Indiana Law](#)

#### **10.8. [IND. DECISIONS - MORE ON: ANOTHER NEW TWIST ON TERRE HAUTE MAYORIAL RACE DISPUTE](#)**

Updating [this ILB entry](#) from Nov. 18th, **14WFIE News** [reported](#) yesterday in a story by Liz Nichols that begins:

EVANSVILLE, IN (WFIE) - We're learning more tonight about a petition filed against an incoming Vanderburgh county commissioner.

Jeff Korb, who holds the seat now, is accusing the man who beat him in the election, Steve Melcher, of violating a state law. It comes after a land-mark decision from the Indiana Court of Appeals last week.

On election night Melcher beat Korb by more than 6,000 votes, but Korb says that doesn't matter. Korb claims Melcher violated a state law that prohibits the federal government from interfering in the election process. After a ruling in another case overturned a local election Korb decided to contest. \* \* \*

The reason is a state law called the Little Hatch Act, which prohibits someone to run or hold elected office if their current employer receives federal funding.

In this case Korb accuses Melcher of violating that law because he works at the Community Action Program of Evansville. CAPE runs the federally-funded Head Start program, which provides early education for low-income households.

Just last week the Indiana Court of Appeals overturned the mayoral election in Terre Haute because the candidate worked for a company that also ran Head Start.

"Mr. Korb had no intention of doing anything until the Terre Haute decision came down," said Korb's attorney, Mark Foster.

The Little Hatch Act has never overturned a local election until now. That's why, according to Korb's attorney, he decided to file the petition."

"The facts being so similar, he felt like, the law's the law, he needs to enforce it," Foster said.

**[More]** Arthur E. Foulkes of the **Terre Haute Tribune Star** has [a lengthy story today](#) on the Hatch Act.

Posted by Marcia Oddi on [Friday, November 21, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

#### **10.9. [IND. COURTS - STILL MORE ON: GOD AND PRAYER CONTINUE IN INDIANA HEADLINES](#)**

Updating [this ILB entry](#) from yesterday, Nov. 20th, the **Indianapolis Star** has [an editorial today](#) that begins:

An occasional collision at the intersection of religion and government may be unavoidable, but a series of recent run-ins over church-state matters illustrates the damage that can be rendered when public officials are heavy-handed and inconsistent.

The editorial covers the three stories (BMV plates, disrupting City Council meeting with prayer, and clergy-led prayer in the GA) the **ILB** also combined in [this entry](#) from Nov. 19th, and concludes:

Given the emotions involved, some disputes over the proper role of religion in public life are inevitable; but to minimize such problems it's incumbent on officials to weigh opposing points of view, to search for sound compromises and to apply rules consistently.

Posted by Marcia Oddi on [Friday, November 21, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

#### **10.10. [IND. GOVT. - MORE ON: IU'S LEGAL BILLS FOR SAMPSON ISSUES ARE \\$203K SO FAR](#)**

Updating [this ILB entry from May 29th, 2008](#), Mark Alesia reports today in the **Indianapolis Star** in a story that begins:

Indiana University's legal bills have reached almost a half-million dollars in the NCAA infractions case related to former men's basketball coach Kelvin Sampson.

Through July, IU had spent \$497,646 on outside legal counsel specializing in NCAA issues, including \$211,034 for work done starting in April.

More bills, related to the school's September response to the NCAA's charge of "failure to monitor," are expected.

The latest bill was released Thursday by the school after a public records request by The Star. The time period for the latest bill included a two-day hearing in Seattle before the NCAA infractions committee. The failure-to-monitor charge was added after that hearing.

About \$470,000 of the total legal bills came from the Indianapolis firm Ice Miller. The rest were for an attorney representing Sampson and IU at an NCAA infractions committee hearing in 2006 for violations while Sampson was coach at Oklahoma.

Most interestingly, here are the legal bills, via the **Star**:

- 19-page bill from Ice Miller for [7/13/07-11/30/07](#)
- 7-page bill from Ice Miller for [1/2/08-2/29/08](#)
- 10-page bill from Ice Miller for [4/1/08-7/31/08](#)

Actually, the 19-page bill covers more time than the **Star** describes - pp 14-16 covers Dec. 07; pp 17-18 covers March 08.

Posted by Marcia Oddi on [Friday, November 21, 2008](#)

Posted to [Indiana Government](#)

#### **11. [Thursday, November 20, 2008](#)**

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##### **11.1. [IND. DECISIONS - COURT OF APPEALS ISSUES 0 TODAY \(AND 9 NFP\)](#)**

**For publication opinions today (0):**

**NFP civil opinions today (2):**

[Term. of Parent-Child Rel. of K.L. v. Indiana Dept. of Child Services of Bartholomew County \(NFP\)](#) - " Michael Lacefield ("Father") appeals the involuntary termination of his parental rights to his daughter, K.L., claiming the Bartholomew County Department of Child Services ("BCDCS") failed to prove (1) that the conditions resulting in K.L.'s removal or continued placement outside his care will not be remedied and (2) that continuation of the parent-child relationship poses a threat to K.L.'s well-being. Concluding that the juvenile court's judgment terminating Father's parental rights to K.L. is supported by clear and convincing evidence, we affirm. "

[Mark E. LaFlech & Diana L. LaFlech v. Robert A. White & Gloria Carney \(NFP\)](#) - " Mark and Diana LaFlech appeal the trial court's dismissal of their breach of contract claim against Robert White. We reverse and remand. \* \* \*

"Given the evidence, we cannot say that the LaFleches breached the August 30 Agreement, where the LaFleches executed the necessary documents to transfer the ATC permit. We therefore find that the evidence points to a conclusion different from the one reached by the trial court."

#### **NFP criminal opinions today (7):**

[Mattie L. King, Jr. v. State of Indiana \(NFP\)](#)

[Roger M. Thompson v. State of Indiana \(NFP\)](#)

[Herman C. Bernard v. State of Indiana \(NFP\)](#)

[Tim E. Leitch v. State of Indiana \(NFP\)](#)

[Robert Wilson v. State of Indiana \(NFP\)](#)

[Juventino Jose Castillo v. State of Indiana \(NFP\)](#)

[Brian K. Chase v. State of Indiana \(NFP\)](#)

Posted by Marcia Oddi on [Thursday, November 20, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

#### **11.2. [IND. DECISIONS - TWO TODAY FROM 7TH CIRCUIT](#)**

In [US v. Webb](#) (ND Ind., Judge Springmann), a 5-page opinion, Chief Judge Easterbrook concludes:

Given this evidence—and there was more—the fact that Webb had a drug conviction on his record could not have affected the jury's verdict. The harmless-error rule means that district judges, rather than courts of appeals, are the principal enforcers of limits on other-crime evidence. We trust that district judges will review evidence of this kind carefully to ensure that it really is relevant, and serves a legitimate goal rather than leading to the forbidden propensity inference. The judgment is affirmed.

In [US v. Ellis](#) (SD Ind., Judge Hamilton), a 13-page opinion, Judge Flaum writes:

Susan Ellis has appealed her eight counts of failure to account for and pay federal taxes in violation of 26 U.S.C. § 7202. Ellis objects to two of the district court's rulings admitting evidence against her, the enhancement of her sentence based on her supposed perjury, and the fine imposed by the district court. For the reasons discussed below, we affirm on all counts.

Posted by Marcia Oddi on [Thursday, November 20, 2008](#)

Posted to [Ind. \(7th Cir.\) Decisions](#)

#### **11.3. [IND. LAW - MORE ON: RECODIFICATIONS, LEGISLATIVE HISTORIES, AND TABLES](#)**

In [an Oct. 22nd ILB entry](#) I wrote:

Following on the two-part article titled "[Can you rely on the Indiana Code](#)," I have a brief article slated for publication in the November issue of *Res Gestae*, titled "[Recodifications, legislative histories, and tables, Part I](#)." This subject was mentioned among the recommendations at the end of the article in last month's *Res Gestae*. Here is a link to an advance ([draft](#)) copy .

Now [the "as published" version of the recodifications article is available, here](#).

Here also are the links to [Part I](#) and [Part II](#) of the earlier, "[Can you rely on the Indiana Code](#)" article.

Posted by Marcia Oddi on [Thursday, November 20, 2008](#)

Posted to [Indiana Law](#)

#### 11.4. [IND. DECISIONS - "LOVELESS' BID TO TOSS PRISON TERM DENIED"](#)

The Court of Appeals decision Nov. 14th in the case of *Melinda Loveless v. State of Indiana* (see [ILB entry here](#) - 4th case) is the subject of [a story today](#) by Harold J. Adams in the **Louisville Courier Journal** that begins:

The ringleader in the brutal torture and murder of a 12-year-old New Albany girl nearly 17 years ago has lost her latest bid to have her 60-year prison term thrown out.

Melinda Loveless, then 16, was one of four teenage girls convicted in the killing of Shanda Renee Sharer. She was kidnapped Jan. 10, 1992, and was beaten, stabbed and set on fire before her body was dumped on a dirt road near Madison.

Loveless, 33, argued in a motion for post-conviction relief that she received ineffective counsel and signed a plea deal under duress, believing she might face execution.

She also challenged the Indiana penal code as unconstitutional and sought release or a new trial. Jefferson Circuit Judge Ted Todd denied her motion in January, and the appeals court upheld Todd's ruling Friday.

Posted by Marcia Oddi on [Thursday, November 20, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

#### 11.5. [IND. DECISIONS - MORE ON "THIRD JOHN DOE DENIED BY JUDGE"](#)

Updating [this ILB entry](#) from Feb. 28th, Sophia Voravang of the **Lafayette Journal & Courier** [reports today](#) that one of the John Does has dropped his suit:

A Lafayette man is no longer challenging an Indiana law that prohibits sex offenders convicted of crimes against children from living near places frequented by youth.

Using the pseudonym John C. Doe, the man filed a civil lawsuit in June against Tippecanoe County Sheriff Tracy Brown and Prosecutor Pat Harrington, challenging their enforcement of the statute.

This came after Doe was told he again had to move, this time from a residence formerly approved by the sheriff's department. His attorney, Earl McCoy, said Wednesday that Doe has since found a new place to live.

"Because of the Indiana Court of Appeals ruling earlier this year ... where they essentially determined each situation would be decided on a case by case basis, each litigant would incur the heavy costs of a trial and potential appeal," McCoy said. "In this case, he ended up finding another residence acceptable to him.

"He decided to go ahead and move and drop it at this time."

Judge Thomas Busch of Tippecanoe Superior Court 2, where Doe's complaint had been filed, recently granted a motion by McCoy to dismiss the lawsuit.

Posted by Marcia Oddi on [Thursday, November 20, 2008](#)

Posted to [Ind. Trial Ct. Decisions](#)

#### 11.6. [IND. COURTS - MORE ON: GOD AND PRAYER CONTINUE IN INDIANA HEADLINES](#)

Updating [this ILB entry from yesterday](#), Jon Murray [reports today](#) in the **Indianapolis Star** under the heading "*BMV gives*

*in -- a little -- on 'God' plates: Plaintiff, 3 others who made request before ban took effect only ones who'll get their wish."* Some quotes:

God will grace a few more Hoosier license plates under a partial reversal Wednesday by the Bureau of Motor Vehicles -- but for new personalized plates, a God-less policy will stand.

Facing a lawsuit, BMV Commissioner Ron Stiver overruled an earlier decision denying a plate reading "BE GODS" to a woman who had had the plate for years but missed a renewal deadline. He also reversed denials for three other plates Wednesday.

All four requests came in before the BMV's new policy that bars references to religion or a deity -- a restriction rarely enacted by other states -- took full effect this month.

The decision means BE GODS can join GOD CAN, GODS KID and PSALM25 on the road when those motorists' registrations come up in 2009, a BMV spokesman said. \* \* \*

The Alliance Defense Fund, a Scottsdale, Ariz.-based group whose mission includes advocating for religious liberty, plans to press forward with Ferris' suit, attorney Erik Stanley said.

The BMV handles about 12,000 personalized-plate requests a year. The suit argues that the new rule violates constitutional rights including free speech and exercise of religion.

In a statement, Stiver defended the measure. A committee proposed it late last year along with other changes, but the rule didn't become administrative law until Nov. 6.

"Simply stated," Stiver said, "if the BMV approves such pro-deity plates as 'GOD CAN,' the agency has no grounds to reject such plates as 'GOD CANT,' 'GODLESS,' or other more extreme anti-deity plates that have been requested and that most Hoosiers would find offensive."

The BMV's grandfather rule exempts existing plates as long as their owners renew on time.

All states restrict obscenity on vanity plates and have varying rules, but Indiana is among just a few to ban religious references.

Courts have not set uniform guidelines, though a federal judge in Vermont has upheld that state's prohibition of religious references. The Alliance Defense Fund is appealing for a man who sought "JN36TN," short for John 3:16.

Indiana's new rule applies to personalized plates, but not to the 2 million vehicles carrying "In God We Trust" plates -- an option created by the General Assembly, Stiver noted, and which contains the official U.S. motto.

Posted by Marcia Oddi on [Thursday, November 20, 2008](#)

Posted to [Indiana Courts](#) | [Indiana Government](#)

## [12. Wednesday, November 19, 2008](#)

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### [12.1. IND. LAW - OTHER MAYORS' RACES STILL AT ISSUE?](#)

Either nothing more has happened or I've lost track of the Anderson mayor's race, where [the most recent ILB entry is from Jan. 7th](#), announcing that a special judge had been appointed to hear a legal challenge to the eligibility of Anderson Mayor Kris Ockomon.

The dispute over the Muncie mayor's race apparently came to an end in February, per this [Feb. 8th ILB entry](#).

Posted by Marcia Oddi on [Wednesday, November 19, 2008](#)

Posted to [Indiana Government](#) | [Indiana Law](#)

## 12.2. [IND. LAW - "RECORDINGS DETAIL ALLEGED VOTER FRAUD IN JEFFERSONVILLE" MAYOR'S RACE](#)

Another mayor's race in the news, but in this case it is because voter fraud is alleged. David A. Mann [has the story](#) in this evening's **Jeffersonville / New Albany News & Tribune**.. Some quotes:

Audio recordings between a private investigator hired by former Jeffersonville Mayor Rob Waiz and several voters who used absentee ballots during the 2007 Democratic Party primary detail allegations of voter fraud that would have benefited Mayor Tom Galligan.

Galligan defeated Waiz during the race and then won the office that November. \* \* \*

In one of the recordings, a voter — whose name was not released — told the investigator that Galligan campaign workers showed up at his door asking him to fill out an absentee ballot application. And later, Galligan himself showed up and instructed him on how to vote.

Another voter, again unidentified, told the investigator that a campaign worker asked her to fill out a ballot application while she was visiting someone in Jeffersonville.

The voter informed the campaign worker that she was a Louisville resident and has never lived in Jeffersonville. But she was told that didn't matter.

Her vote later showed up as being counted, Waiz said. \* \* \*

The allegations are among those at the center of an investigation by state officials and special prosecutor Ron Simpson, which has been in the works for nearly a year.

Simpson, from Harrison County, was appointed on the request of Clark County Prosecutor Steve Stewart, whose wife works in Galligan's office.

Simpson said Tuesday that an initial investigation by the Indiana Attorney General's Office, the Indiana State Police and the Indiana Secretary of State has revealed no wrongdoing.

He was ready to file a report to that effect, but upon urging from Waiz, decided to subpoena 21 voters with questionable absentee ballots.

Sworn depositions will be taken under oath Friday, he said. Such statements can sometimes be different than those given off the cuff to a private investigator, Simpson said.

"I'm just glad to see that things are starting to move forward," Waiz said. "I feel good that something will come out of it."

Posted by Marcia Oddi on [Wednesday, November 19, 2008](#)

Posted to [Indiana Government](#) | [Indiana Law](#)

## 12.3. [LAW - "YOU TAKE THE HOUSE!' 'NO, YOU TAKE THE HOUSE.' 'I DON'T WANT IT, YOU TAKE IT."](#)

Monica Hatcher's [story](#) in the Nov. 15th **Miami Herald** is headed "*When couples split, the home is a hot potato: In this period of a declining housing market and negative equity, there's a different kind of divorce battle for custody of the house -- neither spouse wants it.*" It begins:

During the real-estate boom, couples who divorced would fight over who got the house, betting that the winner could get rich from rapidly escalating prices. Spouses plunked down thousands to buy out their partner. Disposing of the "marital asset" was easy, since homes were selling in a day or two for inflated prices.

Now, in a twist on the classic divorce dispute, houses have become hot potatoes for couples divorcing during the downturn.

'It's like, 'You take the house!' 'No, You take the house.' 'I don't want it, you take it,' " said Drew Sheridan, a veteran divorce lawyer in Kendall.

Falling property values have turned many homeowners upside down on their mortgages, meaning they owe more than their homes are worth. Negative home equity has made it much harder for divorcing couples to disentangle their finances.

In some cases, they are abandoning their property to foreclosure because neither can afford the loan payments and they can't sell the house for what they paid for it.

Posted by Marcia Oddi on [Wednesday, November 19, 2008](#)

Posted to [General Law Related](#)

#### **12.4. IND. DECISIONS - COURT OF APPEALS ISSUES 1 TODAY (AND 9 NFP)**

##### **For publication opinions today (1):**

In [Paul M. Davis v. All American Siding & Windows, Inc.](#), a 14-page opinion, Judge Bradford writes:

Appellant/Plaintiff Paul M. Davis appeals from the trial court's grant of summary judgment in favor of Appellee/Defendant All American Siding & Windows, Inc. ("All American"). Davis contends that All American is obligated to pay him commissions he allegedly earned before terminating his employment with All American and that those commissions are subject to the Indiana Wage Payment Statute. We reverse and remand with instructions. \* \* \*

We conclude that Davis is owed commissions that he earned before leaving All American. Davis designated uncontradicted evidence that the Bolin, Calhoun, Carroll, Confer, Gambrell, Losh, Reeves, Royal, Tucker, and Vickery projects were completed and were not renegotiated so as to alter his commission. We remand for trial, however, on the question of whether the parties had a meeting of the minds regarding whether the commissions were to be reduced by the amount that the final contract price fell short of the final par job cost. The answer to this question will determine if commissions are to be paid, or affect the amount of the commissions, on the Berger/Turner, Daugherty, Harding, Hart, Keen, and Oakley projects. The total amount of commissions will be offset by the \$5916.70 in training pay and draws on commissions that Davis has already been paid. Finally, we conclude that Davis's commissions are not "wages" for purposes of the Indiana Wage Payment Statute. We reverse the trial court's entry of summary judgment in favor of All American and remand for further proceedings not inconsistent with this decision.

##### **NFP civil opinions today (1):**

[In the Matter of the Adoption of A.S. \(NFP\)](#) - "Appellant-respondent Raquel Nelson appeals the trial court's grant of adoption of her minor daughter, A.S., in favor of the appellee-petitioner, A.S.'s stepmother (Stepmother). Specifically, Nelson argues that Stepmother failed to establish by clear and convincing evidence that Nelson's consent to the adoption was not required because she had abandoned A.S. and that the adoption was in A.S.'s best interest. Finding no error, we affirm the judgment of the trial court."

##### **NFP criminal opinions today (8):**

[Jordan Guess v. State of Indiana \(NFP\)](#)

[Charley E. Kingery, Jr. v. State of Indiana \(NFP\)](#)

[William Roger Zeider v. State of Indiana \(NFP\)](#)

[Brandon L. Phillips v. State of Indiana \(NFP\)](#)

[Marc L. Blanchette v. State of Indiana \(NFP\)](#)

[Wayne Reynolds v. State of Indiana \(NFP\)](#)

[Stevie W. Davis-El v. State of Indiana \(NFP\)](#)

[Antonio D. Wright v. State of Indiana \(NFP\)](#)

Posted by Marcia Oddi on [Wednesday, November 19, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

## [12.5. IND. COURTS - MORE ON: STEUBEN COUNTY COUNCIL TO CUT SUPPLEMENTAL SALARIES FROM JUDICIAL POSITIONS](#)

Updating [this ILB entry](#) from Nov. 15th, [WLKI News](#), Angola, is reporting today:

After hearing from members of the judicial community and their supporters, the Steuben County Council reversed course this morning and re-established supplemental pay for the countys judges as well as for the county prosecutor and assistant prosecutor. The Council decided last week when they passed the 2009 budget to remove \$5,000 in supplemental income for each position after the state raised salaries for judges. But Circuit Judge Allen Wheat pointed out what the Council did is against state law. Council Member Sara Tubergen felt there should be a reversal of last weeks decision because the raises from the state fell under Cost of Living Allowances, commonly known as COLA. The Council agreed to put the supplemental pay back in the budget on a 6-1 vote with Paul Sparks casting the only no vote.

Posted by Marcia Oddi on [Wednesday, November 19, 2008](#)

Posted to [Indiana Courts](#)

## [12.6. IND. DECISIONS - 7TH CIRCUIT ISSUES ONE TODAY, RE INDIANA EMPLOYMENT AT WILL](#)

In [Bregin v. Liquidebt Systems](#) (ND Ind., Judge Springmann), an 11-page opinion, Judge Evans writes:

After Donald A. Bregin was discharged from his employment at Liquidebt Systems, Inc. (LSI) he filed this lawsuit, contending that his discharge was in retaliation for his refusal to participate in illegal accounting practices or, alternatively, for being a whistle-blower, and that SIRVA, Inc. (in conspiracy with LSI) tortiously interfered with his employment. The district court granted summary judgment for both companies, and Bregin appeals. Our review is *de novo*. \* \* \*

Bregin filed this lawsuit under Indiana law, contending, in part, that LSI terminated his employment in retaliation for his reporting SIRVA's illegal financial practices, for refusing to engage in those practices, or for being a whistle-blower. Given the undisputed facts, the claim must fail.

Recently, the Indiana Supreme Court reaffirmed the Indiana employment-at-will doctrine which "permits both the employer and the employee to terminate the employment at any time for a 'good reason, bad reason, or no reason at all.'" *Meyers v. Meyers*, 861 N.E.2d 704, 706 (Ind. 2007), quoting *Montgomery v. Bd. of Trustees of Purdue Univ.*, 849 N.E.2d 1120, 1128 (Ind. 2006). The court stated that on "rare occasions, narrow exceptions have been recognized." *Meyers*, at 706. On one "rare" occasion a "narrow" exception was found in *McClanahan v. Remington Freight Lines, Inc.*, 517 N.E.2d 390 (Ind. 1988). McClanahan was a truck driver who was permitted to pursue a cause of action against an employer who fired him for refusing to haul a load that exceeded the weight limits on Illinois highways. He could have been personally liable for a violation. A narrow exception to at-will employment was recognized in that case to avoid encouraging criminal conduct. A second exception is set out in *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973). The court found a cause of action for retaliatory discharge based on explicit language in a statute—the Indiana Worker's Compensation Act. The court said that "under ordinary circumstances, an em- ployee at will may be discharged without cause. However, when an employee is discharged solely for exercising a statutorily conferred right an exception to the general rule must be recognized." At 428. The narrowness of this exception was made clear, however, in *Wior v.*

*Anchor Industries, Inc.*, 669 N.E.2d 172 (Ind. 1996), when the court refused to allow a claim brought by a manager who was terminated for refusing to follow a supervisor's order to fire an employee who filed a worker's compensation claim. \* \* \*

Affirmed

Posted by Marcia Oddi on [Wednesday, November 19, 2008](#)

Posted to [Ind. \(7th Cir.\) Decisions](#)

## **12.7. IND. DECISIONS - IND. DECISIONS - EVEN MORE ON: COURT OF APPEALS NULLIFIES 2007 MAYORAL ELECTION**

First, here is [a list of earlier ILB entries](#) on the Terre Haute mayor election.

Today Arthur E. Foulkes of the **Terre Haute Tribune Star** [reports](#) under the headline "*Burke regrets not double-checking rivals' eligibility: Burke says he offered deal to drop litigation.*" Some quotes from the lengthy story:

Former Terre Haute Mayor Kevin Burke says he made a private inquiry into then-candidate Duke Bennett's eligibility to run for mayor before the November 2007 election. In a news conference Tuesday afternoon, the former mayor also said he regrets not making a stronger inquiry.

Bennett won the mayor's race by 110 votes over Burke, who then challenged Bennett's candidacy under the Little Hatch Act, a law that limits the political activity of people who receive federal funding. While running for mayor, Bennett was employed by the Hamilton Center, which receives federal funding for its Head Start program.

Prior to the election in 2007, Burke said he privately asked Galen Goode, the CEO of Hamilton Center, whether Bennett's candidacy for mayor was a problem under the Hatch Act and was told there was no problem.

"In hindsight, what I regret now is not double-checking the answer I was given," Burke said in a news conference in his home Tuesday afternoon. "I readily admit ... Kevin Burke made a grave mistake by believing what he was told and not double-checking. I believed what I was told. I trusted the fact that Hamilton Center and its employees were in compliance. That was a mistake.

Posted by Marcia Oddi on [Wednesday, November 19, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

## **12.8. IND. COURTS - GOD AND PRAYER CONTINUE IN INDIANA HEADLINES**

Following on [Monday's entry](#) headed "*Court upholds 'God' license plate judgment*", there are several more local stories today relating to God or prayer.

"*BMV is sued for rejecting 'BE GODS' license plate*" is the headline to [a story today](#) in the Indianapolis Star by Jon Murray that begins:

For years, Liz Ferris saw her personalized license plate -- BE GODS -- as a quiet declaration of faith, a shorthand message urging people to "belong to God."

But now the Indiana Bureau of Motor Vehicles says there's no place for God on personalized plates.

The BMV, meanwhile, has issued 2 million plates that proclaim "In God We Trust." On Monday, the Indiana Court of Appeals upheld the constitutionality of those plates.

The BMV, which approved Ferris' license plate eight or nine years ago, now is rejecting her message, saying that it violates a new policy that bars any reference to religion or a deity on personalized plates, a policy she says violates her First Amendment rights. The problem only surfaced after she let her plate

lapse, and when she tried to reclaim the phrase, the BMV turned her down.

The eastern Indiana woman filed a lawsuit this week against the BMV to fix what she sees as a mixed message.

"*Clergy-led prayer returns to House*" is the headline to [this story](#) by **Star** reporter Mary Beth Schneider:

A minister led the Indiana House in prayer Tuesday for the first time in nearly three years.

The tradition of having different members of the clergy say a prayer had stopped in January 2006 after a federal judge ruled that sectarian prayers that favored one religion over another were unconstitutional.

The lawsuit that prompted that ruling was filed by the American Civil Liberties Union of Indiana. But the suit was eventually dismissed by an appellate court that determined the taxpayers bringing the action had no legal standing because they were not directly affected by the House prayers.

During the 2006 legislative session, lawmakers gathered at the back of the House chamber to say a prayer. In the 2007 and 2008 sessions, House Speaker B. Patrick Bauer, D-South Bend, read a nonsectarian prayer from the podium. \* \* \*

It was the use of prayers focusing on Jesus that sparked the ACLU lawsuit against the House.

While only the Indiana House was sued, the state Senate also stopped using ministers as a result, with senators instead saying the prayers. Last session, several of those prayers were to Jesus -- and that happened again Tuesday as Sen. Patricia Miller, R-Indianapolis, gave the invocation, closing with "in Jesus Christ's name."

Ken Falk, legal director of the ACLU of Indiana, said there is "no problem in having a minister give a nonsectarian prayer."

But, he said, if the General Assembly persists in sectarian prayers that exclude some people, the ACLU could consider suing again, this time with plaintiffs who would have legal standing to sue.

"*Protest over prayer ban leads to man's arrest*" is the headline to [this story](#) by Jason Thomas in the **Star** today. Some quotes:

At 70 years old -- and after a night behind bars -- Charles Lynch says he'll continue his fight to return prayer to City Council meetings in the small Southside community of Southport.

He spent about 10 hours in the Marion County Jail late Monday and early Tuesday to prove his point.

Lynch was arrested and charged with disorderly conduct Monday after praying aloud during an official "moment of silence" during the City Council meeting, bringing to a boiling point an issue that has divided Southport since January.

At the onset of the meeting, Mayor Rob Thoman read a statement warning against disorderly conduct and stated that anyone who talked out of turn would be in violation, according to an incident report from the Indianapolis Metropolitan Police Department.

During a moment of silence, Larry Tunget, wife of former Mayor Nannette Tunget, began reading a prayer out loud.

Lynch also began reciting the prayer. When Thoman asked Lynch to be quiet, he began to pray louder, according to the report.

Lynch then was asked to leave the meeting. He refused and grabbed a chair, prompting Southport Assistant Chief Mark Myers to forcibly pry Lynch's hands from the chair, according to the report.

Lynch continued to resist Myers, according to the report, and refused to place his hands behind his back.

He eventually was removed from the building and handcuffed. Lynch said he was released from jail about 7 a.m. Tuesday. \* \* \*

Ken Falk, legal director for the American Civil Liberties Union of Indiana, compared Lynch's action with someone walking into the Statehouse and beginning to talk during a legislative session.

"I guess the argument is not whether he was praying," Falk said, "but whether he was doing something that was allowed during that time period of time on the agenda."

Posted by Marcia Oddi on [Wednesday, November 19, 2008](#)

Posted to [Indiana Courts](#) | [Indiana Government](#)

## 12.9. [IND. COURTS - "CASE OF THE MYSTERIOUS PARKING PLACARD SOLVED"](#)

Tom Spalding and Heather Gillers [report today](#) in the **Indianapolis Star**:

The meter always read "expired." But the champagne-colored Toyota sedan never seemed to get a ticket.

A placard on the dashboard said simply "federal judge official business." No name. No authorizing signature. No date. No contact information. Nothing to suggest the car's owner had special permission not to feed the meter.

Advertisement

No tickets were ever issued, though, because until October there were so many different parking passes in circulation Downtown that meter enforcers could not verify whether the permit was legitimate.

It wasn't.

After a bit of digging, it turns out the car belongs to administrative law judge Reinhardt F. Korte, who is one of 12 administrative law judges assigned to Indianapolis by the Social Security Administration to hear complaints.

SSA spokeswoman Carmen Moreno said neither Korte nor any of the other dozen administrative law judges were authorized to get free parking. They also aren't authorized to use a pass.

Korte, 63, said through Indianapolis attorney John Forbes that he acquired the permit from a now-retired judge, William Vaughn, sometime around 2006 and assumed it was OK to use. Following The Star's inquiry, Korte called the Office of Inspector General to inquire himself, Forbes said, and stopped using the pass.

Posted by Marcia Oddi on [Wednesday, November 19, 2008](#)

Posted to [Indiana Courts](#)

## 13. [Tuesday, November 18, 2008](#)

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### 13.1. [IND. DECISIONS - ANOTHER NEW TWIST ON TERRE HAUTE MAYORIAL RACE DISPUTE](#)

This morning the [ILB posted this entry](#), quoting a story about a potential challenge by the candidate who lost to Mayor Burke in the Republican primary.

Now another twist, reported by John Martin in [this story](#) in the **Evansville Courier & Press**:

Vanderburgh County Commissioner Jeff Korb, a Republican who lost his seat in the Nov. 4 election to Democrat Stephen Melcher, alleges that the election result is not valid because of Melcher's employment with the Community Action Program of Evansville, a nonprofit agency that receives federal funds.

Korb's attorney, Mark Foster, said the circumstances of Melcher's employment are similar to those of Duke Bennett, who won election as mayor of Terre Haute, Ind., in 2007. The Indiana Court of Appeals, in a 2-1

vote last week, threw out Bennett's election victory over former Mayor Kevin Burke, citing Bennett's work Hamilton Center Inc., a mental health agency that received federal funding for its Head Start program.

Burke claimed that Bennett's candidacy violated the Hatch Act, which prohibits political activities by federal workers. Korb today filed a petition in Vanderburgh Circuit Court contesting the result of the county commissioners' election, making the same claim against Melcher.

Korb referred comments to Foster, who said the circumstances of the Terre Haute case to Vanderburgh County's are "almost identical on the facts."

Korb's petition challenging the election states that Korb is entitled to remain a District 3 Vanderburgh County Commissioner until after a special election is held to determine who should hold the seat.

And here, thanks to the **C&P**, is a copy of Korb's [2-page Verified Petition](#) to Contest Election, filed today in Vanderburgh Circuit Court.

Posted by Marcia Oddi on [Tuesday, November 18, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

### **13.2. [LAW - MORE ON "WORKERS' RELIGIOUS FREEDOM VS. PATIENTS' RIGHTS"](#)**

Updating [this ILB entry](#) from July 31, quoting a **Washington Post** story that began:

A Bush administration proposal aimed at protecting health-care workers who object to abortion, and to birth-control methods they consider tantamount to abortion, has escalated a bitter debate over the balance between religious freedom and patients' rights.

Richard Pear of the **NY Times** has a lengthy [front-page story today](#) that reports:

A last-minute Bush administration plan to grant sweeping new protections to health care providers who oppose abortion and other procedures on religious or moral grounds has provoked a torrent of objections, including a strenuous protest from the government agency that enforces job discrimination laws.

The proposed rule would prohibit recipients of federal money from discriminating against doctors, nurses and other health care workers who refuse to perform or to assist in the performance of abortions or sterilization procedures because of their "religious beliefs or moral convictions."

It would also prevent hospitals, clinics, doctors' offices and drugstores from requiring employees with religious or moral objections to "assist in the performance of any part of a health service program or research activity" financed by the Department of Health and Human Services.

But three officials from the Equal Employment Opportunity Commission, including its legal counsel, whom President Bush appointed, said the proposal would overturn 40 years of civil rights law prohibiting job discrimination based on religion.

The counsel, Reed L. Russell, and two Democratic members of the commission, Stuart J. Ishimaru and Christine M. Griffin, also said that the rule was unnecessary for the protection of employees and potentially confusing to employers. \* \* \*

The protest from the commission comes on the heels of other objections to the rule by doctors, pharmacists, hospitals, state attorneys general and political leaders, including President-elect Barack Obama.

Mr. Obama has said the proposal will raise new hurdles to women seeking reproductive health services, like abortion and some contraceptives. Michael O. Leavitt, the health and human services secretary, said that was not the purpose.

Officials at the Health and Human Services Department said they intended to issue a final version of the

rule within days. Aides and advisers to Mr. Obama said he would try to rescind it, a process that could take three to six months. \* \* \*

Pharmacies said the rule would allow their employees to refuse to fill prescriptions for contraceptives and could "lead to Medicaid patients being turned away." State officials said the rule could void state laws that require insurance plans to cover contraceptives and require hospitals to offer emergency contraception to rape victims.

See also [this Nov. 14th ILB entry](#) on "midnight regulations."

Posted by Marcia Oddi on [Tuesday, November 18, 2008](#)

Posted to [General Law Related](#)

### **13.3. COURT - HOW MANY OF US LEARNED THE WORD "ROMANETTE" LAST WEEK ALONGSIDE CJ ROBERTS? [UPDATED]**

*Romanette*. A term for a little Roman numeral, as in Sec. 4(a)(2)(B)(iii). It was new to me, but a very useful new term, and one I am not likely to forget.

Eugene Volokh of **The Volokh Conspiracy** has [a long and very interesting entry](#) today about the term.

I did a search via the Indiana Courts site for any opinions using the term, and came up with zero. Perhaps someone with access to Lexis-Nexis or West might try the Indiana cases?

See also the [Wikipedia entry](#).

**[Updated at 4:25 PM]** The answer, thanks to a reader with Lexis-Nexis:

Never in Indiana, and just once nationally in state cases--in Minnesota (in a tax case).

Here is a quote from the Minnesota case:

In June and December 2002, ILHC and the county filed cross-motions with the tax court for partial summary judgment on the interpretation of two provisions of subdivision 26--romanette (ii) and subpart (D).

Posted by Marcia Oddi on [Tuesday, November 18, 2008](#)

Posted to [Courts in general](#)

### **13.4. IND. DECISIONS - COURT OF APPEALS ISSUES 1 TODAY (AND 4 NFP)**

**For publication opinions today (1):**

In [The Involuntary Term. of Parent-Child Rel. of C.T.](#), a 28-page opinion, Judge Barnes writes:

Kristie Thompson and Dennis Brown appeal the involuntary termination of their respective parental rights to their son, C.T. We affirm.

Issues. The parents raise separate issues on appeal, which we consolidate and restate as: I. whether the juvenile court's judgment terminating Thompson's and Brown's parental rights is supported by clear and convincing evidence; and II. whether Brown was denied due process of law when the juvenile court denied his motion to continue. \* \* \*

Conclusion. Clear and convincing evidence supports the juvenile court's judgment terminating Thompson's and Brown's parental rights to C.T. The MCDCS is cautioned, however, that a juvenile court's determination that reunification services are no longer required pursuant to Indiana Code Section 31-35-21-5.6 does not abolish a parent's fundamental right to family integrity. Nor does such a determination absolve MCDCS of its responsibility to properly oversee and manage the case. Finally, after

balancing the substantial interests of both Brown and the State as they relate to the termination hearing, and in light of the minimal risk of error created by the challenged procedure, we conclude that the juvenile court did not abuse its discretion, nor was Brown denied due process of law, when the court denied Brown's motion to continue and proceeded with the termination hearing in his absence. Accordingly, we affirm

#### **NFP civil opinions today (2):**

[Melanie McNeece Johnson v. Jay McNeece \(NFP\)](#) - "The trial court did not abuse its discretion by failing to award Mother child support arrearage or attorney's fees."

[Norman Nevinger III and Mark Nevinger v. Derrick Nevinger, Jane Nevinger, et al. \(NFP\)](#) - "In summary, the Plaintiffs' claims, which all stem from the ownership of the Dragway's personal and real property that is currently included as part of Papa Norm's Estate, should have been raised in the pending probate action. Although the trial court here granted summary judgment to the Defendants on the grounds that the Plaintiffs' claims were barred by the applicable statutes of limitations and laches, we affirm the trial court's entry of summary judgment for the Defendant based on lack of jurisdiction. Affirmed. "

#### **NFP criminal opinions today (2):**

[Fred Armstrong v. State of Indiana \(NFP\)](#)

[Kimberly Baldwin v. State of Indiana \(NFP\)](#)

Posted by Marcia Oddi on [Tuesday, November 18, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

#### **13.5. LAW - "ADMINISTRATION MOVES TO PROTECT KEY APPOINTEES: POLITICAL POSITIONS SHIFTED TO CAREER CIVIL SERVICE JOBS"**

Juliet Eilperin and Carol D. Leonnig of the **Washington Post** [report today](#) in a story that begins:

Just weeks before leaving office, the Interior Department's top lawyer has shifted half a dozen key deputies -- including two former political appointees who have been involved in controversial environmental decisions -- into senior civil service posts.

The transfer of political appointees into permanent federal positions, called "burrowing" by career officials, creates security for those employees, and at least initially will deprive the incoming Obama administration of the chance to install its preferred appointees in some key jobs.

Similar efforts are taking place at other agencies. Two political hires at the Labor Department have already secured career posts there, and one at the Department of Housing and Urban Development is trying to make the switch.

Posted by Marcia Oddi on [Tuesday, November 18, 2008](#)

Posted to [General Law Related](#)

#### **13.6. IND. DECISIONS - NEW TWIST ON TERRE HAUTE MAYORIAL RACE DISPUTE**

Updating [this ILB entry](#) from Nov. 15th, Deb Kelly of the **Terre Haute Tribune Star** has [a report today](#) that begins:

A former candidate for mayor of Terre Haute has thrown a new kink in the recent upheaval regarding a legal ruling that invalidated the current mayor's candidacy.

John Cunningham, who ran against Mayor Duke Bennett during the 2007 Republican primary, has issued a statement claiming that he won the primary, based on a court ruling Nov. 12 from the Indiana Court of Appeals that Bennett was ineligible to run for office because it was a violation of the Little Hatch Act.

The Court of Appeals was ruling on a lawsuit filed by former Mayor Kevin Burke, who lost the general election to Bennett.

Cunningham says he is requesting that the Indiana Supreme Court deny the transfer of the case, and that a special election be conducted "as soon as possible."

In his statement, Cunningham says, "I request that the Honorable David Bolk Judge of Vigo County Superior Court Division 3 put my name on such ballot as the rightful winner of the 2007 Republican primary."

During an interview Monday, Cunningham said, "If Bennett wasn't qualified during the general election, then he certainly wasn't qualified in the primary.

"I would have been the only qualified candidate," he said.

Posted by Marcia Oddi on [Tuesday, November 18, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

### **[13.7. IND. DECISIONS - MORE ON "COURT UPHOLDS "GOD" LICENSE PLATE JUDGMENT"](#)**

Updating [this ILB entry](#) from yesterday, Patrick Guinane of the **NWI Times** [reports today](#):

Hoosier drivers don't have to pay extra to sport In God We Trust license plates, the Indiana Court of Appeals ruled Monday.

In a unanimous decision, the three-judge panel upheld the General Assembly's 2006 decision to exempt the newly created plate from the \$15 administrative fee Indiana charges on most specialty plates.

The move has been a hit with Hoosier motorists. In God We Trust plates, which also feature an American flag logo, now adorn nearly a third of all passenger vehicles registered in the state and are slightly more popular in Lake and Porter counties.

But the American Civil Liberties Union of Indiana brought a lawsuit last year on behalf of Mark Studler, an Allen County resident who paid additional fees for his Environmental Trust license plate. The ACLU argued the In God We Trust slogan constituted a private religious message and therefore should be subject to the fee charged on most advocacy group plates.

"We are not convinced that In God We Trust, our national motto, can be categorized as a purely private message since the license plate can be construed to express either a public or private sense of national citizenship or patriotism in addition to a private expression of religious belief," wrote Judge Margret Robb, who was appointed to the appeals court by former Democratic Gov. Frank O'Bannon.

The Indiana Bureau of Motor Vehicles charges a \$15 administrative fee on all but a handful of the nearly 80 specialty license plates offered in Indiana. In most cases, another \$25 fee is collected to raise money for an organization or cause linked to the plate.

"We argued that there was inequality here because you had to pay a fee for the environmental plate but not for the In God We Trust plate," said Kevin Falk, legal director of the Indiana ACLU. He said it would be up to Studler to decide whether to appeal Monday's ruling.

Indiana Attorney General Steve Carter said the popularity of the In God We Trust plate demonstrates "deep support" for the nonsecular motto.

The story concludes with figures on 2008 registration by plate in Lake and Porter counties.

From Niki Kelly's [story](#) in the **Fort Wayne Journal Gazette**:

The Court of Appeals ruled that charging administrative fees for some license plates but not others is not

unconstitutional. The legislative classification of license plates is related to inherent characteristics of the license plates and the requirement of paying the administrative fee is uniformly applicable to all similarly situated license plates, the court ruled.

Posted by Marcia Oddi on [Tuesday, November 18, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

### [13.8. IND. COURTS - ANOTHER STORY ON 'SALACIOUS' AFFIDAVIT RESULTS IN JAIL TIME FOR CLIENT HINDS, ATTORNEY DENNEY"](#)

Updating [this ILB entry](#) from Nov. 13th, Rick Yencer of the **Muncie Star-Press** [reports today](#) in a story that begins:

Local attorney Louis Denney remains in jail nights and weekends after his latest effort to reverse a contempt-of-court citation was denied Monday.

Special Judge Brian Hutchison denied Denney's motion to stay the contempt citation to give Denney extra time to prepare for bribery defendant Jeff Hinds' trial, now set for Dec. 8.

Posted by Marcia Oddi on [Tuesday, November 18, 2008](#)

Posted to [Indiana Courts](#)

### [13.9. IND. GOVT. - "LAURA BUSH WILL SPEAK AT LINCOLN BIRTHPLACE TODAY"](#)

Chris Kenning of the **Louisville Courier Journal** [reports today](#):

First lady Laura Bush will speak today at the Abraham Lincoln birthplace outside Hodgenville, Ky., to kick off a nationwide fundraiser for historic Lincoln sites.

Bush, who was to join a Lincoln bicentennial kickoff in Hodgenville in February before it was scuttled by rain and ice, is in Kentucky to launch the National Park Foundation's "Give a Lincoln for Lincoln" campaign, said Sandy Brue, the site's chief of interpretation.

The campaign aims to raise money to preserve or improve Lincoln sites, such as **his birthplace and boyhood home in Kentucky, his home in Springfield, Ill., and the Lincoln Memorial in Washington, D.C.** \* \* \*

The Abraham Lincoln Birthplace National Historic Site, on 116 acres about 60 miles south of Louisville, features a neoclassical temple that holds a cabin similar to the one Thomas and Nancy Lincoln built on Sinking Spring Farm. Lincoln was born there on Feb. 12, 1809.

Notably, [Indiana](#), where [Lincoln grew up](#), is not mentioned.

Posted by Marcia Oddi on [Tuesday, November 18, 2008](#)

Posted to [Indiana Government](#)

### [13.10. LAW - "CAUGHT IN THE LEGAL RECESSION? - ABA JOURNAL SURVEY"](#)

The **ABA Journal** is surveying lawyers about the job market and the current state of the economy. [Follow this link](#) to a page that begins:

We want to know how you think the recession will affect the legal profession. Please take our two-minute survey. Results will be published in the January issue of the ABA Journal. Your answers will be kept confidential, and used only in combination with all other responses received.

Posted by Marcia Oddi on [Tuesday, November 18, 2008](#)

Posted to [General Law Related](#)

#### 14. [Monday, November 17, 2008](#)

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##### 14.1. [IND. COURTS - COURT SEEKS A BUSINESS CONTINUITY PLANNER AND A COURT ARCHIVES SPECIALIST](#)

Indiana Supreme Court, Division of State Court Administration has posted two positions:

- The Indiana Supreme Court, Division of State Court Administration, has an opening for a [Business Continuity Planner \(BCP\)](#). The BCP will serve the Indiana state court system and will be responsible for helping courts develop, test, implement and maintain detailed business continuity and disaster recovery project plans for the courts' role in the event of any emergency, including a public health emergency. The BCP will be responsible for assisting courts in developing business impact analyses, recommending recovery strategies and solutions and assessing the quality of plans and documents for business continuity. The BCP will need to develop recovery training exercises, scenarios and other measures to prepare the courts for emergencies. The BCP will provide expertise and support to the courts as requested whenever a business disruption occurs. The BCP must have excellent oral and written communication skills, interpersonal skills, organizational skills, and computer skills. A bachelor's degree from an accredited institution in a relevant subject is highly preferred. Several years of relevant experience are a plus.
- The Indiana Supreme Court, Division of State Court Administration, has an opening for a [Court Archives Specialist](#). This position will serve the Indiana state court system. Responsibilities will include evaluating records for preservation, retention, and destruction; acquiring, managing and maintaining documents of historical importance; and advising users on how to access, use and interpret archives. The archivist and records specialist will be expected to answer inquiries of the general public and represent the Supreme Court in appropriate boards, professional organizations and commissions. The archivist will need to have a current knowledge of best practices of records management and preservation and a solid knowledge of technology solutions for record creation, imagery, storage and permanent retention of records. The applicant must have excellent oral and written communication skills, interpersonal skills, organizational skills, and computer skills and must be able to travel in Indiana. A bachelor's degree from an accredited institution in a relevant field is a must. Several years of relevant experience are a plus.

Posted by Marcia Oddi on [Monday, November 17, 2008](#)

Posted to [Indiana Courts](#)

##### 14.2. [IND. DECISIONS - "COURT UPHOLDS "GOD" LICENSE PLATE JUDGMENT" \[UPDATED\]](#)

The **Fort Wayne Journal Gazette** has [posted a story on its website](#) this afternoon reporting the COA's ruling this morning in the case of *Mark Studler v. Indiana Bureau of Motor Vehicles and Ronald L. Stiver as Commissioner of the Indiana BMV (NFP)*. Access the [ILB summary of the opinion here](#).

BTW, I was very surprised that this opinion was issued as Not for Publication (NFP), as was at least one reader, who sent this note a few minutes ago:

I'm baffled by that one. It seems like an issue of first impression that requires publication under [Rule 65](#). Moreover, litigants can now raise the same challenge again and again--and a trial court has no binding precedent so it could reach a contrary result.

From the **JG** story:

The lawsuit alleged that the BMV gave preferential treatment to motorists wanting the plates, which also feature the American flag, because they don't have to pay the \$15 administrative fee that the agency collects on sales of most other Indiana specialty plates.

The BMV charges the administrative fees in addition to other costs of up to \$25, with proceeds supporting the causes of the groups or universities.

"We weren't challenging the message of 'In God We Trust,' just that any other message plate has a cost to

it," ACLU-Indiana attorney Ken Falk said in a previous story. He said the trial court accepted the state's argument that the "In God We Trust" plate is a regular plate and not a specialty plate, and therefore not a violation of the Indiana Constitution.

At the time Studler filed the lawsuit, he said he liked the "In God We Trust" plate but it irked him that for years, he has had to pay a \$15 administrative fee to the BMV for his specialty environmental plate.

Here are [earlier ILB entries](#) on the "In God We Trust" challenge.

**[Updated 5 PM]** Here is [the AP report](#).

Posted by Marcia Oddi on [Monday, November 17, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

### **14.3. IND. DECISIONS - COURT OF APPEALS ISSUES 1 TODAY (AND 9 NFP); INCLUDING "IN GOD WE TRUST" PLATES CHALLENGE**

#### **For publication opinions today (1):**

In [Janice and Burdette Ramer v. Betty Smith](#), a 12-page opinion, Judge Robb writes:

Janice and Burdette Ramer appeal the trial court's special findings of fact and conclusions of law granting interlocutory judgment in favor of Betty Smith and ordering partition of the property in question. The Ramers raise three issues on appeal: 1) whether the trial court erred when it determined that the Ramers, as tenants by the entirety, and Betty each hold a one-half joint tenancy interest in the property; 2) whether the trial court erred when it refused to award the Ramers contribution for value added to the property; and 3) whether the trial court erred when it determined that the property cannot be equitably divided. Concluding that the language of the deed sufficiently evidences intent to create joint tenancy interests in the property, but that the Ramers are not entitled to contribution, we reverse in part and affirm in part. In addition, we remand this case to the trial court to determine whether the property can be equitably divided in light of our holding.

#### **NFP civil opinions today (2):**

In [Mark Studler v. Indiana Bureau of Motor Vehicles and Ronald L. Stiver as Commissioner of the Indiana BMV \(NFP\)](#), a 12-page opinion, Judge Robb writes:

Mark Studler appeals the trial court's order denying his motion for summary judgment and granting the Indiana Bureau of Motor Vehicles's ("BMV") motion for summary judgment. On appeal, Studler raises a single issue, which we restate as whether charging an administrative fee for the purchase of a special group recognition license plate, such as the "Environment" license plate, but not for the "In God We Trust" license plate violates Article I, section 23, of the Indiana Constitution. Concluding that charging an administrative fee for some license plates but not for others is not unconstitutional because the legislative classification of license plates is reasonably related to inherent characteristics of the license plates and the requirement of paying the administrative fee is uniformly applicable to all similarly situated license plates, we affirm. \* \* \*

The General Assembly's classification of license plates as chapter 25 and non-chapter 25 license plates is reasonably related to the inherent characteristics of the license plates. In addition, the requirement of paying the administrative fee is equally applicable to all chapter 25 license plates and does not apply to any non-chapter 25 license plates. Therefore, we hold that Indiana Code sections 9-18-24.5-4 and 9-29-5-34.5, offering the "In God We Trust" license plate without the requirement of paying the administrative fee, are constitutional.

[Sandra Elbrink, on Her Own Behalf, and on Behalf of the Estate of Robert Elbrink v. General Electric Co., et al. \(NFP\)](#) - " On appeal, Elbrink fails to cite the record for any allegation or any evidence that any of the Premises Owners had more

knowledge of the dangers of asbestos than any of Robert's employers.

"Elbrink also argues that the Premises Owners were liable because of the negligent conduct of their own employees, under the principle of respondeat superior. \* \* \* The Court concluded that, "[a]t most, PSI created a quantitatively higher risk, but not a risk unique to PSI, and not a risk requiring qualitatively different precautions from those generally associated with asbestos." Id. In light of this analysis, we conclude that Elbrink was not entitled to pursue relief under a theory of respondeat superior. Furthermore, we read the PSI Energy Court's language to apply equally to the conduct of PSI Energy employees and the conduct of employees of its contractors.

"For these reasons, the trial court did not err in entering summary judgment for GE, SIGECO, US Steel, and Whirlpool. \* \* \*

"The Construction Statute of Repose applies to a person who "constructs an improvement to real property." I.C. § 32-30-1-5(a)(2) (West Supp. 2008). The exclusion for maintenance of an improvement, however, pertains only to possessors, not to construction contractors. I.C. § 32-30-1-5(c) (West Supp. 2008). An action for wrongful death arising out of a deficiency may not be brought unless the action is commenced within ten years after the date of substantial completion of the improvement. I.C. § 32-30-1-5(d) (West Supp. 2008). Elbrink filed her lawsuit on June 20, 2006. Therefore, the statute barred work on anything substantially completed before June 20, 1996. Elbrink's appellate argument makes no reference to events occurring any later than the early 1980s. None of her designated evidence regarding ICI referenced events later than the late 1980s. Even viewing the designated evidence and reasonable inferences in the light most favorable to Elbrink, anything Robert worked on while near ICI employees was substantially completed before 1996. The trial court did not err in entering summary judgment in favor of ICI."**NFP criminal opinions today (7):**

[Andrew P. Kawlewski v. State of Indiana \(NFP\)](#)

[Chaz D. Norton v. State of Indiana \(NFP\)](#)

[Ronald Watson v. State of Indiana \(NFP\)](#)

[Samuel Steed v. State of Indiana \(NFP\)](#)

[D.M. v. State of Indiana \(NFP\)](#)

[Jay Stanback v. State of Indiana \(NFP\)](#)

[Larry Wooley v. State of Indiana \(NFP\)](#)

Posted by Marcia Oddi on [Monday, November 17, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

#### **[14.4. IND. DECISIONS - TRANSFER LIST FOR WEEK ENDING NOV. 14, 2008](#)**

[Here](#) is the just issued transfer list for the week ending Nov. 14, 2008. It is one page long.

Two transfers was granted last week, both with opinion. They are summarized in [this ILB entry](#) from Nov. 12th.

**Over 4.5 years of Transfer Lists:** For other weekly transfer lists (going back to Feb. 2, 2004), check "Indiana Transfer Lists" under "Categories" below, or in the right column.

Posted by Marcia Oddi on [Monday, November 17, 2008](#)

Posted to [Indiana Transfer Lists](#)

#### **[14.5. IND. LAW - "IT'S THE LAW" TODAY EXAMINES INDIANA DUNES NATIONAL LAKESHORE AND INDIANA DUNES STATE PARK RULES](#)**

Ken Kosky's "[It's the Law](#)" [column](#) in the **NWI Times** this week focuses on Indiana Dunes National Lakeshore and Indiana Dunes State Park rules. From the article:

About 3 million people visit the Indiana Dunes National Lakeshore and Indiana Dunes State Park each year, but many of them unwittingly commit violations -- doing everything from feeding or harassing seagulls to illegally taking plants, firewood or driftwood. But the most common criminal offense at the National Lakeshore or State Park is underage drinking, officials said.

At the National Lakeshore, Superintendent Costa Dillon said one of the most common violations is operating a personal watercraft within 100 yards of shore. He reminds people that personal watercraft are not permitted along national or other shorelines from Michigan City to Gary.

Another common violation is the use of a metal detector. They are not allowed anywhere in the park.

Visitors can't pick flowers, plants or mushrooms. They can't feed, harass or kill wildlife. They can't take firewood, driftwood, rocks, beach glass or sand.

"Most of our regulations exist to protect the natural wildlife and plants," Dillon said.

People can take seeds, nuts and berries in "personal consumption amounts," Chief Park Ranger Mike Bremer said.

Alcohol is not permitted on the west side of the park, but is on the east. Dogs are not allowed on the beach west of the state park, but are allowed to the east, but they must be on a leash 6 feet or less in length. Fires are not allowed on the beach, but rather only in established campground fire rings or in cooking areas. Nudity is prohibited.

Possession of marijuana also is one of the most common criminal offenses at the National Lakeshore, Bremer said.

At Dunes State Park, Property Manager Brant Baughman said one of the most common violations is bringing alcohol into the park. Dunes State Park is the only state park to ban alcohol. The most common criminal offense at the park is underage drinking.

Another common violation is claiming to be an Indiana resident in order to pay the cheaper in-state entrance fee, but gate workers watch the license plates and violators are tracked down. The park is also cracking down on people who try to avoid the \$2 pedestrian entrance fee by entering from an adjacent beach.

Baughman said visitors are not allowed to take plant material and can't even take firewood to use for campfires. The fallen wood is supposed to decay and become humus. Fires are only allowed in campground fire rings and in shelter fireplaces. Fireworks are prohibited.

Visitors can't feed, harass or kill fish or animals, but they can take mushrooms, berries and nuts.

Baughman said there are also common violations involving the lake. He reminds people they can't use flotation devices while swimming unless they are U.S. Coast Guard approved -- such as life jackets. People also are prohibited from using personal watercraft any closer than 100 yards from shore. And bathing suits must cover the buttocks and can't be transparent.

The state park does allow metal detectors between Labor Day and Memorial Day, but users must obtain a free permit from the park. Dogs are permitted, but must be on a 6-foot leash and must not be unattended.

Confusing, especially re mushrooms.

[Another column](#) in this series, "[It's the law: Valparaiso officer debunks public intoxication myths](#)" was published on Nov. 10th - the **ILB** missed it. It begins:

VALPARAISO | Police said there's a perception among bar patrons that it's better to drive drunk than walk home and risk getting arrested for public intoxication.

But that perception is just not true, a Valparaiso police officer said.

"The officer would much rather see someone walk home than drive, provided they can do it safely," Valparaiso police Sgt. Michael Grennes said.

Grennes said police officers generally don't arrest people for public intoxication unless they are belligerent or uncooperative, or if they are a danger to themselves.

Posted by Marcia Oddi on [Monday, November 17, 2008](#)

Posted to [Indiana Law](#)

#### 14.6. [IND. DECISIONS - UPCOMING ORAL ARGUMENTS THIS WEEK](#)

##### **This week's oral arguments before the Supreme Court:**

##### **This Wednesday, Nov. 19th:**

9:00 AM - ***In The Matter of B.W.*** - The Bartholomew Superior Court found the putative father's consent to the adoption was irrevocably implied, and it entered a judgment granting the adoption. The Court of Appeals affirmed. *In re Adoption of the Unborn Child of B.W.*, 889 N.E.2d 1236 (Ind. Ct. App. July 18, 2008), vacated. (See [ILB summary](#) here.) The Supreme Court has granted a petition to transfer and has assumed jurisdiction over the appeal. Attorneys for Appellant: Bryan H. Babb and Kelly M. Scanlan, Indianapolis, IN . Attorneys for Appellees: Michael P. Bishop and Heather Wysong Zaiger, Indianapolis, IN . James A. Shoaf, Columbus, IN .

9:45 AM - ***Brenda Spar v. Jin S. Cha, M.D.*** - Following a trial in the Lake Superior Court on Spar's medical malpractice complaint, the jury returned a verdict for Dr. Cha. The Court of Appeals reversed and remanded for a new trial, concluding the trial court erred in permitting Dr. Cha to assert an incurred risk defense and in admitting evidence of Spar's consent to prior surgeries. *Spar v. Cha*, 881 N.E.2d 70 (Ind. Ct. App. Feb. 20, 2008). (See [ILB summary](#) here.) Dr. Cha has petitioned the Supreme Court to accept jurisdiction over the appeal. Attorneys for Brenda Spar: Timothy J. Kennedy, Indianapolis, IN and Steven L. Langer, Tara M. Wozniak, Valparaiso, IN. Attorney for Dr. Cha: Robert D. Brown, Merrillville, IN.

10:30 AM - ***Northern Indiana Public Service Company v. U.S. Steel Corporation*** - U.S. Steel filed a complaint against Northern Indiana Public Service Company ("NIPSCO") relating to a contract for NIPSCO's sale of electricity to U.S. Steel. The Indiana Utility Regulatory Commission ("IURC") entered summary judgment for U.S. Steel. The Court of Appeals reversed and remanded for the entry of summary judgment for NIPSCO. *Northern Indiana Public Service Co. v. United States Steel Corp.*, 881 N.E.2d 1065 (Ind. Ct. App. March 7, 2008), vacated. (See [ILB summary here](#) - 2nd case.) The Supreme Court has granted a petition to transfer the case and has assumed jurisdiction over the appeal. Attorneys for U.S. Steel: John F. Wickes, Jr., Todd a. Richardson, Joseph P. Rompala, Karl L. Mulvaney, Nana Quay-Smith, Indianapolis, IN. Attorneys for Amicus Curiae State of Indiana: Thomas M. Fisher and Beth Krogel Roads, Indianapolis, IN. Attorneys for NIPSCO: Jon Laramore, Peter L. Hatton and Elizabeth A. Herriman, Indianapolis, IN. Gregory S. Colton, Merrillville, IN.

##### **This Thursday, Nov. 20th:**

9:00 AM - ***In the Matter of James R. Recker*** - In this attorney discipline action, the Indiana Supreme Court Disciplinary Commission filed a complaint against the respondent, a part-time public defender, alleging improper use of confidential information obtained from another public defender with whom the respondent shared office space. The hearing officer appointed by the Court filed a report recommending finding no violation of the Rules of Professional Conduct. The Commission has filed a Petition for Review by the Supreme Court. Attorneys for the Disciplinary Commission: Donald R. Lundberg and David B. Hughes, Indianapolis, Indiana. Attorneys for the Respondent: Terry E. Hall and Jon Laramore, Indianapolis, Indiana.

9:45 AM - ***Kitchin Hospitality, LLC v. Indiana Dept. of State Revenue*** - The Department of State Revenue denied a taxpayer's claim for a refund of gross retail taxes paid on utilities provided to its guest rooms. The Tax Court reversed in an unpublished memorandum decision, holding the taxpayer is entitled to assert a "Consumed Property Exemption." [Kitchin Hospitality, LLC v. Indiana Dept. of State Revenue](#), 49T10-0604-TA-35 (Ind. Tax Ct. March 3, 2008). The Supreme Court has granted a petition for review of the Tax Court decision. Attorney for Kitchin Hospitality, LLC:: Randal J. Kaltenmark, Larry J. Stroble and Ziaaddin Mollabashy, Indianapolis, IN. Attorneys for Indiana Dept. of State Revenue: Steve Carter, Andrew W. Swain and Jessica E. Reagan Indianapolis, IN.

10:30 AM - ***Steven McCullough v. State of Indiana*** - McCullough was convicted of various offenses and sentenced in the Marion Superior Court. McCullough appealed the convictions. The State cross-appealed the sentence arguing it was inappropriately short. The Court of Appeals affirmed the conviction, but did not reach the merits of the State's cross-appeal because McCullough did not appeal the sentence. *McCullough v. State*, 888 N.E.2d 1272 (Ind. Ct. App. June 30, 2008), vacated. (See the [ILB summary here](#) - 7th case.) The Supreme Court has granted a petition to transfer the case, and has assumed jurisdiction over the appeal. Attorney for McCullough: Steven J. Halbert, Carmel, IN. Attorney for State: Monika Prekopa Talbot, Indianapolis, IN

**Webcasts will be available [here](#).**

**This week's oral arguments before the Court of Appeals that will be webcast:**

None scheduled.

**This week's oral arguments before the Court of Appeals that will NOT be webcast:**

**This Tuesday, Nov. 18th:**

10:00 AM - ***Frank J. Vance vs. David L. Stainbrook, Marilyn Stainbrook, Hilbert Just and Barbara Just*** - Appellee's David L. Stainbrook, Marilyn Stainbrook, Hilbert Just, and Barbara Just, by counsel, have filed a Verified Motion to Dismiss Appeal. The Court, having reviewed Appellee's Verified Motion, has concluded that Oral Argument will assist this court in determining whether to grant or to deny it. The Scheduled Panel Members are Judge Kirsch, Sr. Judges Sullivan and Sharpnack.

2:00 PM - ***Laquania Wallace vs. State of Indiana*** - Wallace appeals his convictions for Theft and Criminal Mischief. Wallace had also been charged with Burglary but was acquitted of that charge based on the trial court's conclusion that there was a reasonable doubt as to the ownership of the home in question at the time of the incident. On appeal, Wallace argues that there was insufficient evidence to support his convictions for Theft and Criminal Mischief because the furnace and water heater he took were fixtures of the home. Thus, he contends, ownership of these items was not proven beyond a reasonable doubt because ownership of fixtures follows that of the home. The question before the court is whether the State proved beyond a reasonable doubt that items stolen and property damaged was property of a person other than the defendant, Wallace. The Scheduled Panel Members are: Judges Riley, Bailey and Bradford.

Posted by Marcia Oddi on [Monday, November 17, 2008](#)

Posted to [Upcoming Oral Arguments](#)

**15. [Sunday, November 16, 2008](#)**

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**15.1. [IND. LAW - ISP TO TICKET GOLF CARTS DRIVEN ON CITY STREETS OF MADISON](#)**

Updating [this long list of ILB entries](#) on golf carts, Peggy Vlerebome [reported Friday](#) in the **Madison Courier**:

The Indiana State Police will ticket golf carts being driven on streets, Mayor Tim Armstrong said Thursday.

Police Chief John Wallace said the ISP sent a message to law enforcement agencies a couple of months ago saying it was going to "crack down" on golf carts on streets as several Indiana communities were discussing or passing ordinances allowing carts on streets as gas prices rose. State law does not allow

regular golf carts on streets, he said.

At least one Madison resident has a golf cart with safety features that qualify it for having a license plate and being legal on streets, a resident at the Mayor's Night Out session Thursday night in District 2 said.

Golf carts are common on Michigan Road and the streets off it as golfers drive to and from Sunrise Golf Course.

One of the five city residents at the Mayor's Night Out at Shawe Memorial High School said Madison police always have looked the other way, and Police Chief John Wallace acknowledged that that has been the practice as long as he has been on the police force, 22 years.

The ticketing of golf carts came up when the resident, John Branigan, asked if he would get "the same consideration" if he drove his golf cart from his home on Westwood Lane to Walgreens, CVS or Kroger as he does when he drives his cart to and from Sunrise.

The golf cart is "low-speed alternative transportation," Branigan said. "My cart gets about three times more fuel efficiency than my most fuel-efficient car."

"It is a violation, technically, of state law," Wallace said.

Posted by Marcia Oddi on [Sunday, November 16, 2008](#)

Posted to [Indiana Law](#)

## 15.2. [IND. LAW - "SURVEYORS SEEK TO RE-ESTABLISH MICH.-IND. BORDER"](#)

James Prichard of the **AP** [reports today](#) in the **Chicago Tribune**:

NILES TOWNSHIP, Mich. - It has been 25 years since Ruby and Richard Evans moved from the Hoosier State to southwestern Michigan, but the retired couple could one day find themselves back home in Indiana without having left their current house.

For several years, land surveyors searched the 104-mile-long border between Michigan and Indiana for the wooden mileposts that were installed when the state line originally was staked out in 1827. Although a few markers were found, nearly all had rotted away long ago, blurring the exact location of the border that stretches from southern Lake Michigan to Ohio's northwestern corner.

Surveyors from both states have started talking to lawmakers about the need to install new, permanent markers and re-establish the border. Once that happens, property that for years was believed to lie in one state could turn out to be in another, creating quandaries regarding property and income taxes, police jurisdictions, school districts and numerous other matters.

"The biggest thing for me would be the taxes," said Ruby Evans, 60, who lives on the north side of State Line Road in Berrien County's Niles Township. Her neighbors across the street live in the city of South Bend, Ind. \* \* \*

While there's no timetable as to when the border must be re-established, surveyors say there will be more problems the longer it is put off. The Michigan-Ohio and Michigan-Wisconsin state lines were reset in the early 1900s.

Surveyors formed the Indiana-Michigan State Line Committee four years ago to recover evidence of the original mileposts. Members voluntarily hiked through all sorts of terrain, including woods, marshes and grasslands, and searched lakes and streams for the wooden stakes.

A confirmed marker was found around the midpoint of the border and a few other possible mileposts also were discovered.

"Many of them cannot be found at this point," said Norman Caldwell, the Shiawassee County surveyor and

the committee's recording secretary. "That leaves surveyors and real estate people and law enforcement, township officials and assessors ... hanging out there with, 'Well, I think the line is about here but I'm not sure, it's in this area somewhere.' That's what we're trying to resolve now."

Professional surveyors can only recover and confirm original markers. Those that are lost can only be replaced by a joint action of the Indiana and Michigan legislatures or, if those bodies cannot agree on the border's location, the U.S. Supreme Court.

Posted by Marcia Oddi on [Sunday, November 16, 2008](#)

Posted to [Indiana Law](#)

### 15.3. [IND. LAW - "GUN RULING UNLIKELY TO AFFECT CASES IN INDIANA"](#)

Rebecca S. Green of the **Fort Wayne Journal Gazette** [reports today](#) under the headline "*Gun ruling unlikely to affect cases in Indiana.*" The subject is the case of *United States v. Hayes*, heard Monday, Nov. 10th before the U.S. Supreme Court. (See **SCOTUSblog's** *Hayes* page [here](#).) The issue in *Hayes*: "Whether, to qualify as a "misdemeanor crime of domestic violence" under 18 USC 922(g)(9), the offense must have as an element a domestic relationship between the offender and the victim."

Green's story begins:

While the U.S. Supreme Court ponders recent arguments that some convicted domestic abusers be allowed to own firearms, two area prosecutors are not concerned about the local effect.

The case of the *United States v. Hayes*, heard Monday by the U.S. Supreme Court, involves the interpretation of the Lautenberg Amendment. Enacted in 1996, the amendment prohibits abusers convicted of misdemeanor domestic violence from possessing firearms.

The question the Supreme Court is to answer is whether the Lautenberg Amendment applied only to those convicted under specific domestic violence laws, rather than a general battery statute.

If the Supreme Court upholds a 4th Circuit Court of Appeals ruling from April 2007, those who physically harm their spouses or domestic partners and are charged with a general misdemeanor battery statute could again have access to firearms, according to the Brady Center to Prevent Gun Violence.

And the names of thousands of domestic batterers convicted under misdemeanor general battery laws would be purged from the Brady background check system, officials at the Brady Center said.

While in some states that might be an issue, particularly those without a specific law regarding domestic battery, it is not an issue here, Allen County Prosecutor Karen Richards said.

More from the story:

Years ago, Indiana enacted a domestic battery statute, making it a Class A misdemeanor, punishable by up to a year in jail, to physically harm a spouse, someone living as a spouse or someone with whom there is a child in common. If a person has a prior conviction for domestic battery, or if the crime occurs in the presence of a child younger than 16, the charge is elevated to a Class D felony punishable by up to three years in prison.

"Normally, if we can prove a domestic violence case, we file as a domestic battery as opposed to a generic battery," she said. "That does carry with it, under federal laws (the Lautenberg Amendment), the prohibition of carrying a handgun. ... I think we're a lot more progressive than people think we are."

Allen County's prosecutors have tried to take a more narrow view of federal laws when charging the crime so that fewer cases would be affected if the higher courts ever required a more narrow view.

"We have always had some concern in our office that a generic battery conviction does not necessarily

prohibit someone from carrying a handgun," Richards said.

And Allen County is likely not the only county in the state to stick with the domestic battery statute in charging cases of domestic abuse, Adams County Prosecutor Chris Harvey said.

"I think everybody files the domestic and pursues the domestic, unless the case goes south with the victim, ... then uses general battery only to resolve the case," he said.

Former Fort Wayne Mayor Paul Helmke, president of the Brady Center to Prevent Gun Violence, said Indiana has done a good job with the domestic battery statute, putting the state in a better position than most.

But he would like to see Indiana's statute expand to include violence to children, rather than just violence to a spouse or live-in partner, thus expanding the firearm prohibition. Those who are willing to harm their children might be willing to do greater harm to others in the home, Helmke said.

Richards said she sees some wisdom in including battery to children as part of the domestic battery statute.

"It would be good to have the least number of weapons available to them," she said.

Posted by Marcia Oddi on [Sunday, November 16, 2008](#)

Posted to [Indiana Law](#)

#### 15.4. [IND. LAW - "GARY COPS WAGING COURT FIGHT OVER RESIDENCY"](#)

[A story today](#) in the **Gary Post-Tribune** begins:

GARY -- When they're not fighting crime, Gary police officers are waging a battle among themselves over residency.

A group of city dwellers who filed a lawsuit demanding termination for all nonresidents will argue their case before Lake Circuit Court Judge Lorenzo Arredondo next month.

"It is a fact that Gary City Ordinance 5881 ... requires police officers to live within the corporate boundaries of the City of Gary or lose their employment," a court document states.

City attorney Jerome Taylor and Gary Police Civil Service Commission attorney Charles Brooks submitted a three-page response stating Indiana law prohibits residency requirements for police officers and firefighters.

Both lawyers, and at least one more hired by nonresidents, are expected to present their legal interpretation at the upcoming hearing, set for 1:15 p.m. Friday, Dec. 5.

Posted by Marcia Oddi on [Sunday, November 16, 2008](#)

Posted to [Indiana Law](#)

#### 15.5. [ENVIRONMENT - MORE ON - "PRESIDENT OF WABASH ENVIRONMENTAL TECHNOLOGIES CHARGED WITH ENVIRONMENTAL CRIMES"](#)

The [first ILB entry](#) on this was Sept. 15, 2006. Here is [a long list of entries](#) that followed. Today Howard Greninger and Arthur Foulkes of the **Terre Haute Trib-Star** have [a lengthy report](#) on getting the cleanup process moving.

Posted by Marcia Oddi on [Sunday, November 16, 2008](#)

Posted to [Environment](#)

#### 15.6. [IND. DECISIONS - "JUDGE TELLS CITY OF NEW ALBANY: PAY THE LAWYERS"](#)

Dick Kaukas [reports today](#) in the **Louisville Courier-Journal**:

New Albany has been ordered to pay \$300,000 to three lawyers who were hired to represent the city in a lawsuit against Georgetown over sewer fees.

Advertisement

Special Judge Kenneth Lopp ruled last week in Floyd Circuit Court that Rick Fox, K. Lee Cotner and Steve Gustafson were retained under an agreement that they would receive a contingency fee of one-third of any amount recovered from Georgetown in the case.

Derrick H. Wilson, representing New Albany, argued that the three lawyers -- who have offices in New Albany -- didn't do much legal work to bring about the settlement. Georgetown ultimately paid \$900,000 to New Albany.

But Lopp said there was "significant evidence before the court" that the lawyers "performed significant work and certainly contributed to the result obtained."

Fox, Cotner and Gustafson, who were practicing together at the time but have since split, sued the city in September 2005 after it declined to pay what they said they were owed. The attorneys originally asked for \$750,000.

Ruling on the lawyers' request for summary judgment, Lopp said they were entitled to \$300,000, one-third of the \$900,000 settlement, plus interest.

Posted by Marcia Oddi on [Sunday, November 16, 2008](#)

Posted to [Ind. Trial Ct. Decisions](#)

## 16. Saturday, November 15, 2008

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### 16.1. IND. COURTS - STEUBEN COUNTY COUNCIL TO CUT SUPPLEMENTAL SALARIES FROM JUDICIAL POSITIONS

[WLKI News](#), Angola, is reporting today:

A special meeting for the Steuben County Council has been scheduled for Wednesday morning so they can discuss 2009 supplemental salaries. Those salaries cover judges in the Steuben Circuit and Superior Courts as well as the County Magistrate, Prosecutor and Deputy Prosecutor. When they passed the 2009 budget on Wednesday, the Council agreed there would be no supplemental salaries for those positions following the adoption of a state law which increased the salaries. The Council agreed on Wednesday that \$5,600 in a supplemental salary for the Deputy Prosecutors position would be cut from the budget. Wednesday's meeting will begin at 8:30.

The story brought to mind the successful suit then-Grant Circuit Court Judge R. Thomas Hunt brought in 2006. This [Nov. 10, 2006 ILB entry](#) quotes from a story in the **Marion Chronicle Tribune**:

After asking the county several times for the money it cut from his 2006 budget, Circuit Court Judge R. Thomas Hunt on Thursday sued the council, the Grant County commissioners and the Grant County auditor.

He filed the suit to regain the \$5,000 in supplemental salary that the county cut in Grant Superior Court 1.

\* \* \*

At issue is a portion of the Indiana Constitution that reads, "The justices of Supreme Court and Judges of the Court of Appeals and of the Circuit Courts shall at stated times receive a compensation which shall not be diminished during their continuance in office."

Hunt, whose salary was raised from \$80,500 to \$110,500 in 2006, also was authorized a supplemental

salary amount of up to \$5,000 per year to be paid by the county, an amount that was paid to Hunt each pay period through Dec. 31, 2005, court documents said.

By eliminating the \$5,000 portion of his salary paid by Grant County, Hunt believes his salary was cut in 2006.

This [Dec. 4, 2007 ILB entry](#) is headed "*Retired Grant Circuit Judge Thomas Hunt wins pay suit.*" See also [this entry from Dec. 4, 2007](#).

Posted by Marcia Oddi on [Saturday, November 15, 2008](#)

Posted to [Indiana Courts](#)

## 16.2. [COURTS - KENTUCKY JURY WEIGHS CASE OF AMISH MEN \[UPDATED\]](#)

[An interesting story today](#) from the **Louisville Courier Journal**, reported by Peter Smith:

A Graves County jury began deliberating last night in the case of nine Amish men facing charges of failing to use safety emblems on their horse-drawn buggies.

The men faced a total of 15 charges in a daylong jury trial in Graves District Court for failing to use emblems indicating a slow-moving vehicle.

The trial began yesterday morning, and the jury began deliberating about 8 CST last night. They had not reached a verdict as of press time.

At issue is an orange-and-red reflective triangle that the state requires to be placed on the back of slow-moving vehicles such as tractors and horse-drawn buggies to warn motorists.

Most Amish groups comply with the law. But the Swartzentruber sect considers the requirement a violation of their religious beliefs.

They contend that they cannot place their trust to keep them safe in a symbol, only in God. The group also contends the bright colors violate their modesty code, as they only use subdued colors in their dress, homes and other possessions.

They have offered to use gray reflective tape outlining the backs of their buggies, as well as lanterns at night.

They also contend prosecutors are not treating them equally because only the Swartzentrubers are being charged for failing to use the emblem. A traffic expert contended in court records that he has seen dozens of slow-moving farm vehicles without the emblem on Graves County roads.

Three Swartzentruber men -- Jacob Gingerich, Emanuel Yoder and Levi Zook -- already were convicted in Graves District Court of violations in 2007 and fined the minimum of \$20, plus court costs. Their attorney is appealing that case. Another Swartzentruber man was fined on the same charge earlier this year in Hickman County.

**[Updated Nov. 16]** Today [the LCJ reports](#):

Seven Amish men will appeal their conviction on charges of refusing to use state-required safety emblems on their horse-drawn buggies.

The men were convicted in Graves District Court in Western Kentucky late Friday night following an all-day trial.

The men are members of the Swartzentruber Amish sect, who do not believe in using the bright orange and red triangles that state law requires be placed on the back of slow-moving vehicles such as tractors and buggies.

"They were certainly disappointed," said their attorney, William Sharp of the American Civil Liberties Union of Kentucky, in an interview yesterday. "But they also knew this is just the beginning, because we will be appealing the decisions." \* \* \*

Sharp said the Amish would file an appeal on grounds that the safety-emblem law violates their religious freedom and that they were discriminated against because only the Amish have been cited in recent years in Graves County -- despite evidence of farm machinery traveling the roads without safety emblems.

Judge Deborah Hawkins Crooks assessed the men \$25 fines for each of a total of 10 violations, plus court costs. They have until May 28 to pay.

Three Amish men were also facing a deadline last week to pay fines from previous cases, but the court extended their deadlines pending a Court of Appeals decision on whether to hear an appeal.

Posted by Marcia Oddi on [Saturday, November 15, 2008](#)

Posted to [Courts in general](#)

### **16.3. [COURTS - MORE ON "MCDONALD'S SANCTIONED IN STRIP-SEARCH CASE"](#)**

Updating [this ILB entry](#) from Oct. 5, 2007, Andrew Wolfson of the **Louisville Courier Journal** [reports](#) today in a lengthy story that begins:

A judge has ordered McDonald's Corp. to pay \$2.4 million in attorney fees and costs to Louise Ogborn, the Bullitt County woman who last year won a \$6.1 million verdict in her strip-search hoax lawsuit against the company.

Citing Ogborn's lawyers' "incredible success," Senior Judge Tom McDonald approved fees of \$934,325 for the lead trial lawyer, Ann Oldfather, and \$311,250 to Kirsten Daniel, her co-counsel, as well as \$25,000 in sanctions against McDonald's for misconduct in the litigation.

Posted by Marcia Oddi on [Saturday, November 15, 2008](#)

Posted to [Courts in general](#)

### **16.4. [IND. COURTS - "JUDGE RULES SHE WILL STICK WITH HOSPITAL ZONING SUIT"](#)**

James D. Wolf Jr. [reports today](#) in the **Gary Post-Tribune**:

VALPARAISO -- The corporation that now owns Porter hospital can legally join a lawsuit brought against Porter County officials by the Liberty Landowners Association.

Judge Mary Harper also will not recuse herself from the case because her ex-husband, County Commissioner Robert Harper, is one of the defendants in the case.

Judge Harper made those determinations Friday morning in the case where the landowners association is suing the county commissioners for rezoning land northwest of the intersection of Indiana 49 and U.S. 6 so that Porter hospital can build a new facility.

However, the legal wrangling before the final hearing still isn't over.

On Dec. 9, both parties return to court on the plaintiff's motion to compel the defendants to answer written interrogatories sent to the commissioners and to hospital officials.

The wife of County Commissioner John Evans works as a hospital official, raising possible conflicts of interest, landowners association attorney Martin Lucas said.

Then, attorneys for the county and for the hospital plan to argue whether the landowners association has the right to sue the county officials for the rezoning.

Judge Harper declined to remove herself as judge from the case because she and the commissioner have been divorced for more than 20 years, have no minor children together and have no financial interests in common, she said.

"I'm not finding that I should treat this case any different than any other BZA or board of commissioners cases that have come through the court," she said.

Attorneys for the hospital and county said Northwest Indiana Health Systems, the hospital owners, have a financial stake in land, construction and a four-year contract to build a new hospital because of the suit.

Bob Kasarda of the **NWI Times** has [a story today](#) headed "*Judge to remain in hospital suit.*" The story begins:

Porter Circuit Court Judge Mary Harper denied a motion Friday to step aside from hearing a lawsuit seeking to block the construction of a new Porter hospital at Ind. 49 and U.S. 6.

The Liberty Landowners Association argued there is a conflict since Mary Harper was once married to Porter County Commissioner Bob Harper, who along with the other two commissioners is the target of the landowners' suit.

County attorney Gwenn Rinkenberger said she successfully argued there is no conflict since the judge and commissioner are no longer married.

The judge did grant another motion allowing Northwest Indiana Health Systems -- Porter hospital -- to enter the legal dispute. The dispute had been between the commissioners and landowners.

The landowners association, which is represented by North Judson attorney Martin Lucas, opposed the request, arguing the health care provider has failed to show its interests would not be adequately represented by the commissioners.

Rinkenberger filed an additional motion asking the judge to dismiss the lawsuit on grounds the landowners association does not have legal standing.

Lucas said there are a variety of interpretations on legal standing in the law. "I think we should have standing," he said.

Posted by Marcia Oddi on [Saturday, November 15, 2008](#)

Posted to [Indiana Courts](#)

#### **16.5. [IND. DECISIONS - STILL MORE ON: COURT OF APPEALS NULLIFIES 2007 MAYORAL ELECTION](#)**

"*Court ruling creates many 'What ifs'*" is the headline to [a story today](#) in the **Terre Haute Trib-Star** reported by. Sue Loughlin. Some quotes from the long story:

The possibility of a special Terre Haute mayoral election is raising many questions about how it would be conducted and how party nominees would be chosen.

"A bomb went off [Thursday] morning," said Pat Mansard, Vigo County clerk. \* \* \*

As far as a special election, "There are a lot more questions than answers," Mansard said. "We're going to have to wait until we get direction from the courts ... We're plowing new ground here."

On Friday, Mansard and other members of the County Election Board still were working on the recent general election and certifying results.

Bennett has said he plans to appeal the latest court ruling to the Indiana Supreme Court, which could overturn the Appeals Court decision.

Mansard suggests the legal process must play out before specific special election procedures are known.

"We don't know if it's going to unfold pretty rapidly or if it's going to take more time," she said.

She and others appear to agree on one point, that it's likely the nominees for the election would be chosen through a caucus of eligible precinct committeemen and women.

Posted by Marcia Oddi on [Saturday, November 15, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

#### 16.6. [LAW - MORE ON "KENTUCKY TESTS STATE'S REACH AGAINST ONLINE GAMBLING"](#)

Updating [this ILB entry](#) from Oct. 9th, Stephenie Steitzer of the **Louisville Courier-Journal** [reports](#):

FRANKFORT, Ky. -- The Court of Appeals yesterday blocked Franklin Circuit Court from proceeding with Gov. Steve Beshear's lawsuit against 141 gambling Web sites until appellate judges hear oral arguments and rule on the matter.

Internet gambling and domain name trade groups asked the Court of Appeals to intervene after Franklin Circuit Judge Thomas Wingate ruled last month that he has the right to decide whether control of the Web sites must be forfeited to Kentucky.

The order issued yesterday prohibits Wingate from holding a forfeiture hearing scheduled for Dec. 3.

Oral arguments are scheduled for Dec. 12 before the Court of Appeals.

Beshear's suit attempts to force the sites to either block access by Kentucky users and pay damages or relinquish control of their Web site domain names.

Beshear has said the sites are "leeches on our communities" that are taking money away from Kentucky's horse racing industry.

Defense attorneys have argued that the state does not have jurisdiction because the Web sites are owned by companies located outside the state and, in some cases, outside the country.

Posted by Marcia Oddi on [Saturday, November 15, 2008](#)

Posted to [General Law Related](#)

#### 16.7. [IND. COURTS - JURISTS HONOR JUDGE JONATHAN J. ROBERTSON II](#)

The **Jackson County/Seymour TribTown** had [this story Thursday](#) by Aubrey Woods. Some quotes:

BROWNSTOWN - Memorial services often tend to be a bit on the solemn side.

That wasn't the case, however, Wednesday afternoon as judges and attorneys from throughout southern Indiana gathered to celebrate the life of Judge Jonathan J. Robertson II. The Brownstown man died Oct. 13 at the age of 76.

"He wrote more opinions than any other appellate judge in the state, but I think that one of his greatest assets was his humor," Senior Judge Robert R. Brown said of Robertson, who served as a judge on the Indiana Court of Appeals from 1971 to 1997. Robertson began his career on the bench in January 1965 when he became Jackson Circuit Court judge.

Robertson's humor came up often during the service, which was sponsored by the Jackson County Bar Association and held in the circuit court room. \* \* \*

John G. Baker, chief judge of the Indiana Court of Appeals, talked about the years he worked with Robertson on the appeals court.

"He always told me it's a great job," Baker said of being a judge. "He said, 'It's not a hard job. You're not

outside and there's not any heavy lifting.' Well, it's a lot harder lifting now without him."

Baker, who joined the appeals court in June 1989, said Robertson, who wrote more than 3,000 opinions while an appellate judge, was a practical joker who sometimes accompanied Baker when he was a new judge to events he really didn't have to attend. \* \* \*

Jackson Superior Court I Judge Bruce Markel III joked he didn't like it very well when Judge Robertson served as senior judge in his court in recent years. "My staff never got anything done," Markel said. "He had them in stitches."

Posted by Marcia Oddi on [Saturday, November 15, 2008](#)

Posted to [Indiana Courts](#)

## 17. [Friday, November 14, 2008](#)

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### 17.1. [COURTS - MORE ON "U.S. SUPREME COURT IS ASKED TO FIX TROUBLED WEST VIRGINIA JUSTICE SYSTEM" \[UPDATED\]](#)

[In this ILB entry](#) from Oct. 12th, a story by Adam Liptak of the **NY Times** is quoted. It begins:

The justice system in West Virginia is broken and the United States Supreme Court should take steps to fix it, according to a pile of briefs in three cases awaiting the court's attention.

Today, according to [this entry from SCOTUSblog](#), the U.S. Supreme Court accepted the first of those cases for review, *Caperton v. A.T. Massey Coal Company, Inc., et al*, where the issue is whether a judge's failure to recuse himself from a case in which he received substantial campaign donations from one of the parties violates the Due Process rights of the other party. The entry goes on to provide links to the opinion below, the petition for certiorari, etc.

Here is a link to [related ILB entries](#).

**[Updated 11/15/08]** *"High Court Tackles Campaign Financing"* is the title of [this story](#) this morning on NPR:

Weekend Edition Saturday, November 15, 2008 · The Supreme Court has agreed to review two cases related to campaign financing. In one, a West Virginia judge did not recuse himself from a case involving a contributor to his election campaign. In the other, a group wanted to advertise its anti-Hillary Clinton movie without making those ads comply with campaign finance laws. NPR's Nina Totenberg reports.

Posted by Marcia Oddi on [Friday, November 14, 2008](#)

Posted to [Courts in general](#)

### 17.2. [LAW - CLOAK OF EXECUTIVE POWERS MAY FOLLOW BUSH OUT OF OFFICE](#)

That according to [a story](#) by Charlie Savage published yesterday in the **NY Times** that begins:

When a Congressional committee subpoenaed Harry S. Truman in 1953, nearly a year after he left office, he made a startling claim: Even though he was no longer president, the Constitution still empowered him to block subpoenas.

"If the doctrine of separation of powers and the independence of the presidency is to have any validity at all, it must be equally applicable to a president after his term of office has expired," Truman wrote to the committee.

Congress backed down, establishing a precedent suggesting that former presidents wield lingering powers to keep matters from their administration secret. Now, as Congressional Democrats prepare to move forward with investigations of the Bush administration, they wonder whether that claim may be invoked again.

"The Bush administration overstepped in its exertion of executive privilege, and may very well try to continue to shield information from the American people after it leaves office," said Senator Sheldon Whitehouse, Democrat of Rhode Island, who sits on two committees, Judiciary and Intelligence, that are examining aspects of Mr. Bush's policies.

Posted by Marcia Oddi on [Friday, November 14, 2008](#)

Posted to [General Law Related](#)

### 17.3. [IND. COURTS - "OFFICER TASERED BY NOBLESVILLE COURT SUSPECT"](#)

Chris Sikich has [a report](#) this afternoon in the **Indianapolis Star**. A quote:

[Joshua P. Lindsey] was in a holding cell outside a courtroom, waiting for his noon sentencing hearing to begin in Superior Court 2, said his defense attorney, Andy Barker. The attorney, who was not with him, heard a loud pop and looked into the room. Barker said Lindsey had gotten a guard's gun and shot him.

The guard has not been identified. He was taken out of the judicial center on a stretcher. His injuries were not thought to be life-threatening.

Posted by Marcia Oddi on [Friday, November 14, 2008](#)

Posted to [Indiana Courts](#)

### 17.4. [LAW - HOOSIER NATIVE NAMED AS BIDEN'S TOP AID](#)

From the **Washington Post**, [a story](#) by Ceci Connolly. Some quotes:

Vice President-elect Joseph R. Biden Jr. turned to one of the most experienced Democratic staffers in Washington yesterday in naming as his chief of staff Ronald A. Klain, a longtime trusted adviser with an intimate knowledge of how the White House operates.

Klain, a Harvard-trained lawyer who first worked for Biden on Capitol Hill in 1987, will be reprising a role he played in the later years of the Clinton administration, when he was chief of staff to Vice President Al Gore. \* \* \*

In the course of his career, Klain has advised several Democratic presidential nominees, clerked at the Supreme Court, held a top position at the Justice Department, been a partner in a Washington law firm and advised Obama confidant and former Senate majority leader Thomas A. Daschle. He now serves as general counsel at Revolution Health, an online wellness company started by AOL founder Steve Case.

After being passed over for a prominent role in Gore's presidential campaign, Klain left the Clinton administration in July 1999. A year later, he returned to run the campaign's Tennessee command center, known as the "boiler room," and then spearheaded Gore's post-election recount efforts in Florida. Kevin Spacey portrayed Klain in the HBO movie "Recount," the dramatization of the 36-day court battle over the results of the 2000 presidential election.

"Every time I heard him talk about [the movie], it was in a humorous way," said Lisa Brown, a friend of Klain's who was Gore's counsel. "It was just this fun thing, like 'Holy cow!'"

The pull of politics has been a constant throughout Klain's life. As a student at Georgetown University, the Indiana native took time off to work on the campaign of his home-state Democratic Sen. Birch Bayh. Between graduation and law school, he again deferred his studies to work for Rep. Edward J. Markey (D-Mass.), who was considering a run for the Senate.

"Ron's an extraordinary multitasker," said John Barrett, a professor at St. John's University School of Law, who has been a friend since college. "He reads fast, writes fast and is a fast typist."

After finishing first in his class at Harvard Law School, Klain was a clerk for Supreme Court Justice Byron

R. White. Biden then hired him as the youngest chief counsel ever for the Senate Judiciary Committee.

Posted by Marcia Oddi on [Friday, November 14, 2008](#)

Posted to [General Law Related](#)

#### **17.5. [IND. DECISIONS - APPEALS COURT REDUCES EX-STRIPPER'S PRISON SENTENCE](#)**

The Court of Appeals' NFP decision yesterday in the case of [Ashley Ray Lawrence v. State of Indiana](#) is the subject of [a story today](#) in the **Gary Post-Tribune**. Some quotes from the report by Ruth Ann Krause:

The Indiana Court of Appeals in Indianapolis on Thursday overturned the sentence for Ashley Lawrence for voluntary manslaughter in the 2007 shooting and stabbing death of Deshun Bennett of Gary.

The Appeals Court decision indicates 25 years for voluntary manslaughter and four years for assisting a criminal would be appropriate for Lawrence, a former stripper who testified she was abused by her co-defendant and others. The sentences would be served simultaneously.

The Appeals Court returned the case to Lake Superior Court Judge Salvador Vasquez to resentence Lawrence to 25 years.

Lawrence's boyfriend, Jason Gaboian, who lived with Lawrence in Hobart, is serving a 53-year sentence for Bennett's murder.

In its decision, the court found that Vasquez failed to take into consideration Lawrence's young age -- she was 18 at the time -- and her diagnoses of depression, battered-wife syndrome and post-traumatic stress disorder.

Those mitigating factors could reduce her sentence from the 30-year starting point, the court noted.

Bill Dolan of the **NWI Times** also has a story, [available here](#).

Posted by Marcia Oddi on [Friday, November 14, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

#### **17.6. [ENVIRONMENT - "U.S. UNDERCUTS CLEAN-AIR RULE"](#)**

[A story today](#) in the **Chicago Tribune**, written by Michael Hawthorne, begins:

Looking to bolster the fight against childhood lead poisoning, the U.S. Environmental Protection Agency last month approved a tough new rule aimed at clearing the nation's air of the toxic metal.

A key part of the initiative is a new network of monitors that will track lead emissions from factories. But the Bush administration quietly weakened that provision at the last minute by exempting dozens of polluters from scrutiny, federal documents show.

Critics say the change undermines a rule that otherwise has been widely hailed as a powerful step forward in protecting children's health.

In Illinois, at least a dozen factories that would have been monitored could now fall through the cracks, the state EPA estimates, including a steelmaking-waste recycler on Chicago's Southeast Side and a lead-acid battery manufacturer in Naperville.

Posted by Marcia Oddi on [Friday, November 14, 2008](#)

Posted to [Environment](#)

#### **17.7. [IND. DECISIONS - COURT OF APPEALS ISSUES 4 TODAY \(AND 19 NFP\) \[CORRECTED\]](#)**

**For publication opinions today (4):**

[James J. and Ryan J. Romanowski v. Giordano Mgmt. Group](#)

In [Wayne Schenk v. State of Indiana](#), a 6-page opinion, Judge Kirsch writes:

Following a guilty plea, Wayne Schenk appeals his sentence for operating a motor vehicle with an alcohol concentration equivalent of .15 or greater with a prior conviction for operating while intoxicated,<sup>1</sup> as a Class D felony. Schenk raises one issue: whether the trial court erred in finding that an operating while intoxicated conviction, under a repealed but recodified statute, constituted a prior conviction for purposes of determining that six months of his sentence was non-suspendable under IC 35-50-2-2(b)(4)(R). We affirm. \* \* \*

In 1991, the Indiana General Assembly recodified the laws relating to motor vehicles (the "1991 Act"). Pub. L. No. 2-1991, § 18 (1991). As part of the recodification, IC 9-11-2- 1 through IC 9-11-2-3, which related to crimes pertaining to operating a motor vehicle while intoxicated, were repealed and replaced with comparable provisions in IC 9-30-5-1 through IC 9-30-5-3. In the recodification, the offenses remained the same in form and substance.<sup>2</sup> The 1991 Act included a savings clause, which read in pertinent part, "If this act repeals and replaces a provision in the same form or in a restated form, the substantive operation and effect of that provision continues uninterrupted." P.L. 2-1991, § 111. \* \* \*

Schenk's 1988 OWI conviction was pursuant to IC 9-11-2, the predecessor to IC 9-30-5. "The savings clause preserves the 'substantive operation and effect' of provisions repealed and replaced 'in the same form or in a restated form' and directs that references to repealed and replaced sections shall be treated as references to the provisions replacing them." Holt, 638 N.E.2d at 787. Noting that sections IC 9-30-5-1 through IC 9-30-5-3 restate the penalty provisions previously set forth in sections IC 9-11-2-1 through IC 9-11-2-3, the savings clause preserves OWI convictions under IC 9-11-2 for consideration under IC 35-50-2-2(b)(4)(R). The trial court did not err in finding Schenk's 1988 OWI conviction qualified as one of the two OWI convictions under IC 35-50-2-2(b)(4)(R), which mandates a non-suspendable six month sentence on Schenk's Class D felony. We affirm the trial court's sentence of eighteen months, with six months executed on home detention and twelve months on AAPS.

[Vicki Heaphy v. Randy Ogle](#)

In [Melinda Loveless v. State of Indiana](#), an 8-page opinion, Judge May writes:

Melinda Loveless was charged with murder and a number of other crimes, and she agreed to plead guilty to murder, arson as a Class A felony, and criminal confinement as a Class B felony. She sought post-conviction relief on the grounds her counsel was ineffective for pressuring her to sign the plea agreement by representing she might otherwise face the death penalty; she was a minor and therefore could not enter into a plea agreement; and the Indiana Penal Code is unconstitutional. The post-conviction court denied her petition and we affirm.

**NFP civil opinions today (9):**

[Guardianship of A.G.O. and T.B.E.O., Teresa Brown and Ronnie Brown v. Douglas Olson \(NFP\)](#)

[In the Matter of M.W. \(NFP\)](#)

[Indiana Office of Utility Consumer Counselor v. Duke Energy Indiana, Inc. \(NFP\)](#)

[In the Matter of: L.D. \(NFP\)](#)

[Ulrich Houzanme v. Sally Houzanme \(NFP\)](#)

[Fifth Third Bank, Successor-in-Interest, to Fifth Third Bank \(Southern Indiana\) v. Moxie Investments and Consulting, LLC, et al. \(NFP\)](#)

[E.E.W., III v. T.R.P. and F.E.P. \(NFP\)](#)

[James F. Glass, Sr. v. Jeff Wrigley \(NFP\)](#)

[Felicia J. Cook v. Demetrius J. Baker \(NFP\)](#)

**NFP criminal opinions today (10):**

[Jon D. Baumgartner v. State of Indiana \(NFP\)](#)

[Tony L. Campbell, Jr. v. State of Indiana \(NFP\)](#)

[Guadalupe Angeles v. State of Indiana \(NFP\)](#)

[Christopher McCroy v. State of Indiana \(NFP\)](#)

[Sidney L. Kincaid v. State of Indiana \(NFP\)](#)

[Thomas Victor Gongora v. State of Indiana \(NFP\)](#)

[Anthony Ferguson v. State of Indiana \(NFP\)](#)

[Keith Rider v. State of Indiana \(NFP\)](#)

[Quintin D. Holmes v. State of Indiana \(NFP\)](#)

[Paul R. Fegan v. State of Indiana \(NFP\)](#)

Posted by Marcia Oddi on [Friday, November 14, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

**17.8. [IND. LAW - STILL MORE ON "ACORN FOLLOWED LAW ON SUSPECT VOTER REGISTRATIONS"](#)**

Updating **ILB** entries from [Oct. 18th](#) and [Oct. 27th](#), two reports today from NW Indiana on the impact of ACORN on Lake County voting.

Bill Dolan [reports](#) in the **NWI Times** under the headline "*Officials: ACORN registration problems didn't hamper Lake County voting.*" Some quotes:

CROWN POINT | ACORN's controversial voter registration drive didn't cause significant problems at the polls Election Day as some critics had feared.

Michelle Fajman, county elections supervisor, said only a handful of people cast ballots from among thousands of questionable voter registration forms generated earlier this year by the Association of Community Organizations for Reform, a grass-roots political action group that paid workers to comb urban areas for potential voters.

The group included registrations in the names of dead, underage or fictitious people.

Republican officials raised concerns before the Nov. 4 election that poll workers would have to deal with large numbers of people who weren't properly registered.

ACORN officials acknowledged their Lake County drive was one of the worst in the country for the percentage of bad applications among the 7,900 new voters its paid employees helped register.

Those officials blamed the problem on a few unscrupulous employees. They said state law required them to hand in all registration forms to Lake election officials, but ACORN's quality control personnel flagged any problematic ones they found.

The count rejected hundreds of ACORN forms and diverted another 2,000 questionable ones to a "double-check stack" that would be brought into play if anyone of those voters showed up at the polls.

"We only had to go to that stack about five times," Fajman said.

"ACORN voter registration flap all but fizzles" is the headline to John Byrne's [report](#) in the **Gary Post Tribune**. Some quotes:

CROWN POINT -- So much for ACORN's voter registrations gumming up the works on Election Day.

Precinct workers reported just a handful of disputes Nov. 4 with voters who were part of the 5,000 registrations the Association of Community Organizations for Reform Now collected in Lake County.

Elections officials set aside about 2,000 ACORN registrations they could not confirm were accurate ahead of the election, deciding that given the furor over the group it wouldn't be prudent to add the voters to the rolls.

They then braced themselves for phone calls from irate residents all over the county wondering why their names weren't on the poll books.

But the flood never came.

"We had about five calls," said County Elections Supervisor Michelle Fajman.

Those who did call in had their registrations verified by election staff, and were allowed to cast ballots.

Posted by Marcia Oddi on [Friday, November 14, 2008](#)

Posted to [Indiana Law](#)

#### 17.9. [IND. DECISIONS - MORE ON: COURT OF APPEALS NULLIFIES 2007 MAYORAL ELECTION](#)

The **Terre Haute Tribune-Star** is full of stories today on the Court of Appeals [ruling yesterday](#) in the case of *Kevin D. Burke v. Duke Bennett*.

- "*Indiana Court of Appeals nullifies 2007 Terre Haute mayoral election: Decision reverses Duke Bennett's victory,*" [reported by](#) Deb Kelly.
- "*Bennett says city situation normal: Mayor urges patience during Council meeting after legal decision on his office,*" [reported](#) by Arthur E. Foulkes
- "*Neither Burke, Bennett seem surprised by ruling,*" [reported](#) by Crystal Garcia
- "*City Council plans business as usual despite court decision,*" [reported](#) by Crystal Garcia
- "*It's not over yet: Bennett says legal team reviewing options,*" [reported](#) by Arthur E. Foulkes
- "*Election officials face possible special election after ruling,*" [reported](#) by Howard Greninger
- "*Where mayoral case goes from here still up in the air,*" [reported](#) by Brian M. Boyce.

Posted by Marcia Oddi on [Friday, November 14, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

#### 17.10. [LAW - MORE ON "DEMOCRATS EYE BUSH MIDNIGHT REGULATIONS"](#)

Updating [this ILB entry](#) from Nov. 11th, Erika Lovley and Ryan Grim of **Politico** had [a lengthy story](#) Nov. 12th, headed "*Dems eye midnight regulations reversal.*" It begins:

Congressional Democrats are eyeing a little-known, Clinton-era law as a way to reverse Bush administration midnight regulations — even ones that have already taken effect.

It's a move that would undermine the White House's attempt to finalize its energy and environmental regulations by November so that Barack Obama couldn't undo them after he's sworn in as the 44th

president on Jan. 20.

“Fortunately, [the White House] made a mistake,” said a top Senate Democratic aide.

More from the story:

Last May, White House chief of staff Joshua Bolten instructed federal agency heads to make sure any new regulations were finalized by Nov. 1. The memo didn't spell it out, but the thinking behind the directive was obvious. As Myron Ebell of the conservative Competitive Enterprise Institute put it: “We're not going to make the same mistakes the Clinton administration did.”

President Bill Clinton finalized regulations within 60 days of the 2001 inauguration, meaning Bush could come in and easily reverse them.

It could take Obama years to undo climate rules finalized more than 60 days before he takes office — the advantage the White House sought by getting them done by Nov. 1. But that strategy doesn't account for the Congressional Review Act of 1996.

The law contains a clause determining that any regulation finalized within 60 legislative days of congressional adjournment is considered to have been legally finalized on the 15th legislative day of the new Congress, likely sometime in February. Congress then has 60 days to review it and reverse it with a joint resolution that can't be filibustered in the Senate.

In other words, any regulation finalized in the last half-year of the Bush administration could be wiped out with a simple party-line vote in the Democrat-controlled Congress. \* \* \*

Congress last used the CRA in 2001 to overturn a Clinton administration rule that set new requirements for ergonomic work spaces.

Targets of the CRA may include a rule to allow federal agencies to determine on their own whether their policies will threaten endangered species, rather than requiring them to go through the U.S. Fish and Wildlife Service for approval. Regulations opening land in the West to oil shale development and mountaintop removal could also be on the block.

Here is [the text](#) of the Congressional Review Act of 1996. Here are [a number of GAO reports on the Act](#).

Posted by Marcia Oddi on [Friday, November 14, 2008](#)

Posted to [Administrative Law](#) | [Environment](#) | [General Law Related](#)

## 18. [Thursday, November 13, 2008](#)

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### 18.1. [IND. DECISIONS - TWO TODAY FROM SUPREME COURT](#)

Each of the following cases was granted transfer with opinion.

In [Lloyd Overton v. Marshall Grillo, D.O., et al.](#), an 8-page, 3-2 opinion, Justice Boehm writes:

We hold that a medical malpractice claim for allegedly misreading a mammogram is barred by the two-year statute of limitations when the plaintiff learned of cancer with approximately nine months remaining in the limitations period. \* \* \*

The trial court's grant of summary judgment for Dr. Grillo is affirmed.

Sullivan, J., concurs.

Shepard, C.J., concurs in result.

Dickson, J., dissents with separate opinion in which Rucker, J., concurs. *[which concludes]* In her separate concurring-in-result opinion in the Court of Appeals, Judge Robb believed that the plaintiff "could have reasonably believed that in July 1999, there was no malignancy, and that the cancer had first appeared sometime in the fifteen months between that mammogram and her September 2001

mammogram." *Overton v. Grillo*, No. 64A04-0605-CV-278 (Ind. Ct. App. 2007). Slip op. at 11. I agree.

I conclude that Dr. Grillo did not uncontrovertibly establish that the plaintiff, upon learning that she had metastasized breast cancer in October 2000, in the exercise of reasonable diligence, "would" or "should" have discovered that malpractice had occurred in her routine mammography in July, 1999. In my view, this was a factual issue inappropriate for summary judgment. For these reasons, I dissent.

In [\*Victor Herron v. Anthony A. Anigbo, M.D.\*](#), a 16-page, 3-2 opinion, Justice Boehm writes:

The Indiana Medical Malpractice Act provides for an occurrence-based statute of limitations, i.e., a medical malpractice claim must be filed within two years after the act or omission alleged to constitute malpractice. We have held that the statute is constitutional on its face but may violate the Indiana Constitution if applied to a plaintiff who despite exercise of reasonable diligence does not learn of the injury or malpractice before the period expires. We elaborate what exercise of reasonable diligence requires when, as here, the limitations period is occurrence-based. Limitations issues in most cases are resolved as a matter of law. There may, however, be genuine issues of material fact as to when the plaintiff in exercise of reasonable diligence should learn of the injury or disease and that it may be attributable to malpractice. If limitations issues cannot be resolved as a matter of law on summary judgment, factual disputes are to be submitted to the trier of fact. \* \* \*

[In this case] Herron claimed only ignorance of the extent of his injuries, and that is as a matter of law an insufficient basis to find the occurrence-based limitations period to violate the right to a remedy afforded by article I, section 12 of the Indiana Constitution.

In sum, claims based on negligence in the May 6, 2002 surgery are barred because Herron failed as a matter of law to pursue his claim with reasonable diligence within the period required by the statute. An occurrence-based limitations period can produce harsh results. If Herron's surgery was below the standard of care, this is such a case. Herron's condition was and is severe, and it is understandable that his focus was on medical outcomes, not legal remedies, in the more than two years following the surgery. But the legislature has prescribed an occurrence-based limitations period, and Herron and all other patients are charged with knowledge of the law, however unrealistic that assumption may be in a given case. Any claim of malpractice in the surgery is therefore barred by the occurrence-based limitation. \* \* \*

The trial court's grant of summary judgment is affirmed.

Sullivan, J., concurs.

Shepard, C.J., concurs in result with separate opinion.

Dickson, J., dissents with separate opinion in which Rucker, J., concurs.

SHEPARD, Chief Justice, concurring in result. The General Assembly's decision to adopt an occurrence-based statute of limitations for medical malpractice claims was long ago upheld against a substantial list of constitutional challenges in *Johnson v. St. Vincent Hosp., Inc.*, 273 Ind. 374, 404 N.E.2d 585 (1980). We later held that the statute might be unconstitutional as applied if the nature of a patient's particular affliction was such that it could not be discovered within the period chosen by the legislature. *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999). Nothing in the present facts prevented Mr. Herron from filing his claim on time, and I thus join in affirming the trial court.

Dickson, J., dissenting. [*the dissent begins*] I dissent, believing that the majority today would create an unprecedented new and rigorous barrier preventing injured patients a reasonable opportunity to access the courts to seek remedy for medical malpractice claims, a barrier that fosters a climate of suspicion and doubt between patients and their health care providers. I also dissent from the majority's application of its new standard to the facts presented.

Posted by Marcia Oddi on [Thursday, November 13, 2008](#)

Posted to [Ind. Sup.Ct. Decisions](#)

## [18.2. IND. DECISIONS - COURT OF APPEALS ISSUES 3 TODAY \(AND 12 NFP\)](#)

### **For publication opinions today (3):**

In [T.D. v. State of Indiana](#), a 7-page opinion on rehearing, Judge Najam writes:

T.D. has filed a petition for rehearing asking that we reconsider our holding that T.D. waived review of her claim that the State presented insufficient evidence to support her juvenile delinquency adjudication. See *In re T.D.*, Cause No. 49A02-0712-JV-1082 (Ind. Ct. App. July 9, 2008) ("*In re T.D. I*"). Simultaneously, T.D. files her petition for leave to supplement the appendix with the dispositional order entered in Cause Number 49D09-06111-JD-4161 ("Cause Number 4161"). Because of the unique circumstances in this case, as explained below, we grant both petitions and consider T.D.'s sufficiency claim on the merits. We reverse our prior decision. \* \* \*

In sum, the record shows that T.D.'s placement at the Academy is not a commitment to the Department of Correction. And the State did not present evidence to show that the Academy is a juvenile detention facility, a secure private facility, or a shelter care facility. As a result, the State did not meet its burden of showing that the Academy is one of the facilities "for custody of persons alleged or found to be delinquent children" as required by Indiana Code Section 35-41-1-18(a)(4). Thus, we grant T.D.'s petition for rehearing and reverse the adjudication finding T.D. to be delinquent for having committed the offense of escape, as a Class C felony. Reversed.

In [Robert Tiller v. State of Indiana](#), a 16-page opinion, Judge Friedlander writes:

Following a jury trial, Robert Tiller was convicted of Attempted Murder, a class A felony, Confinement as a class B felony, and Escape as a class B felony. The trial court subsequently sentenced Tiller to an aggregate sentence of sixty-six years imprisonment. On appeal, Tiller presents three issues for our review:

1. Did the trial court properly instruct the jury on accomplice liability for a charge of attempted murder?
2. Did the trial court properly allow the victim's deposition to be read into evidence when the victim failed to appear to testify during trial?
3. Is the evidence sufficient to sustain Tiller's conviction for attempted murder?

We reverse and remand. \* \* \*

Considering Tiller's testimony as to his involvement and his allegation that he removed himself from the situation when he learned that Cannon had been placed in the trunk of the car in conjunction with the State's evidence that Tiller ordered James and Looney to tie Cannon up, handed James a gun, and retrieved the car in which James and Looney placed Cannon in the trunk, it is clear that Tiller's intent was substantially at issue. We must therefore conclude, as did our Supreme Court in *Hopkins*, that the trial court's instruction on accomplice liability constituted fundamental error in that it failed to adequately instruct the jury that it was required to find that Tiller possessed the specific intent to kill Cannon when he aided, supported, helped, or assisted his accomplices commit the crime of attempted murder.

[Kevin D. Burke v. Duke Bennett](#) - see [ILB entry here](#)

### **NFP civil opinions today (3):**

[Michael E. Stagg, Jr. v. Michelle M. Stagg \(NFP\)](#) - "We reverse and remand to the trial court for a determination of whether modification of custody of K.S. is in the child's best interests. Additionally, if the trial court finds that it is, because the trial court's order is silent regarding parenting time under the modified physical custody arrangement, we direct the court to articulate an appropriate parenting time schedule for the parties. Reversed and remanded."

[Gary B. Plunkitt v. Finance Center Federal Credit Union \(NFP\)](#) -

[Dawn Frederick v. Jim Frederick \(NFP\)](#) - "Finding that the trial court properly awarded her one-third of the value of these assets and that the trial court actually awarded her nearly 50% of the marital pot, we affirm."

**NFP criminal opinions today (9):**

[Ashley Ray Lawrence v. State of Indiana \(NFP\)](#)

[John D. Kwiatkowski v. State of Indiana \(NFP\)](#)

[Mary E. Ooten v. State of Indiana \(NFP\)](#)

[Fred S. Mott v. State of Indiana \(NFP\)](#)

[Daemen Sampson v. State of Indiana \(NFP\)](#)

[Frederick M. Cooper v. State of Indiana \(NFP\)](#)

[Lenn Ivy v. State of Indiana \(NFP\)](#)

[Warren Ivy v. State of Indiana \(NFP\)](#)

[Gar Terry v. State of Indiana \(NFP\)](#)

Posted by Marcia Oddi on [Thursday, November 13, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

**18.3. [IND. DECISIONS - 7TH CIRCUIT ISSUES DEBT COLLECTION OPINION](#)**

In [McKinney v. Cadleway Properties](#) (ND Ill.), a 28-page, opinion split several ways, Judge Sykes writes:

This case requires us to determine whether the defendant, Cadleway Properties, Inc., is a “debt collector” under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 et seq. (“FDCPA”). If it is, then the FDCPA applies, and our second question is whether the “validation of debt” notice Cadleway sent to the plaintiff was clear or confusing on its face.

Reverend Versia McKinney’s Chicago home was damaged by a flood in 1996. To help with repair costs, she obtained a disaster assistance loan from the Small Business Administration (“SBA”). After McKinney ceased making payments in 2002, the SBA sold the debt to a third party, and Cadleway subsequently acquired it. In an attempt to collect on the debt, Cadleway sent McKinney a collection letter that included a notice of her right to dispute and obtain verification of the debt and of the original creditor as required by the FDCPA. McKinney responded with this lawsuit alleging the notice was confusing.

The district court entered summary judgment for McKinney, concluding that Cadleway is a debt collector and its collection letter was confusing to the unsophisticated consumer and therefore violated the FDCPA. We agree with the former conclusion but not the latter. The FDCPA covers debt collectors, not creditors, and these categories are “mutually exclusive.” *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 536 (7th Cir. 2003); see also 15 U.S.C. § 1692a(4), (6) & (6)(F). The undisputed evidence here establishes that Cadleway is a debt collector, not a creditor. Cadleway’s validation-of-debt notice, however, was objectively clear and not obscured by Cadleway’s request that McKinney confirm or dispute the amount she owed. Accordingly, we reverse the judgment of the district court and remand with instructions to enter judgment for Cadleway. \* \* \*

Accordingly, although the district court properly concluded that Cadleway was a debt collector under the FDCPA, it improperly entered judgment for McKinney on the merits of the claim. The judgment of the district court is REVERSED and the case is REMANDED with instructions to enter judgment in favor of Cadleway.

MANION, Circuit Judge, concurring in part and concurring in the judgment. I agree with the court’s well-reasoned analysis that the validation-of-debt notice Cadleway sent McKinney does not run afoul of the FDCPA. That McKinney herself does not claim to have been confused by the notice is telling. The notice

is straightforward. It contains all the disclosures required by 15 U.S.C. § 1692g. It is in a normal, reasonably sized font. And it allows a consumer either to confirm the total amount owed or indicate that the total amount owed listed on the notice is incorrect and provide the correct amount, including \$0. \* \* \*

Even assuming that Cadleway met the statutory definition of a debt collector, Cadleway's validation-of-debt notice was objectively clear, as explained in Part II.B.2 of the court's cogent opinion, and McKinney therefore loses. But because the court has chosen to address the issue of whether Cadleway qualifies as a debt collector, I must respectfully disagree with the court's resolution of the question.

ROVNER, Circuit Judge, concurring in part and dissenting in part. Although I agree with the majority opinion that Cadleway was a debt collector as defined in the Fair Debt Collection Practices Act, I disagree with its conclusion that the debt collection letter was not confusing. Judge Guzmán below determined that any reasonable jury would conclude that the unsophisticated consumer would be confused by the form. My colleague is worlds apart, finding that there is nothing confusing on the face of the letter at all. I find the latter position untenable. \* \* \*

The confirmation portion of the letter raises all of these questions but leaves them unanswered. Not even I know the answer without resorting to legal research. This surely cannot be the standard we require of the unsophisticated consumer. The confirmation portion of the letter is clearly confusing on its face. I therefore respectfully dissent.

Posted by Marcia Oddi on [Thursday, November 13, 2008](#)

Posted to [Ind. \(7th Cir.\) Decisions](#)

#### **18.4. [IND. DECISIONS - COURT OF APPEALS NULLIFIES 2007 MAYORAL ELECTION](#)**

In [Kevin D. Burke v. Duke Bennett](#), a 59-page, 2-1 opinion (including a dissent beginning on p. 46), Judge Brown writes:

Kevin Burke appeals the trial court's denial of his petition contesting the election of Duke Bennett for mayor of Terre Haute. Burke raises one issue, which we revise and restate as:

- I. Whether Bennett was ineligible under Indiana's election contest statutes; and
- II. Whether Burke must be declared elected pursuant to Ind. Code § 3-12-8-17.

On cross appeal, Bennett raises one issue, which we revise and restate as whether Bennett was subject to the Little Hatch Act, 5 U.S.C. § 1502. We reverse and remand. \* \* \*

Because Burke has standing to contest the election and Bennett is ineligible, we conclude that a vacancy exists. In light of this conclusion, we direct the parties' attention to Ind. Code §§ 3-10-8, which govern special elections. See Ind. Code § 3-10-8-1 ("A special election shall be held in the following case: . . . (4) Whenever a vacancy occurs in any local office the filling of which is not otherwise provided by law."). We order the trial court to issue a writ of election pursuant to Ind. Code § 3-10-8-3.

For the foregoing reasons, we reverse the trial court's denial of Burke's petition contesting the election for mayor of Terre Haute, and remand for proceedings consistent with this opinion. Reversed and remanded.

DARDEN, J. concurs

NAJAM, J. dissents with separate opinion [that begins] I respectfully dissent. The majority concludes that Bennett was subject to and violated the Little Hatch Act and, therefore, was ineligible to assume or be a candidate for the office of mayor of Terre Haute. See Ind. Code § 3-8-1-5(c)(6). Next, the majority concludes that, under our Supreme Court's opinion in *Oviatt v. Behme*, 238 Ind. 69, 147 N.E.2d 897 (1958), Burke is not entitled to that office. But the majority then disregards *Oviatt* and holds that Burke is not required to establish a right to the office and is entitled to relief on his complaint in the form of a special election.

The **Terre Haute Trib-Star** [posted a story](#) late this morning on the opinion. Some quotes:

TERRE HAUTE — A news conference has been called for 4 p.m. today in the mayor's office in city hall, following an Indiana Court of Appeals ruling this morning in favor of former Terre Haute Mayor Kevin Burke who had challenged Republican Duke Bennett's eligibility in the 2007 election.

The court by a 2-to-1 decision stated that Bennett was ineligible to take office and that Burke is not entitled to fill that post as a result of the ruling, because voters were unaware of Bennett's ineligibility. Thus, the votes cannot be counted and the court ruled the office vacant.

Here is [a long list of ILB entries](#) on the mayorial election dispute.

Posted by Marcia Oddi on [Thursday, November 13, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

### [18.5. IND. COURTS - EVEN MORE ON "SALACIOUS' AFFIDAVIT RESULTS IN JAIL TIME FOR CLIENT HINDS, ATTORNEY DENNEY"](#)

Updating [this ILB entry from earlier today](#), Doug Masson of **Masson's Blog** writes to ask:

Greetings Marcia,

With respect to that contempt order against the Muncie attorney, I don't suppose you have any notion as to how it could be considered direct contempt under [IC 34-47-2](#) which seems to me to require an act of contempt in open court or, if not, how Judge Hutchison gets around [IC 34-47-3-7\(c\)](#) which would seem to require him to appoint a 3 judge panel from which the defendant and the prosecuting attorney get to strike?

Doug also noted this morning's **Star-Press** story [on his blog](#).

Posted by Marcia Oddi on [Thursday, November 13, 2008](#)

Posted to [Ind. Trial Ct. Decisions](#)

### [18.6. IND. DECISIONS - MORE ON "COURT VOIDS PAIR'S RIGHTS AS PARENTS OF BOY, 9"](#)

The Nov. 5th Court of Appeals decision in the case of *Term. of Parent-Child Rel. of J.M. v. A.S. and A.M., Allen Co. Dept. of Child Services*, the subject of [this Nov. 7th ILB entry](#) quoting from a **Fort Wayne Journal Gazette** story, is referenced again today by that paper, albeit not by name, in [this editorial](#) that begins:

A recent study criticizing Indiana for removing endangered children and placing them in foster homes at a higher rate than the national average places a welcome spotlight on child welfare. But Hoosiers should not assume that the state is removing too many children from a dangerous home life.

The reference:

[State Department of Child Services division head, former Marion County Judge James W. Payne] points out that caseworkers' recommendation to remove children from a home must be backed up by a judge. Critics of the system argue that too many parents have inadequate legal representation and that judges are inclined to side with welfare workers. That is not true in Allen County, where parents who meet criteria are frequently appointed knowledgeable lawyers, and judges weigh all the factors in determining the child's best interests.

Indeed, just last week the Indiana Court of Appeals ruled on a case in which Allen Superior Court Judge Charles Pratt denied a request from the Department of Child Services to terminate parental rights. The appeals court overturned Pratt's order and permanently removed children from the home.

Posted by Marcia Oddi on [Thursday, November 13, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

### **18.7. IND. COURTS - STILL MORE ON "SALACIOUS' AFFIDAVIT RESULTS IN JAIL TIME FOR CLIENT HINDS, ATTORNEY DENNEY"**

Updating [this ILB entry](#) from Nov. 8th, here are some quotes from [a story](#) by Rick Yencer in the **Muncie Star-Press** today:

Attorney Louis Denney failed on Wednesday to get a judge to reverse a contempt citation that sent Denney and his client, Jeff Hinds, to jail.

Special Judge Brian Hutchison jailed Denney and Hinds last week after Denney filed an affidavit alleging criminal misconduct by the judge, including patronizing a prostitute and possession of marijuana. That affidavit accompanied a motion to get a change of judge in Hinds' bribery case where he is accused of bribing a witness to change his testimony in a case. Attorney Michael Alexander, a former prosecutor, also faces conspiracy to commit bribery in that case.

Hutchison, a Jay Circuit Court judge, sealed that affidavit, saying it contained salacious and defamatory statements not related to reasons to change judges. The affidavit also included statements that Hutchison questioned Alexander's and Hinds' characters, as well as alleging a dislike for Alexander's attorney, Donald McClellan.

Denney, who receives work release privileges during weekdays to maintain his law practice, filed a writ of habeas corpus, claiming he and Hinds were illegally incarcerated. \* \* \*

That action was denied Wednesday by Delaware Circuit Court 4 Judge John Feick, saying the writ was not procedurally correct, because notice was not given to other parties in the action. \* \* \*

Local attorneys have mixed opinions about whether Denney should be in jail for contempt, essentially for defaming a judge.

Attorney Bruce Munson called the action "ridiculous," adding he hoped the Muncie Bar Association would weigh in on the issue. Long-time public defender and former mayor Alan Wilson said direct contempt could be handed down by a judge summarily, saying there was an exemption to the Constitution.

Posted by Marcia Oddi on [Thursday, November 13, 2008](#)

Posted to [Ind. Trial Ct. Decisions](#)

### **18.8. IND. DECISIONS - "MOLESTING PLEA CAN'T BE ALTERED"**

The Indiana Supreme Court's decision yesterday in the case of *Shawn E. Norris v. State of Indiana* (see [ILB entry here](#)) is the subject today of [a story](#) by Niki Kelly in the **Fort Wayne Journal Gazette**. Some quotes:

The Indiana Supreme Court on Wednesday found that a Kosciusko County man cannot challenge his guilty plea to child molesting based on newly discovered evidence.

It was the first time the state's high court ruled on this particular legal issue.

Defendants have long had the right to use the post-conviction relief process to introduce newly discovered evidence and argue their guilt. But the avenue has been used only by those convicted at trial, not those who voluntarily admit their guilt.

Shawn Norris, 22, pleaded guilty to child molesting after a woman informed police in 2004 that he had fondled her daughter. The girl was living in the same home as Norris at the time of the allegations. He received and served a two-year prison term. He is out on parole but must comply with Indiana's sex offender registry requirements, which includes lifetime notification.

Norris is mildly mentally retarded, and his lawyers argued he believed he had molested the girl based on what the girl's mother told him. Then in 2006, the girl's mother signed an affidavit recanting the allegations, saying they are "wholly and completely false." She said she initiated the case against Norris to regain custody of her children. \* \* \*

"Though this defendant now claims that new evidence would require that his conviction be vacated, we cannot harmonize this new position taken by the defendant with the fact that he originally admitted to committing the crime by his guilty plea," Wednesday's decision said. "It is inconsistent to allow defendants who pleaded guilty to use post-conviction proceedings to later revisit the integrity of their plea in light of alleged new evidence seeking to show that they were in fact not guilty. \* \* \*

Two justices wrote their own opinion, concurring with the result of the majority opinion in the Norris case but differing on the overall legal question.

Justices Theodore Boehm and Robert Rucker said they don't think Norris presented sufficient evidence to overcome the guilty plea, partly because the victim did not officially recant in a sworn affidavit.

But they disagreed with not allowing people who have pleaded guilty to use the post-conviction relief process if new evidence arises.

They acknowledged that innocent people in Indiana might plead guilty – often to get the benefit of a lesser prison sentence when it appears they would be convicted of a harsher crime.

"Any system of justice must allow for correction of injustice based on clear and convincing evidence of innocence, even if the defendant can be said to have contributed to his own plight by pleading guilty," the concurring opinion said.

Posted by Marcia Oddi on [Thursday, November 13, 2008](#)

Posted to [Ind. Sup.Ct. Decisions](#)

### **18.9. [IND. COURTS - "JUDGE TELLS PROSECUTOR TO REPAY \\$18,000"](#)**

In the long-running Delaware County battle over handling of drug forfeiture funds, Rick Yencer of the **Muncie Star-Press** [reports today](#) in a story that begins:

Embattled Deputy Prosecutor Mark McKinney was ordered Wednesday to repay \$18,395 in attorney fees as drug task force attorney in 10 cases where he used confidential agreements to seize money and property without a court order.

Delaware Circuit Court 2 Judge Richard Dailey handed down the order along with provisions for repaying another \$34,981 in auction proceeds from property seized by the DTF from accused drug dealers. The order came after a hearing Wednesday where the judge found more money and property from forfeiture cases taken by the DTF.

McKinney used confidential agreements distributing money and property from civil drug forfeiture cases to the Muncie-Delaware County Drug Task Force that used the money to equip a high-end city hall gym for police, donate to youth charities and pay other operating expenses.

"None of these cases came before (the court)," said Dailey. "Being no judgment was entered, Mr. McKinney is not entitled to get attorney fees."

See list of [earlier ILB entries here](#).

Posted by Marcia Oddi on [Thursday, November 13, 2008](#)

Posted to [Indiana Courts](#)

### **19. [Wednesday, November 12, 2008](#)**

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### 19.1. [IND. COURTS - "LONGTIME MARION CO. JUDGE DEITER DIES" \[UPDATED\]](#)

Jon Murray of the **Indianapolis Star** is reporting this afternoon in [a story](#) that begins:

Marion Superior Court Judge Charles J. Deiter died this morning after a battle with cancer, court officials announced to staff.

Deiter, 71, the longtime presiding judge over probate court, had planned to retire at the end of the year and did not seek reelection.

[Updated 11/13/08] Here is [a longer story](#) from today's **Star**, and here is [the obituary](#).

Posted by Marcia Oddi on [Wednesday, November 12, 2008](#)

Posted to [Indiana Courts](#)

### 19.2. [ENVIRONMENT - IDNR DEPUTY DIRECTOR TOLD SHELBY COUNTY OFFICIALS THAT HE ALSO HAD SOME "FENCE MENDING" TO DO WITH OFFICIALS WITH IDEM](#)

"DNR official apologizes to county over logjam misunderstanding" is the headline to [a story](#) by Ron Hamilton of the **Shelbyville News** that begins:

A top official with the Indiana Department of Natural Resources apologized to county commissioners at their weekly meeting Monday evening for what he called his "exuberance" in dealing with the Big Blue River logjam problems this summer near the village of Marion northeast of Shelbyville.

Ron McAhron, deputy director of the DNR, told Shelby County officials that he also had some "fence mending" to do with officials with the Indiana Department of Environmental Management.

"After I met with you folks this summer and saw for myself the serious logjam problems that you've been contending with for years, I became convinced that they needed to be cleaned out immediately," he said. "However, when I permitted you a wide latitude in taking care of the situation, I failed to consult with officials with IDEM. I mistakenly gave you permission to supervise their removal without filing for the usual permits. So, I've got some people at IDEM upset with me."

McAhron told the commissioners that IDEM has simple erosion-control measures, stream-management guidelines and habitat-preservation programs that should have been integrated into the logjam cleanup but were not.

"I'm afraid they are demanding more paperwork from you on those projects," he said. "I'm very sorry for any inconvenience this has caused you. Please let me know if there's any way I can help you."

Posted by Marcia Oddi on [Wednesday, November 12, 2008](#)

Posted to [Environment](#) | [Indiana Government](#)

### 19.3. [IND. DECISIONS - COURT OF APPEALS ISSUES 0 TODAY \(AND 5 NFP\)](#)

**For publication opinions today (0):**

**NFP civil opinions today (2):**

[Kidane Beraki v. Dehab Beraki \(NFP\)](#) - "In conclusion, Husband had the burden of proving that the California judgment was void for lack of jurisdiction. The resolution of that question did not involve disputed questions of fact and thus was ripe for summary disposition. On the record before us, it appears that he did nothing more than assert a bare denial of jurisdiction. To the extent it might be otherwise, Husband has not submitted a record that permits us to review his claim in this regard. "It is the duty of an appellant to provide this court with a record sufficient to enable us to review the claim of error". *Lenhardt Tool & Die Co., Inc. v. Lumpe*, 703 N.E.2d 1079, 1084 (Ind. Ct. App. 1998), *trans. denied*. Husband must bear the consequences of that failure. See *Cortez v. Jo-Ann Stores, Inc.*, 827 N.E.2d 1223 (Ind. Ct. App. 2005). Based

upon the record before us, we hold that Husband did not carry his burden to demonstrate that jurisdiction was lacking. Therefore, the trial court did not err in registering the California judgment. "

[Aaron Sparks v. Mayor Bart Peterson, et al. \(NFP\)](#) - " The gist of Sparks's complaint, the harm suffered, and the relief he requested are directly related to the discipline imposed, i.e., the five-day suspension. As noted above, in such case, judicial review is not available. We therefore conclude that the trial court properly granted the Appellees' motion to dismiss for lack of subject matter jurisdiction. Judgment affirmed. "

### **NFP criminal opinions today (3):**

[Ernest Johnson III v. State of Indiana \(NFP\)](#)

[Jessie Smith v. State of Indiana \(NFP\)](#)

[Oscar Harris v. State of Indiana \(NFP\)](#)

Posted by Marcia Oddi on [Wednesday, November 12, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

### **19.4. [IND. DECISIONS - SUPREME COURT ISSUES TWO TODAY](#)**

In [Shawn E. Norris v. State of Indiana](#), a 9-page, 5-0 opinion, Justice Dickson writes:

Four years after his guilty plea, conviction, and sentence for child molesting, the defendant sought post-conviction relief on grounds of newly discovered evidence. The post-conviction court granted the State's motion for summary disposition, and the defendant appealed. The Court of Appeals reversed and remanded for an evidentiary hearing before the post-conviction court. *Norris v. State*, 881 N.E.2d 691, 692 (Ind. Ct. App. 2008). We granted transfer and now hold that a guilty plea may not be challenged in post-conviction proceedings by a claim of newly discovered evidence regarding the events that constituted the crime. \* \* \*

A defendant's plea of guilty is thus not merely a procedural event that forecloses the necessity of trial and triggers the imposition of sentence. It also, and more importantly, conclusively establishes the fact of guilt, a prerequisite in Indiana for the imposition of criminal punishment. The defendant here is seeking to undermine the sanctity of his own guilty plea by seeking to challenge facts that were presented to police and led to his arrest and the filing of criminal charges against him. He is not contesting any testimonial evidence at trial that resulted in a determination of guilt notwithstanding a not-guilty plea. \* \* \*

Though this defendant now claims that new evidence would require that his conviction be vacated, we cannot harmonize this new position taken by the defendant with the fact that he originally admitted to committing the crime by his guilty plea. It is inconsistent to allow defendants who pleaded guilty to use post-conviction proceedings to later revisit the integrity of their plea in light of alleged new evidence seeking to show that they were in fact not guilty. Both his confession and his new claims cannot be true. A defendant knows at the time of his plea whether he is guilty or not to the charged crime. With a trial court's acceptance of a defendant's guilty plea, the defendant waives the right to present evidence regarding guilt or innocence. This constitutes a waiver under P-C R. 1(1)(8), set forth above. \* \* \*

We affirm the trial court's granting of the State's motion for summary disposition and the resulting denial of the defendant's petition for post-conviction relief.

Shepard, C.J., and Sullivan, J., concur. Boehm, J., concurs in result with separate opinion in which Rucker, J., concurs.

*[Justice Boehm begins]* I agree with the majority that Norris has not shown that the post-conviction court erred in dismissing his petition. I do not agree with the majority that a guilty plea precludes a court from granting post-conviction relief on a claim of actual innocence. Any system of justice must allow for

correction of injustice based on clear and convincing evidence of innocence, even if the defendant can be said to have contributed to his own plight by pleading guilty. See *Sanchez v. State*, 749 N.E.2d 509, 515 (Ind. 2001) (affirming earlier decisions holding or assuming that “fundamental fairness in judicial proceedings is assumed and required by our state constitution”).

In [Rudy Wayne Cardwell v. State of Indiana](#), a 14-page, 4-1 opinion, Justice Boehm writes:

Rudy Wayne Cardwell challenges the appropriateness of his sentence under Indiana Rule of Appellate Procedure 7(B). Concluding that Cardwell’s aggregate sentence of thirty-four years is inappropriate in light of the nature of his offense and his character, we revise his sentence to consecutive terms of nine and eight years for an aggregate sentence of seventeen years. \* \* \*

Shepard, C.J., and Sullivan and Rucker, JJ., concur.

Dickson, J., concurs and dissents with separate opinion. *[which begins]* Although I concur with Part I, discussing the challenges posed by appellate review and revision of criminal sentences, and Part II, finding no abuse of discretion in the trial court’s sentencing determination, I decline to join Part III, revising the sentence chosen by the trial court in this case. The Court finds that Cardwell’s thirty-four years is excessive for two class B felony convictions for burning his girlfriend’s three-year-old daughter with hot water and then failing to seek prompt medical treatment, as compared to the girl’s mother’s one and one-half year sentence for a single class D felony conviction for failing to seek prompt medical treatment for her daughter. I disagree with the grant of appellate sentence revision in this case.

Posted by Marcia Oddi on [Wednesday, November 12, 2008](#)

Posted to [Ind. Sup.Ct. Decisions](#)

#### [19.5. IND. COURTS - APPROXIMATELY 72% OF THE VOTERS STATEWIDE ASKED THAT THE THREE JUSTICES BE RETURNED TO THE BENCH](#)

[A release today](#) from the Indiana Courts reports on the results of the retention election on November 4th. The release begins:

The 2008 retention ballot marks the first election where any Indiana Supreme Court Justice has attracted more than one million “yes” votes. Indiana Supreme Court Chief Justice Randall T. Shepard, Justice Theodore R. Boehm and Justice Brent E. Dickson were each retained by Indiana voters with a solid “yes” across the state.

\* 1,348,172 voters cast their ballot in favor of keeping Chief Justice Randall T. Shepard on the state’s highest court.

\* 1,290,882 voters cast their ballot in favor of keeping Justice Theodore R. Boehm on the state’s highest court.

\* 1,298,751 voters cast their ballot in favor of keeping Justice Brent E. Dickson on the state’s highest court.

This year, approximately 72% of the voters statewide asked that the three justices be returned to the bench (according to the numbers most recently available from the Indiana Secretary of State.) Historically, the justices have maintained a high approval rating by voters. In 1998, the last time Chief Shepard, Justice Boehm, and Justice Dickson were on the retention ballot, more than 70% of the voters cast a “yes” ballot.

Posted by Marcia Oddi on [Wednesday, November 12, 2008](#)

Posted to [Indiana Courts | Judicial Retention](#)

#### [19.6. COURTS - U.S. SUPREME COURT DENIES SECRET LITIGATION CHALLENGE](#)

Shannon P. Duffy of [The Legal Intelligencer](#) [reports today](#) in a story that begins:

The U.S. Supreme Court on Monday refused to hear an appeal by *The Legal Intelligencer* challenging

decisions by the 3rd U.S. Circuit Court of Appeals that approved the "blanket" sealing of a lawsuit, including all documents and the courts' dockets at both the trial and appellate levels.

But just days before the high court turned down the appeal, the 3rd Circuit announced in a one-page memo to the bar that it will no longer allow the sealing of appellate dockets.

**"Because the text of the docket contains procedural information only, Court of Appeals dockets will not be sealed," 3rd Circuit Clerk Marcia M. Waldron wrote in a notice to the bar that was posted on the court's Web site Nov. 4.**

Attorney Robert C. Clothier of Fox Rothschild, who represented *The Legal Intelligencer* before the 3rd Circuit and the Supreme Court, said he was "gratified that the 3rd Circuit has remedied one of the significant issues we were raising."

Clothier said he hopes that the district courts within the 3rd Circuit follow the appellate court's lead and "establish rules that say dockets are always open."

In the petition for certiorari, Clothier argued that the high court should reverse a series of rulings by the 3rd Circuit in *Doe v. C.A.R.S. Protection Plus Inc.* that allowed the case to be litigated in secret.

**For more than seven years, all court documents in the Doe case were under seal, including the court dockets in the Western District of Pennsylvania and the 3rd Circuit.**

**The public first learned of the existence of the case in May, when the 3rd Circuit handed down a precedent-setting decision that said a woman who claimed she was fired because she had an abortion had the right to sue under Title VII.**

The unanimous three-judge panel reversed a lower court's decision that dismissed a sex discrimination suit brought by a woman -- identified in court papers only as "Jane Doe" -- who claimed she was fired three days after she opted to have an abortion because tests showed that the fetus had severe deformities.

Ruling on a question of first impression, the 3rd Circuit held that Title VII, as amended by the Pregnancy Discrimination Act, protects a worker's right to terminate a pregnancy because an abortion qualifies as a "related medical condition."

*[Emphasis added by ILB]*

Posted by Marcia Oddi on [Wednesday, November 12, 2008](#)

Posted to [Courts in general](#)

**[20. Tuesday, November 11, 2008](#)**

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**[20.1. LAW - "FED DEFIES TRANSPARENCY AIM IN REFUSAL TO DISCLOSE" \[UPDATED TWICE\]](#)**

Mark Pittman, Bob Ivry and Alison Fitzgerald of **Bloomberg News** [report](#) in a lengthy story:

Nov. 10 (Bloomberg) -- The Federal Reserve is refusing to identify the recipients of almost \$2 trillion of emergency loans from American taxpayers or the troubled assets the central bank is accepting as collateral.

Fed Chairman Ben S. Bernanke and Treasury Secretary Henry Paulson said in September they would comply with congressional demands for transparency in a \$700 billion bailout of the banking system. Two months later, as the Fed lends far more than that in separate rescue programs that didn't require approval by Congress, Americans have no idea where their money is going or what securities the banks are pledging in return.

“The collateral is not being adequately disclosed, and that’s a big problem,” said Dan Fuss, vice chairman of Boston-based Loomis Sayles & Co., where he co-manages \$17 billion in bonds. “In a liquid market, this wouldn’t matter, but we’re not. The market is very nervous and very thin.”

Bloomberg News has requested details of the Fed lending under the U.S. Freedom of Information Act and filed a federal lawsuit Nov. 7 seeking to force disclosure.

There are several websites following this topic, including [bailoutsleuth.com](http://bailoutsleuth.com) and [open.thegovernment.org](http://open.thegovernment.org).

See also this [related story from Bloomberg](#) on executives' bonuses.

**[More]** See [this story](#) from **ABC News**.

**[Update 11/12/08]** I've been looking for this case on PACER, the Bloomberg story identifies it as: "The Bloomberg lawsuit is Bloomberg LP v. Board of Governors of the Federal Reserve System, 08-CV-9595, U.S. District Court, Southern District of New York (Manhattan)." But, so far, no luck.

**[Update 11/12/08]** The **ILB** has now obtained a copy of the 9-page Bloomberg complaint. It is interesting reading - [access it here](#).

Posted by Marcia Oddi on [Tuesday, November 11, 2008](#)

Posted to [General Law Related](#)

## **20.2. [COURTS - SPECULATION OVER THE SUPREME COURT MAY BE PREMATURE](#)**

"*Despite Obama Victory, Will Supreme Court Justices Sit Tight?*" is the headline to [an article](#) by Tony Mauro of **Legal Times**. "*Rumors of Retirements*" is the heading to [this blog entry](#) by ABC News Correspondent Jan Crawford Greenburg

Posted by Marcia Oddi on [Tuesday, November 11, 2008](#)

Posted to [Courts in general](#)

## **20.3. [IND. LAW - MORE ON "APPROVING A PROPOSED CONSTITUTIONAL AMENDMENT THAT WOULD PUT LIMITS ON PROPERTY-TAX BILLS, SO IT CAN BE PUT ON THE BALLOT FOR RATIFICATION IN 2010"](#)**

Updating [this ILB entry](#) from Nov. 9th, the **Fort Wayne Journal Gazette** has [an editorial today](#) arguing against, at least for the upcoming session, the General Assembly approving the pending proposal to amend the Indiana Constitution to cap property taxes.

Posted by Marcia Oddi on [Tuesday, November 11, 2008](#)

Posted to [Indiana Law](#)

## **20.4. [LAW - "DEMOCRATS EYE BUSH MIDNIGHT REGULATIONS"](#)**

Cindy Skrzycki, business columnist who writes the column, *The Regulators*, for the **Washington Post**, has [an important article today](#) that begins:

As President-elect Barack Obama's transition team prepares for the Jan. 20 inauguration, it is tracking the "midnight" regulations being churned out in the final days of the Bush administration.

Regulatory policy may not have as high a profile as economic issues and foreign policy for Obama. Still, many of these latter-day Bush rules are flash points for liberal public-interest groups, Democrats in Congress and the business community.

Among the regulations being monitored are a proposal to end a ban on carrying loaded guns in national parks, a plan that could make it harder for women to get federally funded reproductive health care, and a Labor Department proposal to change the way regulators assess risk for jobs, especially those that expose workers to chemicals.

"These are the ones worth watching," said Matt Madia, regulatory policy analyst at OMB Watch, a nonprofit group critical of many Bush regulatory policies. "Most of them relax existing requirements. They make it easier for industries to pollute or deny a worker medical leaves."

Some 130 rules could be completed before Bush leaves. The White House has finished reviews of 100 rules since Sept. 1, up from 36 in the same period last year. Representatives of chemical makers, scallop fishermen and kidney dialysis companies are among those who have pressed their cases with White House officials in recent weeks, according to a public list of the meetings.

The new president may issue executive orders to reverse some Bush policies and may get help from a law passed by the Republican-controlled Congress in 1996 to review and eliminate Clinton-era rules it didn't like. The law has been successfully used once, in 2001, to kill a rule designed to prevent repetitive motion injuries in the workplace.

See also this Nov. 3rd [editorial from the NYT](#), titled "*So Little Time, So Much Damage*," cited in [this Nov. 6th ILB entry](#).

Posted by Marcia Oddi on [Tuesday, November 11, 2008](#)

Posted to [General Law Related](#)

## [20.5. IND. COURTS - MORE ON "PARK BAN ON SEX OFFENDERS CHALLENGED: MAN CAN'T WATCH SON PLAY BASEBALL"](#)

[Updating this ILB entry](#) from August 26th, Ben Zion Hershberg of the **Louisville Courier Journal** [reports](#) that a ruling has now been issued in the case:

A judge in Clark County has upheld the constitutionality of a Jeffersonville ordinance barring convicted sex offenders from using the city's parks.

The ruling last week by Superior Court Judge Vicki Carmichael came in a lawsuit by Eric Dowdell, who was convicted of sexual battery in 1997.

He wants to attend his son's baseball games in the city's Little League ballpark.

But Carmichael ruled that entering parks was not "a fundamental right." She also said that because Dowdell had the right under the city ban to seek an exemption but was denied one, the ordinance protected his legal right to due process.

Carmichael also said the ordinance was not unduly punitive because it didn't ban Dowdell from all public areas but only from parks, which she said the city has the right to regulate. \* \* \*

Larry Wilder, the lawyer representing Jeffersonville in the case, said he expected the ruling would be appealed but was confident Carmichael's decision would be upheld.

The ordinance, enacted in 2006 and amended last year, says convicted sex offenders can't use city parks but provides a City Court procedure for those who believe they deserve an exemption.

Dowdell twice sought an exemption, arguing that he was no longer required to register as a sexual offender with the state and that he posed no risk if he was allowed in the park. He was denied the exemption based largely on convictions of battery and domestic violence since the 1997 case.

Carmichael's ruling wasn't specifically on Dowdell's request for an exemption but was on whether the ordinance was constitutional.

[Here is a list of earlier ILB entries.](#)

Posted by Marcia Oddi on [Tuesday, November 11, 2008](#)

Posted to [Indiana Courts](#)

## 20.6. [IND. COURTS - LEGISLATIVE PANEL ADVISES AGAINST ELECTING JUDGES](#)

Jeff Parrott [reports today](#) in the **South Bend Tribune** in a story that begins:

A state legislative panel has recommended that St. Joseph County should continue having most of its judges selected by the governor instead of voters.

The General Assembly's Commission on Courts recently voted 7-2 to recommend the county preserve its "merit selection" system for choosing Superior Court judges. Under that system, in place since 1973, a local group of lawyers and judges interviews judicial applicants for a judge vacancy, then sends a list of finalists to the governor, who makes the selection.

Voters can then vote "yes" or "no" every six years on whether to retain the judge.

Lake County is the only other county in Indiana that uses merit selection. The commission recommended that Lake County also keep the status quo.

At a hearing Oct. 3 in Indianapolis, the South Bend area's top legal officials spoke in favor of maintaining merit selection. They included Indiana Supreme Court Justice Frank Sullivan Jr., a South Bend native and chair of the St. Joseph County Judicial Nominating Commission; Judge Robert Miller Jr., chief judge of the U.S. District Court for Northern Indiana; St. Joseph County judges Michael Gotsch (who as a Circuit Court judge is popularly elected) and Michael Scopelitis; and county bar association leaders Carl Greci and Aladean DeRose.

They defended the system as the best way to keep judges free from political pressure, because sometimes judges must make rulings that are unpopular but legally sound.

Arguing that St. Joseph County judges should be more accountable to the public, state Rep. Craig Fry, D-Mishawaka, this year had pushed unsuccessfully to scrap merit selection. His efforts resulted in a bill ordering the commission to study the issue and advise the legislature on whether changes are needed.

As with any legislative summer study commission, the recommendation is not binding in any way.

Advocating for change at the hearing were state Rep. Ryan Dvorak, D-Granger, a commission member, and Kathy Karczewski, mother of slain South Bend police officer Scott Severns.

[Here is the website](#) of the legislative Commission on Courts. Here is [the final report](#) - the committee's findings and recommendations begin on p. 15 of the PDF version.

Posted by Marcia Oddi on [Tuesday, November 11, 2008](#)

Posted to [Indiana Courts](#)

## 21. [Monday, November 10, 2008](#)

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### 21.1. [COURTS - STILL MORE ON: CONFRONTATION CLAUSE CASE RE ADMISSIBILITY OF CRIME LAB REPORT](#)

[Updating this ILB entry](#) from earlier this afternoon, Lyle Denniston of **SCOTUSblog** has posted [a long analysis](#) of the oral arguments today in *Melendez-Diaz v. Massachusetts*.

**[More]** Here is [the 76-page transcript](#) of the oral argument.

Posted by Marcia Oddi on [Monday, November 10, 2008](#)

Posted to [Courts in general](#) | [Ind. App.Ct. Decisions](#) | [Ind. Sup.Ct. Decisions](#)

### 21.2. [COURTS - "SUPREME COURT POSTS VIDEO IN VICTIM IMPACT CASE"](#)

**The Blog of Legal Times** has this [very interesting just-posted entry](#) on the admission of multimedia victim impact presentations. Some quotes:

Today the Supreme Court denied review in two California cases in which defendants claimed that multimedia victim impact presentations prejudiced jurors against them. The California Supreme Court had ruled the presentations admissible. \* \* \*

Justice David Souter, who was in the majority in *Payne*, would have taken the case, though he did not say why.

Justice John Paul Stevens, a dissenter in *Payne*, and Justice Stephen Breyer, who was not yet on the Court in 1991, also said they'd have taken up the case. They explained their reasoning, and in an unusual step, they referred to the victim video in the *Kelly* case and indicated it had been put up on the Court's Web site. \* \* \*

Today's video posting was not the first time the Court has gone multimedia on its Web site. In April 2007, it posted the police video of a high-speed car chase that was important in the Court's resolution of *Scott v. Harris*, a Section 1983 civil rights case brought by a person severely injured in an accident resulting from the chase.

Those who attended the Oct. 28th ICLEF seminar, "*Welcome to the 21st Century: An Appellate Perspective*" may find this particularly interesting.

Posted by Marcia Oddi on [Monday, November 10, 2008](#)

Posted to [Courts in general](#)

### **21.3. COURTS - MORE ON: CONFRONTATION CLAUSE CASE RE ADMISSIBILITY OF CRIME LAB REPORT**

As [the ILB noted yesterday](#), the U.S. Supreme Court is hearing/heard oral arguments today at 1:00 PM in the case of *Melendez-Diaz v. Massachusetts*, a confrontation clause case involving whether a crime lab report is, itself, a form of testimony.

As the [ILB noted in this entry on August 19th](#), Indiana has had two such cases. One, *Richard Pendergrass v. State of Indiana* (7/8/08), was argued before our Supreme Court on Oct. 9. No ruling has yet been issued. The COA ruling in *Pendergrass*:

Based on the foregoing, we conclude that the trial court properly admitted State's Exhibits 1, 2, and 3 and related testimony concerning DNA analysis and the subsequent test result without the testimony of the laboratory technician who performed the actual testing; and Pendergrass' confrontational rights pursuant to the Sixth Amendment of the United States Constitution were not implicated when he was denied the opportunity to confront and cross-examine the laboratory technician who performed the DNA analysis. Affirmed.

*Pendergrass* was cited in another COA opinion, *Ricky L. Jackson v. State of Indiana*, issued by a different panel on Aug. 12th, which held:

Thus, we reject the State's contention that the Certificate of Analysis is admissible under the business record exception to the hearsay rule under Indiana Evidence Rule 803. *Cf. Pendergrass v. State*, 889 N.E.2d 861 (Ind. Ct. App. 2008) (holding Confrontation Clause inapplicable to use of Certificate of Analysis pertaining to DNA test where Certificate used to provide context for expert's testimony, not to prove element of charged crime), *trans. pending*. Neither is the Certificate admissible through Ballard's [the lab supervisor] expert testimony under Indiana Evidence Rule 703. Jackson's Sixth Amendment right to confrontation is not subordinate to a rule of evidence under the circumstances of this case. As the Court stated in *Crawford*, "[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence[.]" 541 U.S. at 61. In sum, the Court in *Crawford* rejected "reliable hearsay" as a substitute for the right of confrontation. See *Giles*, 128 S. Ct. at 2695 (Souter, J., concurring in part). Jackson's conviction must be reversed.

A petition to transfer was filed in *Jackson*, Sept. 15th.

Posted by Marcia Oddi on [Monday, November 10, 2008](#)

Posted to [Courts in general](#) | [Ind. App.Ct. Decisions](#) | [Ind. Sup.Ct. Decisions](#)

#### [21.4. IND. DECISIONS - COURT OF APPEALS ISSUES 0 TODAY \(AND 1 NFP\)](#)

**For publication opinions today (0):**

**NFP civil opinions today (0):**

**NFP criminal opinions today (1):**

[John C. Newsome v. State of Indiana \(NFP\)](#)

Posted by Marcia Oddi on [Monday, November 10, 2008](#)

Posted to [Ind. \(7th Cir.\) Decisions](#)

#### [21.5. IND. DECISIONS - 7TH CIRCUIT RULING INTERPRETS RULE 25\(A\) OF THE FEDERAL RULES OF CIVIL PROCEDURE](#)

In an Illinois case, *Atkins v. City of Chicago*, the opinion by Judge Posner begins:

This appeal from the dismissal of a civil rights suit under 42 U.S.C. § 1983 requires us to interpret Rule 25(a) of the Federal Rules of Civil Procedure, which governs the substitution of a party who has died. The rule was revised last year, after the district court proceedings relating to this appeal, so our references will be to the unamended rule. The committee note states that the changes made by the amended rule are only stylistic.

Posted by Marcia Oddi on [Monday, November 10, 2008](#)

Posted to [Ind. \(7th Cir.\) Decisions](#)

#### [21.6. IND. DECISIONS - TRANSFER LIST FOR WEEK ENDING NOV. 7, 2008](#)

[Here](#) is the just issued transfer list for the week ending Nov. 7, 2008. It is 3 pages long.

Four transfers was granted last week. Three of them, all criminal cases, were granted Nov. 6th and are discussed in [this ILB entry](#) from last Friday. The fourth was granted last Wednesday, the case of [Rudy Wayne Cardwell](#) - which is a 2-1 NFP opinion issued March 13, 2007.

**Over 4.5 years of Transfer Lists:** For other weekly transfer lists (going back to Feb. 2, 2004), check "Indiana Transfer Lists" under "Categories" below, or in the right column.

Posted by Marcia Oddi on [Monday, November 10, 2008](#)

Posted to [Indiana Transfer Lists](#)

#### [21.7. LAW - "OBAMA LAWYERS READY THEIR PLAN FOR DOJ"](#)

Joe Palazzolo of **Legal Times** reports today in [a story](#) that begins:

For more than a month, a squad of lawyers has been gathering for the first Justice Department transition in the post-9/11 world. Now that their candidate has won, they're at the gates -- or rather, the 20-foot-high aluminum doors of Main Justice -- waiting for President-elect Barack Obama and President George W. Bush to finalize the rules for information-sharing and access during the transition.

The Justice Department calls its own preparation unprecedented in modern times. Under a 2004 law, the department has been vetting Obama's transition team for security clearances for more than two months.

And since at least July, the department has been laying the groundwork for a new administration. Attorney General Michael Mukasey appointed his chief of staff, Brian Benczkowski, and Lee Lofthus, the assistant attorney general for administration, to coordinate the transition.

Obama has tapped Wilmer Cutler Pickering Hale and Dorr's David Ogden, the assistant attorney general for the Civil Division under President Bill Clinton, to lead the transition team. His deputy, Thomas Perrelli, managing partner of Jenner & Block's Washington office, is another Clinton administration alum. Perrelli worked under Ogden in the Civil Division as deputy assistant attorney general, supervising the Federal Programs Branch.

The transition will be twice as long as the last one and -- it's hoped -- at least twice as disciplined as the one before that. Obama's first task, the selection of the next attorney general, is likely to be fraught with the memories of Zoe Baird and Kimba Wood, whose botched nominations got Clinton's Justice Department off to a wobbly start.

Posted by Marcia Oddi on [Monday, November 10, 2008](#)

Posted to [General Law Related](#)

## 21.8. [IND. DECISIONS - UPCOMING ORAL ARGUMENTS THIS WEEK](#)

### **This week's oral arguments before the Supreme Court:**

None scheduled

### **This week's oral arguments before the Court of Appeals that will be webcast:**

#### **This Monday, Nov. 10th:**

2:00 PM - **Bank One vs. Jeannene Surber** - Appellant, Bank One, appeals the trial court's judgment in favor of Appellee, Jeannene Surber. The trial court found that Bank One was negligent and breached its contract with Surber when it determined that Surber was not the owner of a joint savings account. The trial court awarded Surber damages totaling \$822,621. Bank One contests the trial court's award of damages. The Scheduled Panel Members are: Judges Darden, Barnes and Crone. [*Where: Indiana Supreme Court Courtroom*]

### **This week's oral arguments before the Court of Appeals that will NOT be webcast:**

None scheduled.

Posted by Marcia Oddi on [Monday, November 10, 2008](#)

Posted to [Upcoming Oral Arguments](#)

## 22. [Sunday, November 09, 2008](#)

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### 22.1. [COURTS - CONFRONTATION CLAUSE CASE RE ADMISSIBILITY OF CRIME LAB REPORTS](#)

Lyle Denniston of **SCOTUSblog** presets a comprehensive preview of *Melendez-Diaz v. Massachusetts*, [to be argued tomorrow](#) before the U.S. Supreme Court. The issue:

Crime laboratory reports are key pieces of evidence in a large number of criminal trials. When they can be brought into a case, without live testimony from the forensic experts who prepared them, is before the Supreme Court in *Melendez-Diaz v. Massachusetts* (07-591). A basic issue in the case is whether a crime lab report is, itself, a form of testimony.

The briefs and documents filed in the case [are available here](#), via **SCOTUSblog**.

**Note:** The ILB would set up pages like this for Indiana cases in an instant, if only there were a reliable way to obtain the documents and materials.

Posted by Marcia Oddi on [Sunday, November 09, 2008](#)

Posted to [Courts in general](#)

## **22.2. IND. LAW - "APPROVING A PROPOSED CONSTITUTIONAL AMENDMENT THAT WOULD PUT LIMITS ON PROPERTY-TAX BILLS, SO IT CAN BE PUT ON THE BALLOT FOR RATIFICATION IN 2010"**

Lesley Stedman Weidenbener of the **Louisville Courier Journal** [writes today](#) about one of the big issues facing the 2009 General Assembly:

[Governor] Daniels and Republicans say one of their priorities will be approving a proposed constitutional amendment that would put limits on property-tax bills, so it can be put on the ballot for ratification in 2010.

Republican and Democratic lawmakers approved the amendment last session for the first time as part of a larger property-tax package. But constitutional amendments require approval by two separately elected legislatures before they can be ratified.

That means lawmakers must approve it again in 2009 or 2010 or be forced to start over.

House Speaker Pat Bauer, D-South Bend, thinks it might be a good idea to wait until 2010. That's because property tax reform passed this year will start phasing in a cap on tax bills in 2009, limiting revenues to some local governments and schools.

Bauer wants to see how local officials adapt to the lost revenue before moving forward with the amendment.

Senate Republicans, though, think that's a bad idea.

Senate Appropriations Chairman Luke Kenley, R-Noblesville, said he feels lawmakers have a sort of "contract" with voters to put those limits into the constitution. That's in part because the larger legislative package that cut property taxes also boosted sales taxes.

Waiting, he said, means lawmakers might buckle under pressure from local officials complaining they'll have to cut spending to accommodate lower revenues. That's unacceptable, Kenley said.

The issue is bound to be one of the session's biggest quarrels -- but not the only one.

Posted by Marcia Oddi on [Sunday, November 09, 2008](#)

Posted to [Indiana Law](#)

## **22.3. LAW - "FORECLOSURES PICK POCKETS OF HOMEOWNERS ASSOCIATIONS"**

Elizabeth Razzi has [this report](#) in today's **Washington Post** that begins:

If you live in a neighborhood that has a homeowners association, brace yourself. Neighbors losing their homes to foreclosure and short sales not only are dragging down your property values but also are setting you up for higher fees. There's even a threat that your entire neighborhood could grow shabby over time, if cash runs short for upkeep.

Associations often lose six months of dues, sometimes more, from each homeowner who slides into foreclosure or short sale. Budget trouble can hit any community where homes are being lost, whether they're neighborhoods of detached houses or townhouses, or condominium apartment buildings.

When some people don't pay, of course, the remaining neighbors must spend more to keep things running. Trash still needs to be hauled; insurance bills need to be paid; grass needs to be mowed. Soon, snow will need to be cleared.

Posted by Marcia Oddi on [Sunday, November 09, 2008](#)

Posted to [General Law Related](#)

#### 22.4. [COURTS - "CITING WORKLOAD, PUBLIC LAWYERS REJECT NEW CASES"](#)

Erik Eckholm of the **NY Times** reports [on the front page](#) of today's paper. Some quotes:

MIAMI — Public defenders' offices in at least seven states are refusing to take on new cases or have sued to limit them, citing overwhelming workloads that they say undermine the constitutional right to counsel for the poor.

Public defenders are notoriously overworked, and their turnover is high and their pay low. But now, in the most open revolt by public defenders in memory, many of the government-appointed lawyers say that state budget cuts and rising caseloads have pushed them to the breaking point.

In September, a Florida judge ruled that the public defenders' office in Miami-Dade County could refuse to represent many of those arrested on lesser felony charges so its lawyers could provide a better defense for other clients. \* \* \*

The Miami-Dade case, which is being closely watched across the country, was appealed by the state, which says that defender offices must share the burden of falling revenues. On Friday, the Florida Supreme Court sent the case to an appellate court for a ruling. If the judge's decision is upheld, it will force courts here to draw lawyers from a smaller state office and contract with private lawyers to represent defendants, at greater expense.

But such lawsuits are just the most overt sign of the burdens that lead harried lawyers in Michigan to talk openly about "McJustice" and in New York to make dark jokes about the plea bargain "assembly line."

"In my opinion, there should be hundreds of such motions or lawsuits," said **Norman Lefstein, a professor at the Indiana University School of Law** and an expert on criminal justice.

"I think the quality of public defense around the country is absolutely deteriorating," Mr. Lefstein said, asserting that unless states spent more on lawyers, the courts would force them to delay trials or, as has happened in a few cases, threaten to drop charges against unrepresented defendants.

The most immediate impact of the rushed justice, Mr. Lefstein and Mr. Carroll said, is that innocent defendants may feel pressure to plead guilty or may be wrongfully convicted — which means the real offenders would be left untouched. Appeals claiming inadequate defense are very difficult to win, experts say.

This story sent me to the archives, where I found [this ILB entry from July 27, 2004](#), that began with a quote from an **Indianapolis Star** story and then looked at the situation in other states. From the **Star** story: "Citing oppressive caseloads in the juvenile court, the public defender's office stopped accepting new clients Friday, forcing judges then to appoint private attorneys to 17 youths accused of crimes."

Posted by Marcia Oddi on [Sunday, November 09, 2008](#)

Posted to [Courts in general](#)

#### 22.5. [COURTS - "THE CAREER OF LINDA GREENHOUSE: A DIALOGUE"](#)

"Covering the U.S. Supreme Court," with Linda Greenhouse, Correspondent (1978-2008), New York Times, Supreme Court; Sandra Day O'Connor, Associate Justice (1981-2006), U.S. Supreme Court; Ronald K. L. Collins, Scholar, Freedom Forum, First Amendment Center; and Walter E. Dellinger, III, Professor Emeritus, Duke University, Law School. Former Supreme Court reporter Linda Greenhouse talked about her career with retired Associate Justice Sandra Day O'Connor. Walter Dellinger made introductory remarks, and Ronald Collins moderated. [Watch it here.](#)

It is one hour, 22 minutes - not to be missed, particularly Dellinger's introduction. There are also brief remarks at the end about secret dockets.

Posted by Marcia Oddi on [Sunday, November 09, 2008](#)

Posted to [Courts in general](#)

### [23. Saturday, November 08, 2008](#)

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#### [23.1. COURTS - JUDGE DIANE WOOD ON C-SPAN TONIGHT](#)

[C-SPAN's announcement:](#)

This Saturday on America & the Courts: Seventh Circuit Court of Appeals Judge Diane Wood, who has been mentioned as a possible Supreme Court nominee of President-elect Barack Obama. Last month, she spoke at the American Enterprise Institute about European and U.S. citizenship. Judge Wood worked alongside Obama on the faculty at the University of Chicago Law School.

America and the Courts begins at 7 PM. Here is Judge Wood's Univ. of Chicago [biography](#). Here is [more](#), including some writings.

Posted by Marcia Oddi on [Saturday, November 08, 2008](#)

Posted to [Courts in general](#)

#### [23.2. IND. GOVT. - LAKE COUNTY OFFICIALS MAY BORROW UP TO \\$2M TO SETTLE LAWSUIT](#)

Bill Dolan of the **NWI Times** [reports today:](#)

CROWN POINT | The Lake County Council is prepared to vote Monday to borrow up to \$2 million to resolve allegations against county employees accused of harassment, brutality, neglect and other misconduct.

Lake County Attorney John Dull told council members Thursday he hopes to settle at least 20 cases in which lawsuits and labor complaints are pending or threatened against county government.

Dull said the county is prepared to pay \$43,000 to a former employee of North Township Assessor John Matonovich regarding allegations the employee was sexually harassed in relation to the employee's sexual orientation. \* \* \*

Dull said the county is prepared to pay another \$300,000 to convicted murderer Tommy D. Ford, who had threatened to sue the county regarding injuries he received from an alleged Dec. 26, 2006, beating at the hands of several former Lake County Jail corrections officers. \* \* \*

Six corrections officers accused of taking part in the beating and its cover-up have resigned or been fired. Ford is serving a 50-year prison term for shooting a 15-year-old boy in the back of the head to free himself from a \$60 debt.

Dull said the county is preparing to pay former county government Finance Director Pamela Swiss \$60,000 to settle her suit alleging she was fired in 2005 for publicly disclosing the county was keeping millions of tax dollars in a "black hole" of secret funds. \* \* \*

The county will pay \$625,000 to a group of county sheriff's employees who claim they were denied overtime for attending roll call meetings at the jail prior to the beginning of their work shifts, Dull said.

Posted by Marcia Oddi on [Saturday, November 08, 2008](#)

Posted to [Indiana Government](#)

#### [23.3. ENVIRONMENT - "RULES FOR BIG LIVESTOCK FARMS"](#)

Updating [this ILB entry](#) from Nov. 6th (2nd item), the **Fort Wayne Journal Gazette** [editorializes today:](#)

Federal environmental regulators finally released long-awaited new rules regulating concentrated animal feeding operations. But advocates keeping tabs on the effects of the significant growth of large livestock farms on the environment have good reason to view the new rules with skepticism.

It was only in September that the U.S. Government Accountability Office released a damning report titled "Concentrated Animal Feeding Operations: EPA Needs More Information and a Clearly Defined Strategy to Protect Air and Water Quality." [See [this ILB entry](#) from Sept. 24]

It said the U.S. Environmental Protection Agency doesn't know enough about the environmental effects of large concentrated animal operations to create effective policies to govern the growing agricultural businesses. Opponents of CAFOs will understandably question whether the new rules will do enough to protect the environment.

The National Pork Producers Council – a knowledgeable but obviously biased source for analysis – describes the new rules as "tough but fair."

Agency officials say the new rules are meant to strike a balance between protecting the environment without hurting livestock production. But it's yet unclear whether the regulations will go far enough in protecting the environment.

"We are evaluating the new rules relative to our own CAFO regulations now to determine what if any changes to our regulations may need to be made," said Amy Hartsock, spokeswoman for the Indiana Department of Environmental Management. It is likely that state regulations are more stringent than the new federal rules. \* \* \*

[A] questionable component of the new rules is a self-certification process that helps farm owners calculate whether they will need a discharge permit. The voluntary nature of the self-certification makes it ineffective.

Tough but fair regulations governing large-scale animal operations are greatly needed. But often the efficacy of any rule is based on the enforcement of those rules.

Posted by Marcia Oddi on [Saturday, November 08, 2008](#)

Posted to [Environment](#)

#### [23.4. IND. COURTS - MORE ON "'SALACIOUS' AFFIDAVIT RESULTS IN JAIL TIME FOR CLIENT HINDS, ATTORNEY DENNEY"](#)

Updating [this ILB entry](#) from yesterday, Rick Yencer [reports today](#) in the **Muncie Star-Press** in a story that begins:

Special Judge Brian Hutchison has decided not to preside over the conspiracy-to-commit-bribery trial of attorney Michael Alexander.

In an order handed down this week, Hutchison granted Alexander's latest request for a change of judge.

Alexander's attorney, Donald McClellan, filed the change-of-judge motion last week, claiming Hutchison had expressed bias and prejudice against Alexander in conversations he had with a friend, Julie Ashman.

Posted by Marcia Oddi on [Saturday, November 08, 2008](#)

Posted to [Ind. Trial Ct. Decisions](#)

#### [23.5. COURTS - STILL MORE ON "KENTUCKY PROSECUTOR SAYS PLEA DEAL PUNISHES PHILANTHROPIST ROBERT CLARKSON IN DUI CASE"](#)

Updating [this ILB entry](#) from Oct. 7th, Andrew Wolfson of the **Louisville Courier Journal** [reports today](#) in a story that begins:

Insurance executive Robert "Bobby" Clarkson, who seriously injured a motorcyclist while driving drunk in June, will get to keep a plea bargain that Jefferson County Attorney Mike O'Connell says is "ridiculously lenient."

Advertisement

A Jefferson District Court judge ruled yesterday that O'Connell cannot withdraw the deal, which was negotiated by an assistant prosecutor under O'Connell's predecessor, Irv Maze.

During a contentious 90-minute hearing, O'Connell said the terms of the deal, in which Clarkson's felony-assault charge was amended to careless driving, were never presented to Judge David Holton II, who accepted the plea.

"The record is devoid of any discussion of amending the charge," O'Connell said. "It is dead silent."

But ruling for Clarkson, Judge Kevin Delahanty said Holton -- like all district court judges -- relied on the prosecutor to evaluate whether the plea bargain was justified.

Delahanty also noted that Bob Fleck, the assistant who proposed the deal, was the chief DUI prosecutor and known for being "stern and thorough."

Yesterday, passing the case for sentencing, Delahanty said he would let O'Connell present arguments about whether the court can increase the sentence.

But in a news conference later, O'Connell told reporters that the maximum penalty for the drunken-driving offense with which Clarkson is charged is 30 days in jail.

"There's not a whole lot of room to work," O'Connell said.

Clarkson sat at the defense table but didn't speak during the hearing, which featured several angry exchanges between O'Connell and Clarkson's lawyer, Stephen Miller.

Miller told Delahanty that "a lawyer's word must be his bond" and said O'Connell was trying to "welsh" on the deal.

Miller also cited several cases in which the Kentucky and U.S. Supreme Courts have said prosecutors cannot renege on their promises.

But O'Connell, who was appointed county attorney in August after Maze was named to the circuit bench, said courts may set aside plea agreements when they are "contrary to the administration of justice."

O'Connell also played a television news interview in which Holton said he wouldn't have accepted the plea agreement if he had known the details.

And O'Connell questioned the process in which judges approve hundreds of pleas a day without knowing whether they are justified.

"There seldom is -- but there should be -- a colloquy (discussion) about the basis for the plea."

He cited a document used by commonwealth's attorneys in circuit court in which they are required to elaborate on why charges are being amended. But questioned directly by Delahanty, O'Connell acknowledged that his assistants don't use that paperwork in district court.

Rejecting O'Connell's arguments, Delahanty said district judges properly rely on prosecutors to assess the strengths and weaknesses of cases and whether they should be tried or negotiated.

Posted by Marcia Oddi on [Saturday, November 08, 2008](#)

Posted to [Courts in general](#)

### [23.6. IND. COURTS - MORE ON: PANEL RECOMMENDS MARION COUNTY SUPERIOR COURT JUDGE GRANT W. HAWKINS REMOVAL](#)

Updating [yesterday's ILB entry](#), Will Higgins has [this report today](#) in the **Indianapolis Star**. Some quotes:

The panel said it would have recommended a suspension for Hawkins except that the judge was less than helpful during the Indiana Commission on Judicial Qualifications' investigation. It wrote that Hawkins "did not fully investigate the facts before he responded to the commission, and for that reason his responses were not factually correct and were flawed in many respects." \* \* \*

Broyles and Hawkins "could give no explanation why the Buntin order was not effectuated immediately after Commissioner Broyles prepared it in May 2006," said the three-judge panel of Marianne L. Vorhees, Terry C. Shewmaker and Clarence D. Murray.

In March 2007, the commission got involved and found Broyles' error. Broyles issued a new decision, but Buntin was not freed until April. Broyles has since resigned her post.

Hawkins has had a long legal career in Indianapolis. He practiced law for 27 years before being elected judge in 2000. A Democrat, he ran again in 2006 and won re-election.

A 2008 Indianapolis Bar Association survey found he commands wide respect among lawyers -- 90 percent of respondents approved of his work.

Buntin, who did not return a reporter's phone calls, in January sued Marion Superior Court. He also sued his lawyer, Carolyn Rader, and court records show the two reached a settlement.

The three-judge panel noted that Hawkins and Broyles "came very close to putting the blame on Ms. Rader" for the inertia in the case. But the judges concluded Rader had tried repeatedly to speed the case, only to be brushed off by Hawkins' staffers.

In their findings, the judges detail an office poorly organized and bogged down in paperwork. The judges noted the existence in Hawkins' office of a "Can't Find File." Into it the "staff put pleadings and correspondence for which they could not locate the file. Some materials stayed in the file for months, even one or more years."

The matter now goes to the Indiana Supreme Court, which has the final say on Hawkins' future.

The commission, which brought the charges against Hawkins, has 20 days to file a response to the decision with the state high court.

After that filing, Hawkins is permitted a response. "We'll definitely file one," said Hawkins' lawyer, Kevin McGoff.

It's rare for judges to be tossed from the bench.

In 2004, the Indiana Supreme Court removed Lake County Judge Joan Kouros after she was twice suspended for mismanaging her office, creating a substantial backlog of cases. Kouros told the commission she suffered from obsessive-compulsive disorder.

The following year, Elkhart County Judge Benjamin Pfaff was dismissed for allegedly pulling a gun on an 18-year-old while looking for his runaway daughter.

A side-bar sets out a timeline:

- » Aug. 4, 1984: A 22-year-old clerk at a Northside cleaners is robbed and raped. She eventually identifies Harold David Buntin, then 15, as her attacker.
- » April 1986: Buntin's case goes to trial. He flees before it ends but is convicted in absentia of armed robbery and rape.
- » 1994: After an unrelated arrest in Florida, police discover Buntin is a fugitive and send him back to

Indiana. He is sentenced to 50 years in prison for the rape and robbery.

- » March 2005: New DNA evidence is presented during a post-conviction relief hearing before Marion Superior Court Master Commissioner Nancy L. Broyles, working under elected Judge Grant Hawkins. Buntin's attorney argues the evidence clears Buntin of the crime.
- » August, November 2005: Buntin sends letters asking the court why a decision has not been issued.
- » May 2006: Broyles signs a decision granting Buntin's request to set aside his conviction, which could have led to an appeal by the state, a new trial or his release. But the court fails to notify either party, and the file later is lost. Broyles, who initially reported signing the decision in May 2005, later said she likely finished it one year later, in May 2006.
- » January 2007: Buntin files a "lazy judge" complaint against the court.
- » March: A review of Buntin's complaint by the Indiana Commission on Judicial Qualifications reveals the mistake, and Broyles issues a new decision after the file is found. But Buntin's release is not ordered, giving the state 30 days to decide whether to appeal.
- » April: Buntin is released after a hearing before Hawkins, who apologizes for the delays.
- » January 2008: Buntin files suit against Marion Superior Court for mishandling the case. He earlier sued his attorney, accusing her of failing to press the court during the nearly two-year lapse.
- » April: The Indiana Commission on Judicial Qualifications files notice of 11 disciplinary charges against Hawkins and 10 against Broyles.
- » October 2008: The Indiana Commission on Judicial Qualifications convenes a hearing in the allegations against Hawkins.
- » October 2008: The Indiana Supreme Court bans Broyles from serving as a judge, even temporarily.
- » Friday: The panel issues a recommendation that Hawkins be removed from office.

Posted by Marcia Oddi on [Saturday, November 08, 2008](#)

Posted to [Indiana Courts](#)

## [24. Friday, November 07, 2008](#)

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### [24.1. IND. COURTS - MORE ON: FRUSTRATION WITH THE APPELLATE CLERK'S OFFICE OPERATIONS](#)

In response to [this ILB post of Nov. 6th](#), the **ILB** received this note earlier today from Kathryn Dolan, Indiana Supreme Court Public Information Officer:

I noticed a concern on your blog about the Appellate Clerk's Office. I hope this information clears up some misunderstandings and provides some details about the construction project.

Long-needed renovations have been underway since mid-July. The renovations will modernize the office's functionality while visually restoring it, like the rest of the State House's public spaces, to its original historic motif. The changes will help streamline office logistics to provide prompt customer service and increase efficiency and productivity. Construction is scheduled to be complete at the end of November.

During construction, the Clerk's Office's staff and records had to move to another location. The Clerk set up a system to minimize the inconvenience on those filing. There is a temporary station at the State House. The space only accommodates one computer terminal with one staff member—however; it means patrons do not have to travel to another location during construction.

Wait times for walk-in patrons are NOT typically one hour. Instead, usually there are very few people, if any, in line. As before the renovation, there are times when the office is busier than others. This will likely remain the case even after the renovation is complete, although wait times should be reduced because more than one person will be able to staff the counter during peak periods.

3:30 p.m. and 5 p.m. is our peak traffic time, particularly on Fridays and before or after state holidays. The Clerk's Office is open Monday through Friday 8 a.m. to 5 p.m. and rotunda filing is available from 5 p.m. to 8 a.m. So, there are many "low-to-no wait" options available to those wanting to avoid lines caused by the "end-of-the-day" rush. And of course, we accept filings via mail as well.

Please let your readers know that if they have a complaint or a member of the media needs help they can contact me at [kdolan@courts.state.in.us](mailto:kdolan@courts.state.in.us) or the Clerk and Deputy Clerk at [Clerk@courts.state.in.us](mailto:Clerk@courts.state.in.us).

Posted by Marcia Oddi on [Friday, November 07, 2008](#)

Posted to [Indiana Courts](#)

#### **24.2. IND. DECISIONS - COURT GRANTS THREE TRANSFERS THIS WEEK**

The formal transfer list will not be out until next Monday, but the **ILB** has received notice that three cases were granted transfer Thursday, Nov. 6th. They are:

*Thomas Armfield v. State* - this is an Aug. 11th NFP COA opinion - [access it here](#).

*Damen Holly v. State* - here is [the ILB summary](#) of the June 17th COA decision.

*Kail Fortson v. State* - this is an Aug. 29th NFP COA opinion - [access it here](#).

Posted by Marcia Oddi on [Friday, November 07, 2008](#)

Posted to [Indiana Transfer Lists](#)

#### **24.3. IND. LAW - NON-CODE "LEGISLATIVE CHANGES AFFECT SEVERAL COUNTY TERM TIMES"**

[Part II](#) of my October *Res Gestae* article, "[Can You Rely on the Indiana Code?](#)" set out a number of Indiana statutory provisions that are not found in the Indiana Code and that may therefore catch you unaware. One of the examples, Example 6, found beginning on p. 6 of the PDF version of the article (p. 17, if you are looking in the version printed in *Res Gestae*), relates that:

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. \* \* \*

*[See the introductory provision, SECTION 19, on p. 13 of the 47-page, 93-SECTION bill, followed by the remaining 73 SECTIONS that cover offices of the individual affected counties.]*

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 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."

All this is by way of explanation for [this story today](#) in the **Gary Post-Tribune**, reported by John Byrne:

CROWN POINT -- Lake County's murky politics will get more confusing over the next year or two as legislation aimed at standardizing the state's election schedule takes effect.

The Lake County Clerk's Office and the Lake County Coroner's Office were among 80-odd elected positions in the state which, for some reason, had a one-year lag between a candidate's election and when that candidate took office.

A few years ago, the General Assembly fixed the situation by setting a series of three-year terms in the offices so they will eventually come in line with other offices, which have two or four-year terms and only a two-month separation between getting elected and taking office.

Lake County Clerk Thomas Philpot -- elected Lake County coroner on Tuesday -- will continue clerking through the end of 2009. He then will step down to become coroner Jan. 1, 2010.

But a single year will remain on Philpot's three-year term as clerk, so the Lake County Democratic precinct organization will need to caucus to replace him for 2010.

Philpot will take over a three-year term as coroner, through 2012, at which time the office will again be on the ballot.

If that's not complicated enough, things will get messy if Philpot, as he has hinted he might, opts to run for Lake County Sheriff in 2010.

He would have to declare his candidacy for that office just a few weeks after taking office as coroner, though there's nothing stopping him from holding one post while campaigning for the other.

The non-code SECTION 59, found on p. 31 of [SEA 308](#), deals with the term of the clerk of the circuit court of Lake County. SEA 308, however, does not address the term of the coroner of Lake County.

Posted by Marcia Oddi on [Friday, November 07, 2008](#)

Posted to [Indiana Law](#)

#### **24.4. [LAW - "PUSH TO EXPAND VOTER ROLLS AND EARLY BALLOTING IN U.S. " \[UPDATED\]](#)**

[This lengthy story](#) by Ian Urbina was on the front-page of my **NY Times** this morning, but appears as an inside-the-paper story on the website. Some quotes:

"The single most important thing that Congress can do right now is create universal voter registration, which would mean that all eligible voters are automatically registered," said Rosemary E. Rodriguez, the chairwoman of the federal Election Assistance Commission, which oversees voting. "We also saw incredible success with early voting, and requiring states to adopt it would help as well." \* \* \*

Congress is already discussing the adoption of early voting nationwide. It now exists in 32 states in various forms.

A bill to do so was drafted last year by Senator Dianne Feinstein, Democrat of California, and its co-sponsors included Senator Barack Obama, Democrat of Illinois. The bill was tabled after receiving little support from Congressional Republicans but is likely to have a better chance next year when Democrats hold expanded majorities on Capitol Hill and Mr. Obama is president.

Early voting proved extraordinarily successful in providing people with more options to cast their ballot and in easing the strain of turnout on Election Day. It gave voters the chance to clarify their eligibility before Election Day, and it gave election officials more time to test and understand new machines and rules.

"But the bigger reason that Republicans have resisted expanding the franchise," Dr. Minnite said, "is that the new people who are likely to come into the electorate are more often of lower income and are people

of color, who tend to vote Democratic." \* \* \*

R. Doug Lewis, director of the National Association of Election Officials, a nonpartisan group that represents local and state election officials, said his members saw this as a "state's rights issue" and were not thrilled about any possible federal takeover of registration or new laws that required early voting. But Mr. Lewis said they would support legislation that gave states incentives to help achieve these goals.

Most state election officials see the merit in early voting, Mr. Lewis said, and have become frustrated by dealing with voter registrations being submitted by third-party organizations, often in duplicate or with errors. He said state officials believed that they could do a better job than Washington in deciding how to keep the lists accurate and whether to expand them.

But how states maintain and verify their lists has become a serious problem and led to many lawsuits around the country. Before the election, Colorado, Louisiana and Michigan were found to have wrongly removed thousands of voters from their rolls.

Legislation to expand registration, most likely to be introduced in the coming months, may be tougher to pass.

"A system of automatic registration, in which the government bears more of the responsibility for assembling accurate and secure lists of eligible voters, is a necessary reform," Senator Hillary Rodham Clinton of New York, who is working on legislation intended to overhaul how eligible voters register, said Thursday. "All eligible Americans should be able to cast their ballot without barriers, and the registration problems we saw on Tuesday and during the weeks that preceded Election Day make clear that the system needs improvement." \* \* \*

Lorraine C. Minnite, a political science professor and voting rights expert at Barnard College, said Republicans had generally resisted such efforts in part out of concern about ineligible voters like noncitizens being permitted to vote.

**My thoughts.** I early voted Tuesday and intend to do so from now on. But one thing gives me pause. It was *my vote*, and the votes of other "early voters" in the state's two largest counties, that appeared to be up-for-grabs during all the party-based legal challenges that went on before election day. The talk of not counting early votes, for one reason or another, made me nervous. The time period before election day created by allowing early voting should not be permitted to become a time period for legal bickering.

The poorly drafted statute law, which as the court opinions show, needs an overhaul, also makes me nervous.

And stories in the paper, [such as this one](#) in the **Indianapolis Star** today headed "*About 2,100 absentee ballots went astray,*" that begins:

About 2,100 votes cast by absentee ballot never made it to their intended precincts to be counted on Election Day, but the Marion County clerk's office said they will be part of the final tally.

Nearly 500 of the votes were received in the mail too late Tuesday to make it to the polls, while the clerk's office put about 1,600 in the wrong pile and delivered them to the wrong precincts.

and [this one](#) headed "*350 Hamilton Co. ballots tossed after error,*" which reports:

As many as 350 people who voted Tuesday at Carmel's University High School had their ballots tossed because of a clerical mistake.

The paper ballots, used to speed up voting because of heavy turnout in the Clay Center precinct, were discarded Tuesday evening because poll workers didn't initial them as required by state law, said Hamilton County Election Board President Tory Callaghan Castor.

only confirm my concerns.

[Updated Nov. 18th] And [this one from today's Star](#):

Marion County GOP Chairman Tom John on Monday said the discovery of 446 uncounted absentee ballots in the county clerk's office provides more evidence that the election was poorly run.

Democratic Clerk Beth White, whom John has criticized often, oversees elections in Marion County.

Angie Nussmeyer, the spokeswoman for the clerk's office, said the ballots had been "overlooked" because they were pushed out of sight on the top shelf in a storage closet where absentee ballots are secured before Election Day. They were found during a final sweep Monday.

Nussmeyer said the discovered ballots from precincts in Washington, Warren and Perry townships will be counted. They did not change the outcome of any elections. Though the county certified election results Monday morning, she said, state law allows counties a week to amend the final count and include the ballots.

But John said the 446 ballots represent a pattern of mistakes by the clerk's office that does not happen in other major cities.

"These are people's votes we're talking about," John said in a news release. "The fact that Beth White had no idea that these ballots were missing shows the lack of training and accountability in how votes are handled by her office."

Posted by Marcia Oddi on [Friday, November 07, 2008](#)

Posted to [General Law Related](#)

#### **24.5. [IND. DECISIONS - COURT OF APPEALS ISSUES 1 TODAY \(AND 7 NFP\)](#)**

##### **For publication opinions today (1):**

In [Knox County Council v. John Sievers, et al.](#), an 11-page opinion, Judge Friedlander writes:

The Knox County Council (the Council) filed a three-count complaint seeking under Count I an accounting with respect to Knox County Prosecutor John F. Sievers (the Prosecutor) and Knox County Sheriff Stephen P. Luce (the Sheriff), under Count II certain records from the Sheriff and from attorney Matthew Parmenter, who was hired by the Prosecutor to represent the Prosecutor's Office in civil forfeiture proceedings, and under Count III injunctive relief. Upon appeal, the Council seeks reversal of the grant of motions to dismiss filed by the Sheriff and the Prosecutor with respect to Count II, presenting several issues for review. We address only the following issue, as we find it dispositive of the appeal: Did the trial court err in determining the Council did not have standing to pursue legal action against the Prosecutor and the Sheriff? We reverse and remand with instructions. \* \* \*

The trial court erred in determining that the Council does not have standing to pursue this action under APRA, and we reverse the dismissal of the Council's lawsuit on that basis. We note that the other basis for dismissal cited by the court, i.e., its lack of subject matter jurisdiction, is a direct derivative of that erroneous conclusion and is therefore also erroneous. The trial court is reversed and this matter is remanded with instructions to reinstate the Council's APRA action and to proceed in this case in a manner consistent with the principles set out in this opinion.

##### **NFP civil opinions today (1):**

In [the Matter of V.B., J.H. III, J.B., and J.H. \(NFP\)](#) - "Appellant-Respondent James Hopson Jr. ("Father") appeals from the juvenile court's determination that his minor children, J.H. III, J.B., and J.H., are children in need of services ("CHINS"). Father presents a single issue for our review, namely, whether the evidence is sufficient to support the CHINS adjudication. We affirm. "

**NFP criminal opinions today (6):**

[Jack W. Ferman v. State of Indiana \(NFP\)](#)

[Norman Richardson v. State of Indiana \(NFP\)](#)

[Anthony White v. State of Indiana \(NFP\)](#)

[Michelle Dearing v. State of Indiana \(NFP\)](#)

[Erick C. Pollock v. State of Indiana \(NFP\)](#)

[Allan G. Becker v. State of Indiana \(NFP\)](#)

Posted by Marcia Oddi on [Friday, November 07, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

**24.6. [IND. DECISIONS - 7TH CIRCUIT RULES ON ILLINOIS "CHOOSE LIFE" LICENSE PLATE ISSUE](#)**

No Indiana decisions today from the 7th Circuit, but an interesting decision in the case of [Choose Life, Illinois v. Jesse White, Sec. of State](#). Judge Sykes writes the opinion, and Judge Manion has a concurring opinion. From Judge Sykes:

[T]he Secretary now argues that the amendment reinforces his position that the messages on specialty license plates are the government's own speech—not private or a mixture of government and private speech—and therefore no First Amendment rights are implicated. We disagree, though we acknowledge the question has divided other circuits.

Specialty license plates implicate the speech rights of private speakers, not the government-speech doctrine. This triggers First Amendment “forum” analysis, and we conclude specialty plates are a nonpublic forum. Illinois may not discriminate on the basis of viewpoint, but it may control access to the forum based on the content of a proposed message—provided that any content-based restrictions are reasonable. The distinction between content and viewpoint discrimination makes a difference here.

It is undisputed that Illinois has excluded the *entire subject* of abortion from its specialty-plate program; it has authorized neither a pro-life plate nor a pro-choice plate. It has done so on the reasonable rationale that messages on specialty license plates give the appearance of having the government's endorsement, and Illinois does not wish to be perceived as endorsing *any* position on the subject of abortion. The State's rejection of a “Choose Life” license plate was thus content based but viewpoint neutral, and because it was also reasonable, there is no First Amendment violation. We reverse the judgment of the district court. \* \* \*

Because the General Assembly's rejection of the “Choose Life” specialty plate was viewpoint neutral and reasonable, there was no First Amendment violation here, and the district court improperly entered judgment for CLI. We REVERSE the judgment of the district court, VACATE its order directing the Secretary to issue the “Choose Life” plate, and REMAND with instructions to enter judgment for the Secretary.

Posted by Marcia Oddi on [Friday, November 07, 2008](#)

Posted to [Ind. \(7th Cir.\) Decisions](#)

**24.7. [IND. COURTS - PANEL RECOMMENDS MARION COUNTY SUPERIOR COURT JUDGE GRANT W. HAWKINS REMOVAL](#)**

First, [here is the 70-page](#) "Master's Findings of Fact, Conclusions of Law, and Recommendations to the Supreme Court," in the matter of The Honorable Grant W. Hawkins, Judge of the Marion Superior Court.

Start reading on p. 57 for the Master's conclusions on each of the 11 Counts. Page 62 begins the Recommendation of Sanction:

There is one glaring detail the Masters cannot set aside in recommendation a sanction in this case: Judge Hawkins' failure to discharge his judicial duties properly resulted in Mr. Buntin's spending almost two unnecessary years in prison.

On p. 64:

This matter is seriously complicated by Judge Hawkins' response to the Commission's investigation, including the information he gave to the Commission, which later proved to be incorrect; the missing order, disk, letters from the *Buntin* file; and the lack of any coherent explanation for what happened to the *Buntin* file and how it somehow appeared on a desk on March 6, 2007.

From p. 67:

The Masters strongly believe Judge Hawkins owed Mr. Buntin, the Commission, and the public an accurate and complete accounting of what happened in the Buntin case, what exactly caused the almost two year delay in ruling, and we strongly believe they are still entitled to that explanation today. We do not find that Judge Hawkins has provided that accounting.

The Masters have reluctantly come to the conclusion that the failure to correct the misrepresentations promptly and the failure to offer an accurate and complete accounting for what happened in the *Buntin* case is the same as Judge Hawkins' deliberately setting out to deceive the Commission and the public. The loss of public confidence in our judiciary from the delayed rulings, then the failure to release Mr. Buntin from prison immediately, then the misinformation given as to the circumstances which caused the delay, causes the Masters to conclude that the appropriate sanction in this case is removal.

We reach these conclusions with great regret and after much thought and do not make this recommendation lightly. As trial judges, we know too well how difficult our jobs are, how many demands we have on our time and attention, and how easy it is to make mistakes. The Masters believe, however, the mistakes made in this case were so critical, the loss of liberty so significant, and the Judge's response so lacking, that we as trial judges would not carry out our duty as Masters unless we called for a significant sanction.

In October Hawkins' former Master Commissioner Nancy L. Broyles was "PERMANENTLY BANNED from serving in any judicial capacity of any kind, including service as a judge pro tempore." See ILB entries from [Oct. 10](#) and [Oct. 11](#).

For background, see [a long list of ILB entries here](#).

The story originates with [an April 24, 2007 Indianapolis Star](#) report headed "*Indy man is angry that '05 order for his release was wrongly put in storage*" and another, from [Jan. 16, 2008](#), headed "*Cleared of rape, Indy man sues over delay in prison release.*"

Posted by Marcia Oddi on [Friday, November 07, 2008](#)

Posted to [Indiana Courts](#)

#### **24.8. IND. COURTS - "SPECULATION ON U.S. ATTORNEY PICK SWIRLS"**

Andy Grimm [reports](#) in the **Gary Post-Tribune** in a story that begins:

HAMMOND -- President-elect Barack Obama has named his chief of staff, and is expected to announce members of his economic and national security teams within days.

It likely will be months, however, before he names appointees to a handful of key judicial posts in Northwest Indiana. But local political players surely are speculating about who'll be tapped for a handful of

Northern District court appointments, notably U.S. attorney.

A new U.S. attorney may or may not continue to make public corruption a top priority of the office. There also is an opening on the District Court in South Bend, and current District Court Judge Philip Simon was nominated just months ago for a seat on the 7th U.S. Circuit Court of Appeals.

U.S. Attorney David Capp has been at the center of speculation about whether he'd retain the post during Obama's administration. Capp had been rumored as a candidate for the South Bend court seat. Capp declined to comment.

Since the Jimmy Carter administration, the U.S. attorney appointee has come from Lake or Porter counties and the office is based in Hammond. Most often, the pick has been taken from private practice, but has had experience as a state or federal prosecutor.

Posted by Marcia Oddi on [Friday, November 07, 2008](#)

Posted to [Indiana Courts](#)

#### 24.9. [IND. LAW - "VOTER ID LAW CONFUSION PERSISTS"](#)

Margaret Fosmoe of the **South Bend Tribune** [reports](#) today:

SOUTH BEND — Indiana mails postcards to each newly registered voter stating that an Indiana- or federal-issued valid photo identification is required to cast a ballot and providing other details about voting. \* \* \*

Despite voter education efforts by local colleges, dozens of students at the University of Notre Dame and other local campuses were disappointed when they turned out to vote and learned they needed an Indiana- or federal-issued ID to vote in this state.

Notre Dame, Holy Cross and Saint Mary's College each conducted voter-education efforts aimed at students — ranging from information booths to campaign events to e-mails detailing Indiana's strict voter-ID law.

"We really encouraged students to register in their home state," said Notre Dame senior Mallory Laurel, co-chair of ND Votes, a voter registration and education effort. The group created a database of students who signed up to receive information via e-mail.

Saint Mary's accepted the offer from the Indiana secretary of state's office to provide free e-mail notices to students detailing the state's voter laws.

A receptionist in Notre Dame's student affairs office said Thursday she referred calls offering voter education help to other offices on campus that were involved in such efforts.

Forty-five to 50 Notre Dame students who showed up to vote Tuesday at the campus polling place ran into problems because they didn't have the required Indiana- or federal-issued valid photo ID.

At least 10 other students who appeared at the polling place at Castle Point Apartments clubhouse also didn't have the required forms of ID, said Paula A. Smith, a volunteer who worked that polling site.

"They seemed surprised. A couple said they had been given information that they could use their student IDs," Smith said.

The students were allowed to submit provisional ballots.

Some students left and returned later with their passports,

which are acceptable ID. Others went to the Bureau of Motor Vehicles to request an Indiana ID card, but decided against it when they learned they would have to surrender their home-state driver's licenses,

Smith said.

When someone registers by mail to vote in Indiana, he or she receives a letter from the county voter registration office. Letters sent by all counties are identical, with wording set by the state.

The letter states the individual must present the office with a copy of a personal identification document in order to be eligible to vote. The letter states the document must be one of the following: "current and valid photo identification, such as your Indiana driver's license; current utility bill; current bank statement; current government check; current paycheck (or) other government document that shows your name and address."

The letter doesn't detail Indiana's requirement that a voter must show a valid Indiana- or federal-issued photo ID at the polling place.

That lack of detail in the letter might be responsible for some of the confusion, said Linda Silcott, the Republican board member for St. Joseph County voter registration. She plans to raise the issue in December during an annual meeting of Indiana election officials.

Posted by Marcia Oddi on [Friday, November 07, 2008](#)

Posted to [Indiana Law](#)

#### **24.10. [COURTS - "JUDICIAL RACES: LOTS OF CASH, LOTS OF NEGATIVITY, LOTS OF CHANGE"](#)**

Amanda Bronstad of **The National Law Journal** [recaps the election results](#) from Tuesday involving state judicial races.

Posted by Marcia Oddi on [Friday, November 07, 2008](#)

Posted to [Courts in general](#)

#### **24.11. [LAW - STILL MORE ON "NEB. OFFICIALS: PARENTS MISUSING INFANT DROP-OFF LAW"](#)**

Updating earlier **ILB** entries ([start here](#)), Erika D. Smith of the **Indianapolis Star** has [a story today](#) headed "*Indiana boy, 8, is latest to be left in Nebraska.*" Some quotes:

An 8-year-old Wabash County boy is in the custody of Nebraska child services workers today after his mother -- taking advantage of that state's lenient and controversial safe-haven law -- left him at an Omaha hospital Thursday. \* \* \*

So far, 28 children have been left under Nebraska's safe-haven law, which took effect in July. Just two sentences long, it states that anyone can leave a child at a hospital without fear of prosecution for abandonment.

The measure was intended to protect infants, [Jeanne Atkinson, spokeswoman for Nebraska's Division of Children and Family Services] said, but that was never written into the law. Instead, parents, such as the Indiana mother, have seized on the word "child" to legally drop off children as old as 17.

**Legislators are holding a special session this month to add an age limit of 3 days old to the law.**

Indiana's safe-haven law applies to children who are younger than 45 days old.

It allows parents to drop off an infant -- no questions asked -- at sites such as hospitals, police stations and firehouses. The child then is placed in the custody of the Department of Child Services' office in the county where he or she was dropped off.

Legislators enacted the law in 2000 in response to the death of a baby who was abandoned in a snowdrift outside Community Hospital North.

Posted by Marcia Oddi on [Friday, November 07, 2008](#)

Posted to [General Law Related](#)

#### **24.12. COURTS - "NEW JERSEY JUDGE FACES ETHICS CHARGES FOR DWI ANTICS WITH CHAPSTICK AND PENNY"**

An interesting story today by Maria Vogel-Short of the **New Jersey Law Journal** - some quotes:

Peter Tourison isn't the first judge to come up for discipline as the result of a drunken driving conviction, but he may be the first to have tried to beat the DWI rap by exploiting the foibles of New Jersey's new breath-testing device.

Tourison, 57, who sits in three Cape May County, N.J., towns, was charged with driving while intoxicated on March 27, after he failed field sobriety tests and an Alcotest at the police station. He later pleaded guilty.

The DWI itself would have been enough for the state Advisory Committee on Attorney Ethics to bring charges, which it did, but what he did while in custody at the station could stiffen his discipline.

Tourison attempted to apply Chapstick to his lips, which delayed the Alcotest. According to protocol for operating the device, nothing can be in or around a driver's mouth for 20 minutes before the test is administered. When the police took the Chapstick away, Tourison produced and used another tube before it, too, was confiscated.

Then, when a patrolman turned his back, Tourison placed a penny in his mouth. It's a common ploy, says Herbert Leckie, of DWI Consultants in Lebanon, N.J., who trains lawyers and police on Alcotest operation. While the penny won't affect the test, the presence of an object in a suspect's mouth may show the officer didn't perform a proper oral inspection, thus fouling the testing process.

Tourison's test showed a 0.08 Alcotest reading, the threshold for drunken driving. He pleaded guilty to the DWI charge on June 25 before Penns Grove Municipal Judge David E. Krell. A separate charge of careless driving was dismissed. \* \* \*

The ACJC charged Tourison with violating Canon 1, which requires judges to observe the highest standards of conduct and violating Canon 2A, which compels a judge to respect and comply with law and uphold the public confidence. He was also charged with violating Canon 5A(2), which mandates judges not demean the judicial office through their extra-judicial activities.

The ACJC also charged that Tourison violated Rule 2:15-8(a)(1), with misconduct in office, and Rule 2:15-8(a)(6), with conduct prejudicial to the administration of office which brings the judicial office in disrepute.

Judges convicted of DWI are issued at least a reprimand and higher discipline, such as censure or suspension from the bench, if there are aggravating factors. It is possible that Tourison's police-station antics might cause the ACJC to seek a heavier sanction.

Posted by Marcia Oddi on [Friday, November 07, 2008](#)

Posted to [Courts in general](#)

#### **24.13. IND. COURTS - "'SALACIOUS' AFFIDAVIT RESULTS IN JAIL TIME FOR CLIENT HINDS, ATTORNEY DENNEY"**

Rick Yencer reports today in the **Muncie Star-Press** in [a very long story](#) that begins:

MUNCIE -- Local attorney Louis Denney and his client, Jeff Hinds, were found in contempt of court and sentenced to 30 days in jail Thursday by Jay Circuit Court Judge Brian Hutchison after Denney filed an affidavit that focused in part of the judge's sexual relationship with his girlfriend and, according to Hutchison, also contained "allegations of criminal conduct" by the judge.

Denney on Monday filed a change-of-judge motion on behalf of Hinds, charged along with local attorney Michael J. "Mick" Alexander with bribery and conspiracy to commit bribery. The Muncie men are accused of bribing a witness to change his testimony in a criminal case against an Alexander client.

Along with the motion, Denney included an affidavit purported to be a transcription of a taped conversation between Hinds and Hutchison's girlfriend, Julie Ashman.

Here, via the **Star-Press**, [is a copy](#) of the Criminal Contempt Order issued by special judge Brian D. Hutchinson, plus an Order Striking Pleading, also issued by Special Judge Hutchinson, ordered that:

the 39 page document entitled "Excerpts from Transcript in Support of Motion for Change of Judge" shall be and is hereby stricken from the record.

The Clerk of the Court is directed to remove the pleading from the public file, but is instructed to retain the pleading in a separate confidential envelope so that it may be accessed for appellate review, if necessary,

Posted by Marcia Oddi on [Friday, November 07, 2008](#)

Posted to [Ind. Trial Ct. Decisions](#)

#### **24.14. [IND. COURTS - PAUL BUCHANAN JR. DIES AT 90 \[UPDATED\]](#)**

Ted Evanoff's [story today](#) in the **Indianapolis Star** begins:

Paul Buchanan Jr., a legal force in Indianapolis for decades as a judge and lawyer, died Thursday at age 90.

Bruce Buchanan, his son, said the lawyer passed away after a bout of ill health related to colon cancer.

Born in 1918 into the family that runs the Flanner & Buchanan funeral home business to this day, Paul Buchanan went into law. He was instrumental in the 1955 founding of what today is Bose McKinney & Evans. It now ranks among the five largest law firms based in the city.

"His career and his pride was made as a lawyer and a judge," said Bruce Buchanan, noting that his father prized an engraving of President Abraham Lincoln as a symbol of integrity.

Paul Buchanan was known in legal circles for the clarity and logical organization of his writing and the reflections he made on the law in columns written over 25 years for *Res Gestae*, an Indiana Bar Association publication.

He was elected a judge in 1971. On the bench, Buchanan railed against graft in the courts, although perhaps his most famous case involved Ryan White, then a 14-year-old Kokomo resident stricken with AIDS. Serving on the Indiana Court of Appeals, Buchanan in 1986 tossed out a case filed by several Kokomo parents attempting to keep the boy out of public school.

**[Updated 11/12/08]** Here is [the obituary](#).

Posted by Marcia Oddi on [Friday, November 07, 2008](#)

Posted to [Indiana Courts](#)

#### **24.15. [IND. DECISIONS - "COURT VOIDS PAIR'S RIGHTS AS PARENTS OF BOY, 9"](#)**

Wednesday's Court of Appeals decision in the case of *Term. of Parent-Child Rel. of J.M. v. A.S. and A.M., Allen Co. Dept. of Child Services* ([ILB summary here](#) - 3rd case) is the subject of [a story today](#) by Rebecca S. Green in the **Fort Wayne Journal Gazette**. Some quotes:

Overturing a local court ruling, an appellate court ordered the parental rights of two convicted drug offenders terminated, allowing their son to be adopted after years of shuttling among temporary homes.

In late February, Allen Superior Court-Family Division Judge Charles Pratt denied a request by local officials with the Department of Child Services to terminate the parental rights of the parents of a now-9-year-old boy, identified in court documents as J.M.

But in a ruling issued Wednesday, the Indiana Court of Appeals ordered the case sent back to Pratt for the parental rights to be terminated.

The parents are both serving prison sentences for conspiring to deal methamphetamine and other charges. J.M. was removed from the mother's care in April 2004 by Montgomery County officials and then lived with his aunt and grandmother in Vermillion County, but they grew tired of caring for him, according to court documents. \* \* \*

In a unanimous opinion, Appellate Judge Carr L. Darden wrote, "it is foreseeable that J.M. would have to remain in foster care until his parents could take on the responsibilities of parenthood; however, there is no guarantee that either parent will be able to care for J.M. following their release."

Looking at the totality of the evidence, the court concluded it would be in the best interests of the child to terminate his parents' rights and ordered the case sent back to Pratt for him to do just that.

Posted by Marcia Oddi on [Friday, November 07, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

## [25. Thursday, November 06, 2008](#)

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### [25.1. IND. COURTS - 2007-2008 ANNUAL REPORT OF THE INDIANA SUPREME COURT](#)

The [2007-2008 Annual Report of the Indiana Supreme Court](#) is now available online. It is 3 MB, so be aware, but definitely worth your review. The Report includes a number of photos and a half-dozen pages of statistics.

**[More]** This might be helpful - I've extracted the [6 pages of data](#) from the 3 MB report, for those who want to review or print them.

Posted by Marcia Oddi on [Thursday, November 06, 2008](#)

Posted to [Indiana Courts](#)

### [25.2. IND. COURTS - AN ORDER TODAY IN A VANDERBURGH COUNTY CASE](#)

Of procedural interest, in the case of *Kerry J. Greenwell v. State of Indiana* (see [ILB summary of COA opinion here](#) -5th case), the Supreme Court has this afternoon issued this "[Order](#) Dismissing Petition to Transfer," dismissing the currently pending transfer petition.

Posted by Marcia Oddi on [Thursday, November 06, 2008](#)

Posted to [Indiana Transfer Lists](#)

### [25.3. IND. COURTS - MAKING SENSE OF COURT FEES](#)

In the second half of [this ILB entry](#) from August 3rd, there is a discussion of Indiana court fees, ending with "I've been unable to locate a simple, one-page statement of current Indiana court fees."

That is still the case. However, the **ILB** has just obtained copies of an overview of court fees and information on the revenue generated by these fees, prepared by the LSA for the legislative [Commission on Courts](#) meeting last month. Access [the 3-page report](#) here.

In addition, [these two charts](#) (each is extra-wide and extends onto the following page) list "Fee Type" and how they have changed over the period from 1990-2008.

Posted by Marcia Oddi on [Thursday, November 06, 2008](#)

Posted to [Indiana Courts](#)

#### **25.4. IND. COURTS - SUPREME COURT RECEIVES INTERNATIONAL AWARD FOR INFORMATION SYSTEMS**

[A press release](#) issued today begins:

The Indiana Supreme Court has been recognized by the Information Integrity Coalition (IIC) for providing accurate, consistent and reliable information. Chief Deputy Executive Director of State Court Administration, Dave Remondini, accepted the award on behalf of the Court in Chicago, Illinois on October 20th at the 13th annual awards banquet. The court was honored for its work on major technology initiatives including the Odyssey statewide case management system; electronic Protection Order Registry; electronic Citation and Warning System for law enforcement and electronic reporting of driver suspensions and convictions to the Bureau of Motor Vehicles.

Who else received awards? As announced [here](#):

Winners and Finalists in the Non-Profit category included:

- Gold Winner - Akshara Foundation – Bangalore, India
- Gold Winner - Pratham Mumbai Education Initiative – ASER, Mumbai, India
- Silver Winner - Metropolitan Sewer District of Greater Cincinnati – Cincinnati, Ohio, USA
- Bronze Winner - Office of the CFO, US Department of Labor – Washington, District of Columbia, USA
- Finalist - Indiana Supreme Court – Indianapolis, Indiana, USA
- Finalist - Office of the Clerk of the Circuit Court of Cook County – Chicago, Illinois, USA
- Finalist - The MITRE Corporation – McLean, Virginia, USA

Posted by Marcia Oddi on [Thursday, November 06, 2008](#)

Posted to [Indiana Courts](#)

#### **25.5. IND. DECISIONS - COURT OF APPEALS ISSUES 2 TODAY (AND 3 NFP)**

**For publication opinions today (2):**

In [Fairbanks Hospital v. Dan Harrold, et al.](#), an 11-page opinion, Judge Friedlander writes:

Upon interlocutory appeal, Fairbanks Hospital (Fairbanks) appeals the trial court's determination that a claim filed against it by Dan, Eva, and Natalie Harrold (collectively, the Harrolds) does not fall within the scope of the Indiana Medical Malpractice Act. Upon appeal, we consider the following restated issue: Does a complaint alleging negligent hiring, training, and supervision of a hospital employee fall within the Act if the underlying tort allegedly committed by that employee was unwanted sexual advances? We affirm. \* \* \*

The IDI, however, does cite one case that we deem to be dispositive of the appeal: *Winona Mem'l Hosp., Ltd. P'ship v. Kuester*, 737 N.E.2d 824 (Ind. Ct. App. 2000).

The relevant facts in *Winona* are that the patient/plaintiff alleged that Winona Hospital and affiliated medical providers were negligent in credentialing a doctor whose malpractice caused injury to her. Winona moved to dismiss the complaint on the basis that the patient had failed to comply with the requirement of the Act that a patient first obtain an opinion from a medical review panel. The trial court denied the motion to dismiss and Winona filed an interlocutory appeal. This court took the occasion to address a question of first impression in Indiana, i.e., "[w]hether a claim against a qualified health care provider for the negligent credentialing of a physician is an action for malpractice subject to the provisions of the Medical Malpractice Act?" There, as here, the court observed that the patient's claim alleged that her injuries were proximately caused by two acts – Winona's negligence in credentialing the doctor in question, and, of course, that doctor's negligence in treating the patient. We observed that, as pleaded, in

order for the patient to prove the tort of negligent credentialing, she was first required to establish that a negligent act of the doctor's proximately caused her injury "before she can proceed against Winona." \* \* \*

We thus learn from *Winona* that a medical malpractice action cannot become completely unmoored from the provision of what our case law has established is the very essence of health care, i.e., "conduct, curative or salutary in nature, by a health care provider acting in his or her professional capacity[.]" This is especially true where, as here, the patient is required to prove more than one layer – or multiple acts - of tortious conduct in order to prevail. It is for this reason that the court held in *Winona* that it availed the patient nothing to prove that Winona was negligent in credentialing the physician in question if the patient did not also prove that said physician's negligence in rendering health care services was a proximate cause of the patient's harm. In other words, *both* allegedly tortious acts that comprised the patient's claim of malpractice must sound in medical malpractice and not merely ordinary negligence.

Applying these principles to the instant case, the Harrolds' claim against Fairbanks requires proof, at least so far as this appeal is concerned, both that Shears was guilty of sexual misconduct with Natalie, and that Shears was in a position to do this as a result of Fairbanks's negligent supervision. \* \* \* As set out above, this court has consistently held that an employee's sexual conduct with a patient cannot constitute a rendition of health care or professional services, and thus a claim based thereon does not fall under the Act. [citations omitted] For these reasons, the trial court did not err in determining that the claim filed against Fairbanks by the Harrolds does not fall within the purview of the Act. Ruling affirmed.

[Steven A. Powell v. State of Indiana](#) - " Steven Powell appeals the sentence imposed after he pleaded guilty to one count of attempted child molesting as a Class A felony and one count of child molesting as a Class C felony. We affirm. "

#### **NFP civil opinions today (2):**

[In Re: C.A.W., Jr. \(NFP\)](#) - "In light of C.A.W.'s failure to justify the seven-year delay in seeking to set aside his juvenile adjudication and the great prejudice resulting to the State because of this delay, C.A.W. has not met his burden of showing that he filed his T.R.60(B)(8) motion within a reasonable amount of time. (Compare the instant case with *G.B. v. State*, 715 N.E.2d 951 (concluding that T.R. 60(B) motion challenging the voluntariness of waiver of counsel in juvenile proceeding was timely filed ten months after modification hearing when juvenile initiated procedures to obtain transcripts of hearing for purposes of filing T.R. 60(B) motion within three months of disposition modification proceeding)). We therefore conclude that the trial court did not abuse its discretion in denying C.A.W.'s requested relief. "

[Carr Development Group v. The Town of North Webster \(NFP\)](#) - " Carr Development Group, LLC, (Carr), appeals the trial court's grant of declaratory relief in favor of the Town of North Webster upon its complaint for reformation of a contract between the parties.

"The sole issue for our review is whether the trial court erred in ordering the contract reformation. We affirm. \* \* \*

"Here, the parties to the contract had a prior understanding that North Webster would not waive any fees in the Carr project. Carr nevertheless drafted an amendment contrary to this understanding and permitted North Webster to sign the contract without informing North Webster of the amendment. This is inequitable conduct that supports the reformation of the parties' contract. We find no error. "

#### **NFP criminal opinions today (1):**

[Jeremy A. Bishop v. State of Indiana \(NFP\)](#)

Posted by Marcia Oddi on [Thursday, November 06, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

#### **25.6. [LAW - "AN EARLY LINE ON LEGAL SLOTS IN OBAMA ADMINISTRATION "](#)**

Marisa McQuilken and Brian Katkin of **Legal Times** run though some of the regulatory agency and Justice Department speculation in [this article](#).

Posted by Marcia Oddi on [Thursday, November 06, 2008](#)

Posted to [General Law Related](#)

### **25.7. IND. COURTS - FRUSTRATION WITH THE APPELLATE CLERK'S OFFICE OPERATIONS**

Some attorneys are reporting problems filing, or accessing information, at the Appellate Clerk of the Court's office. From a note I received from a reader in August:

Let me assure you, everything is messed up. I've had problems getting stuff in the last few weeks because of the move. They are split between two locations temporarily, and are having major logistical problems. Stuff comes in to the State House office, gets shipped to the South Meridian location, and comes back to the judges. Stuff is not always happening on a timely basis, and they are just as frustrated as you and me.

I'm told that when they come back, it will be better in terms of public access to briefs, etc. No, not on-line yet it seems. Apparently, however, there will at least be better short-term access to folks who walk in (who have not even been able to see any -- period -- for the last two months).

From notes received recently:

I wonder if other attorneys have complained about the (extremely) long wait to file anything in person at the Appellate Clerk's office. I was there recently and for the second time my wait was over 25 minutes. But this time I had to leave before getting anything filed, so my wait would probably have been much longer. Other attorneys I have talked to have waited up to an hour or more, just to file a brief.

From what I understand, it won't get any better once construction is done. The clerk's office will have a "banker's window" for filing, which will still allow only one person at a time to assist someone with a filing. The rest of the area will be a waiting room for attorneys. It seems so inefficient.

At first I thought the long wait would be temporary. But it has been going on for a while now. It used to be cheaper to run downtown and file a brief in person rather than trying to send it through the mail. But if you consider the time it takes to file it (especially if you are a solo without a legal assistant), it may be cheaper to send it by mail).

Any comments?

Posted by Marcia Oddi on [Thursday, November 06, 2008](#)

Posted to [Indiana Courts](#)

### **25.8. ENVIRONMENT - POLLUTION DILUTION; NEW EPA CAFO RULES; OTHER EPA ACTION**

**Pollution Dilution.** Gitte Laasby of the **Gary Post Tribune** [reports](#):

BP says the diffuser it plans to use to dilute wastewater in Lake Michigan will not harm people's drinking water or wildlife -- but a federal agency wants the company to use wetlands on its own property to mitigate environmental impact.

The refinery has proposed building a diffuser consisting of a pipe extending 3,500 feet into Lake Michigan from the Whiting refinery. At the end, 12 exit ports would dilute the wastewater so pollutants come out less concentrated.

"When IDEM (the Indiana Department of Environmental Management) approved the (wastewater) permit, they determined the mixing zone would not cause harm to human health and aquatic life. It would not block passage of wildlife, it would not have an impact on habitat. It would not impact drinking water intakes. It's an ideal location," said BP spokesman Scott Dean.

The project requires a construction permit from the U.S. Army Corps of Engineers, which took public

comments until last week. Environmental groups and the U.S. Fish and Wildlife Service disagree with BP's assessment, saying that diffusing pollutants could degrade drinking water, make spills harder to contain, result in more algal blooms and encourage the spread of invasive fish at the expense of lake trout and sturgeon.

**New CAFO Rules.** Gary Truitt of **Hoosier Ag Today** [writes](#):

The EPA has announced the long delayed regulations on Confined Animal Feeding Operations (CAFOs). Tough but fair is how the National Pork Producers Council reacted to the new CAFO rules. \* \* \* The Indiana Department of Environmental Management (IDEM) told HAT they are still analyzing the rules to see how they fit with state regulations. Indiana Pork is also reviewing the documents, but was not ready to issue a statement at this time.

Here is the [US EPA press release](#) on the new rules. Here is the [EPA's CAFO page](#).

**Other EPA Action?** [An editorial](#) in the **NY Times** Monday was headed "*So Little Time, So Much Damage.*" Some quotes:

Most presidents put on a last-minute policy stamp, but in Mr. Bush's case it is more like a wrecking ball. We fear it could take months, or years, for the next president to identify and then undo all of the damage. \* \* \*

The administration has been especially busy weakening regulations that promote clean air and clean water and protect endangered species.

Mr. Bush, or more to the point, Vice President Dick Cheney, came to office determined to dismantle Bill Clinton's environmental legacy, undo decades of environmental law and keep their friends in industry happy. They have had less success than we feared, but only because of the determined opposition of environmental groups, courageous members of Congress and protests from citizens. But the White House keeps trying.

Mr. Bush's secretary of the interior, Dirk Kempthorne, has recently carved out significant exceptions to regulations requiring expert scientific review of any federal project that might harm endangered or threatened species (one consequence will be to relieve the agency of the need to assess the impact of global warming on at-risk species). The department also is rushing to remove the gray wolf from the endangered species list — again. The wolves were re-listed after a federal judge ruled the government had not lived up to its own recovery plan.

In coming weeks, we expect the Environmental Protection Agency to issue a final rule that would weaken a program created by the Clean Air Act, which requires utilities to install modern pollution controls when they upgrade their plants to produce more power. The agency is also expected to issue a final rule that would make it easier for coal-fired power plants to locate near national parks in defiance of longstanding Congressional mandates to protect air quality in areas of special natural or recreational value.

Interior also is awaiting E.P.A.'s concurrence on a proposal that would make it easier for mining companies to dump toxic mine wastes in valleys and streams. \* \* \*

We suppose there is some good news in all of this. While Mr. Bush leaves office on Jan. 20, 2009, he has only until Nov. 20 to issue "economically significant" rule changes and until Dec. 20 to issue other changes. Anything after that is merely a draft and can be easily withdrawn by the next president.

Unfortunately, the White House is well aware of those deadlines.

Posted by Marcia Oddi on [Thursday, November 06, 2008](#)

Posted to [Environment](#)

**26.** [Wednesday, November 05, 2008](#)

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## [26.1. LAW - SEC'S DIVISION OF ENFORCEMENT ISSUES A 122-PAGE ENFORCEMENT MANUAL](#)

Amy Walsh of the **New York Law Journal** has [a long article today](#) headed "*New SEC Enforcement Manual: Better Late Than Never.*" It begins:

Since its establishment in 1934, the policies and practices governing the Securities and Exchange Commission have existed under a shroud of mystery accessible only to those who previously worked at the SEC or to those who represented parties in front of the commission.

In February, at least one SEC commissioner, Paul S. Atkins, noted the irony of this black box approach coming from an agency that demands transparency from those it regulates: \* \* \* Among other suggestions relating to transparency, Commissioner Atkins proposed that the SEC publish an enforcement manual that describes the internal policies and procedures of the Enforcement Division, "similar to the U.S. Attorney Manual."

On Oct. 6, 2008 -- eight months after Commissioner Atkin's remarks, and amid the most significant market turmoil since 1929 -- the SEC's Division of Enforcement issued a [122-page Enforcement Manual](#) that addresses a multitude of subjects, ranging from waiver of the attorney client privilege to the best practices for Bates stamping documents.

Posted by Marcia Oddi on [Wednesday, November 05, 2008](#)

Posted to [General Law Related](#)

## [26.2. IND. GOVT. - AG ISSUES OFFICIAL OPINION ON PUBLIC BIDDING OF SCHOOL ROOF REPAIR WORK](#)

The Attorney General issued an [Official Opinion Nov. 3rd](#) in response to a question posed by the State Board of Accounts:

You have requested our opinion regarding the extent to which the public work laws apply to certain expenditures by school corporations. Although you posed several questions related to this matter, we understand the basic question to be whether the public work statute applies to roof repair / replacement projects undertaken by school corporations and whether school corporations participating in educational service centers are excepted from the public work statute.

Brief Answer. The public work statute at Indiana Code chapter 31-1-12 applies to roof repair / replacement projects undertaken by school corporations, including those schools participating in educational service centers.

The conclusion:

It is the opinion of this Office that school corporations are covered by the public work statute and are subject to the procedures for bids and quotes whenever they contract for public work even when the public work is contracted through an educational service center. The process required to award a contract for a particular public work project is determined by the cost of the project except in the event of a declared emergency. The definition of "public work" includes repairs to a roof, including those made to a portion of a roof.

Thanks to [the reader/blogger](#) who pointed the **ILB** to this opinion.

Posted by Marcia Oddi on [Wednesday, November 05, 2008](#)

Posted to [Indiana Government](#)

## [26.3. COURTS - "MISS. VOTERS UNSEAT THREE HIGH COURT JUSTICES"; ALABAMA RACE](#)

That is the headline of this [AP story](#) by Jack Elliot Jr. that begins:

Three sitting members of the Mississippi Supreme Court were ousted Tuesday by voters.

Chief Justice Jim Smith, Presiding Justice Oliver Diaz Jr. and Justice Chuck Easley lost to opponents in balloting.

Attorney Jim Kitchens defeated Smith, who had been on the court for 15 years, the past four years as chief justice.

"Alabama Supreme Court Race Too Close to Call" is the headline to [this AP story](#) by Phillip Rawls that begins:

Republican Greg Shaw has taken a 7,300-vote lead over Democrat Deborah Bell Paseur for the state Supreme Court. But final precinct counts are being awaited Wednesday to decide a bitterly contested race that maintained Alabama's tradition of expensive court races where black robes end up muddy.

Posted by Marcia Oddi on [Wednesday, November 05, 2008](#)

Posted to [Courts in general](#)

#### 26.4. [COURTS - MORE ON: "AN 'ORGY OF NEGATIVITY' IN MICHIGAN JUDICIAL RACE"](#)

Updating [this ILB entry](#) from yesterday, the **Detroit Free Press** is reporting today, in [a story](#) by Zachary Gorchow:

Diane Hathaway sprung a stunning upset Tuesday of Clifford Taylor, the conservative chief justice of the Michigan Supreme Court who was the target of a scathing advertising campaign from Democrats.

Hathaway, a Wayne County Circuit Court judge nominated by the Democrats, is the first challenger to unseat an incumbent justice since 1984.

The loss is a devastating blow to the Michigan Republican Party, which was braced for a bad night elsewhere on the ticket but badly wanted to re-elect Taylor, who has been a critical member of the conservative majority that has ruled the court the last decade. \* \* \*

Taylor was favored to win re-election because he had an incumbent designation on the ballot and was on the nonpartisan ballot, theoretically inoculating him from the Democratic wave that swamped the state.

The race exploded in the last two weeks when the Michigan Democratic Party funded scathing ads labeling Taylor "the Sleeping Judge," claiming he fell asleep during a case -- a charge Taylor and Republicans denounced as a lie. \* \* \*

Republicans countered the assault by attacking Hathaway's record on crime and claiming that she once told a newspaper she only wanted to serve on the state Court of Appeals to enhance her vacation time.

With 73% of the precincts reporting, Hathaway led with 49%- 40% for Taylor. Libertarian Robert Roddis had 11%.

Taylor has been a fixture of the Republican court majority that alternately has been hailed and castigated during the past decade for its conservative rulings.

Business interests and Republicans said Taylor and his fellow conservatives have taken a more literal interpretation of the law that has created a better climate to do business in Michigan.

But Democrats and plaintiffs' attorneys said Taylor has been part of a majority that has overturned years of precedent and stacked the deck against individuals trying to sue businesses and government.

The court has five justices nominated for election by the Republican Party and two nominated by the Democrats.

Posted by Marcia Oddi on [Wednesday, November 05, 2008](#)

Posted to [Indiana Courts](#)

#### 26.5. [IND. DECISIONS - COURT OF APPEALS ISSUES 5 TODAY \(AND 9 NFP\)](#)

**For publication opinions today (5):**

In [Jeremy W. Combs v. State of Indiana](#) , a 13-page pinion, Judge Vaidik writes:

Following a jury trial, Jeremy W. Combs was convicted of Class D felony operating a vehicle while intoxicated. On appeal, he argues that the trial court abused its discretion in admitting the results of his blood alcohol test into evidence. Specifically, Combs contends that the search warrant used to obtain his blood was not based upon probable cause and that the State failed to lay a proper foundation for admitting the test results because it did not present evidence that the person who drew Combs's blood acted under proper protocol. We conclude that the search warrant was based upon probable cause but that the State failed to lay a proper foundation for admitting the test results, namely, that Combs's blood was drawn under the direction of or under a protocol prepared by a physician. Therefore, the trial court abused its discretion in admitting this evidence. However, this error is harmless because the evidence is otherwise sufficient to support Combs's conviction. We therefore affirm.

In [John Edward Skolak v. Linda Skolak](#) , a 12-page opinion, Judge Darden writes:

John Edward Skolak appeals the trial court's order finding that the State's action to collect child support arrearage was not untimely. We reverse. \* \* \*

Skolak argues that the applicable statutes of limitation bar the State's action of August 20, 2007, to determine and collect an arrearage of his court-ordered child support payments. We agree. \* \* \*

The State has conceded that unless Indiana Code sections 31-16-16-2 and 34-11-2-12 apply so as to allow pursuit of its action to collect Skolak's child support arrearage after August 20, 1987, its action against Skolak is time-barred. Finding that the State's argument in that regard cannot prevail, we reverse the trial court's order.

[Term. of Parent-Child Rel. of J.M. v. A.S. and A.M., Allen Co. Dept. of Child Services](#) - "Given the evidence presented, including the GAL's testimony that termination would be in J.M.'s best interests, we conclude that the trial court's denial of the petition for termination of both Mother's and Father's parental rights is clearly erroneous. Accordingly, we reverse the trial court's determination that Mother's and Father's parental rights as to J.M. should not be terminated, and we remand to the trial court with instructions to enter an order terminating the parental rights of Mother and Father. Reversed and remanded. "

[Brian A. Staley v. State of Indiana](#) - "In his appellate brief, Staley devotes fifteen pages to explain the differences between the Deputies' testimonies and his own. However, his argument amounts to nothing more than a request to reweigh the evidence, which we will not do. See *Perez*, 872 N.E.2d at 212-13. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). In the case before us, we conclude that the jury was presented with sufficient evidence of probative value that Staley was driving intoxicated and endangering the public, the police, or himself.

"CONCLUSION. Based on the foregoing, we conclude that the trial court properly instructed the jury and the State presented sufficient evidence to support Staley's conviction beyond a reasonable doubt. Affirmed."

In [Joseph K. Alvies v. State of Indiana](#) , a 7-page opinion, Judge Riley writes:

Appellant-Defendant, Joseph K. Alvies (Alvies), appeals his conviction for panhandling, a Class C misdemeanor, Ind. Code § 35-45-17-2. We affirm. \* \* \*

Laws targeting street begging have been around for many years, but in the last twenty years, communities have tried to narrowly draw ordinances to target the most bothersome types of street solicitations and give police another tool in their effort to make public areas, particularly downtown areas, safe and inviting. \* \* \*

Rather than ban all panhandling outright, the statute is restricted to only those circumstances when panhandling can be considered especially unwanted or bothersome—at night, around restaurants and

sidewalk cafes, at financial institutions or commercial establishments, or by blocking an individual's path. These represent situations in which people most likely would feel a heightened sense of fear or alarm, or might wish especially to be left alone. Moreover, the statute is limited to the bare request for cash or valuables. Under the statute, panhandlers may ply their craft lawfully by holding up a sign that says 'give me money' and sing 'I'm cold and starving,' so long as one does not voice the words to the effect of 'give me money.' \* \* \*

Based on the facts before us, we conclude that Alvies panhandled. He solicited money from Officer Shaughnessy by stepping in front of him in the downtown business district at night and repeatedly requesting money. Therefore, we hold that the trial court properly convicted Alvies of panhandling, a Class C misdemeanor.

#### **NFP civil opinions today (4):**

[The Health and Hospital Corp. of Marion Co. d/b/a Wishard Memorial Hospital v. Phyllis Long \(NFP\)](#) - "Following a jury trial in this personal injury action, Appellant-Defendant The Health and Hospital Corporation of Marion County, Indiana, d/b/a Wishard Health Services ("Hospital") appeals a \$245,000 verdict and judgment in favor of Appellee-Plaintiff Phyllis Long. Upon appeal, the Hospital challenges the sufficiency of the evidence to support the verdict by claiming that there was no evidence at trial that the Hospital knew or reasonably should have known of the premises defect causing Long's injuries. We affirm. "

[Carmen R. Posey v. Elkhart County Sheriff's Department \(NFP\)](#) - "Thus, we conclude that the trial court properly granted summary judgment in favor of the Sheriff's Department and Drug Task Force, upon a finding that Posey's tort claims are barred by the statute of limitations and for noncompliance with the notice requirement pursuant to the Indiana Tort Claims Act."

[Aleksander Stojceski, et al. v. Northern Indiana Public Svc. Co. \(NFP\)](#) - "Based on the foregoing, we reverse the trial court's denial of NIPSCO's Motion for Judgment on the Evidence with regard to Kiriakopoulos' damages. With regard to the remaining claims of Stojceski and Prentoski, we find that the trial court properly denied Appellants' Motion for Judgment on the Evidence concerning comparative fault. Also, we affirm the trial court with regard to its jury instructions on comparative fault and a motorist's duties, but reverse the trial court with regard to the *Res Ipsa Loquitur* jury instruction. Affirmed in part, reversed in part, and remanded for further proceedings with regard to Stojceski's and Prentoski's claims for damages."

[In Re the Paternity of C.W.R. \(NFP\)](#)

#### **NFP criminal opinions today (5):**

[Jorge Lopez v. State of Indiana \(NFP\)](#)

[Maurice A. Stantz v. State of Indiana \(NFP\)](#)

[Emily L. Castro v. State of Indiana \(NFP\)](#)

[Phil L. Honer, Jr. v. State of Indiana \(NFP\)](#)

[Maurice A. Stantz v. State of Indiana \(NFP\)](#)

Posted by Marcia Oddi on [Wednesday, November 05, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

#### **26.6. IND. COURTS - VOTERS RETAIN ALL INDIANA SUPREME COURT, COURT OF APPEALS, AND TAX COURT JUDGES ON THE NOVEMBER BALLOT**

From [the official release](#) on the Court website:

Indiana Supreme Court Chief Justice Randall T. Shepard, Supreme Court Justice Brent E. Dickson,

Supreme Court Justice Theodore R. Boehm, Court of Appeals Judge Carr L. Darden, and Tax Court Judge Thomas G. Fisher were all retained by Indiana voters. The Indiana Secretary of State reported all five appellate judges garnered more than 650,000 "yes" votes.

**For the first time**, Indiana voters had access to a website designed specifically for voters interested in learning more about the judges on the ballot. [*ILB - but see note below*] The new site, [courts.in.gov/retention](http://courts.in.gov/retention), was launched in October. It gave voters access to biographical information about the judges and details about the decisions they have made while serving on the bench. Court of Appeals Judges Terry Crone and Cale Bradford (who were not on the November ballot) coordinated the website creation. The Indiana Division of State Court Administration provided technical support.

**Note:** That is not really correct - it is the first "official" website. The **ILB** created an extensive [ILB judicial retention website for the 2006 election](#), because there was no official retention information available at that time.

Posted by Marcia Oddi on [Wednesday, November 05, 2008](#)

Posted to [Judicial Retention](#)

## 26.7. [IND. LAW - "LAKE COUNTY SEES CLIMB IN PROVISIONAL BALLOTS TUESDAY" \[UPDATED\]](#)

Marisa Kwiatkowski has [this report](#) in the **NWI Times**. A quote:

Lake County voter rolls couldn't keep up with the flood of new voters Tuesday, elections officials said.

More than 29,000 new people registered to vote in Lake County this year, according to the Indiana secretary of state's office.

Deputy Elections Commissioner John Moos said that new glut of registrations meant a larger number of provisional ballots were cast Tuesday because some new voters who received their registration cards were not listed in the voter roll books in time.

Provisional ballots are votes cast by people who either fail to present photo IDs at the polls or aren't listed as registered to vote in the precincts in which they cast the provisional ballots. In order for their votes to count, provisional voters must provide evidence -- such as photo IDs -- to county elections officials within 10 days of the election showing they were eligible to vote.

**[Updated]** For a nation-wide view, [see this article](#), titled "*Malfunctioning Machines, Ballot Glitches, Election-Law Litigation -- and a Busy Day for Lawyers,*" by Amanda Bronstad of *The National Law Journal*."

Posted by Marcia Oddi on [Wednesday, November 05, 2008](#)

Posted to [Indiana Law](#)

## 26.8. [LAW - SOCIAL ISSUES ON THE BALLOT](#)

**How Appealing** has a rundown, [here](#).

Posted by Marcia Oddi on [Wednesday, November 05, 2008](#)

Posted to [General Law Related](#)

## 26.9. [IND. COURTS - REPORTS ON SOME LOCAL COURT RACES](#)

[From the LCJ](#), a report by Harold Adams:

Democrats swept four contested judgeships in Clark, Floyd and Harrison counties last night, with two victories in Floyd County, one in Clark and another in Harrison.

In the Clark Circuit Court race, Democrat Dan Moore unseated short-term Republican incumbent Abraham "Abe" Navarro with 59 percent of the vote. Gov. Mitch Daniels had appointed Navarro to the bench in

June to replace Democrat Daniel Donahue, who retired.

Navarro stumbled in his first week on the job when he fired two longtime Donahue staffers and unsuccessfully attempted to replace one of them with the Clark County Republican Party chairman.

Moore said last night that he believes he benefitted from Navarro's missteps. "It's just the kind of thing you don't expect from your court," he said.

But Moore said ideas he put forth for changing the court also helped him win. "We talked about longer hours and a good hard work ethic for the court. I think people want that."

In Floyd County, which had two newly created Superior Court judgeships up for grabs, Democrat Glenn Hancock, the incumbent judge of Floyd County Court, which is being converted to Superior Court 2, beat Republican Chris Lane, a deputy county prosecutor.

Hancock garnered 59 percent of the vote.

Democrat Maria Granger, a real-estate attorney, beat out Republican Richard Fox for the Floyd Superior Court 3 seat, getting 54 percent of the vote.

Granger said: "I really think that people believe in building the court on integrity, fairness and respect. I think they knew that ... I was dedicated ... to making sure that that happened."

In Harrison County, Democratic incumbent Roger Davis, narrowly won a third term by defeating Republican John Evans with 52 percent of the vote.

From the **Greencastle Banner Graphic**, [this story](#) that begins:

In a tight race for Putnam County's Superior Court Judge, Denny Bridges beat out Craig Kenny by 2,677 votes. Bridges received 8,299 votes and Kinny had 5,622.

From the **NWI Times**, [a story](#) by Bob Kasarda that begins:

VALPARAISO | Porter County Superior Court Judge Roger Bradford was one of the few local Republicans who remained standing Tuesday following a strong turnout by Democratic voters.

The 63-year-old was re-elected to a fifth term against Democratic challenger William Suarez.

Also victorious Tuesday was incumbent Democratic Superior Court Judge David Chidester, who handily defeated Republican challenger Tim Vojslavek.

MORE?

Posted by Marcia Oddi on [Wednesday, November 05, 2008](#)

Posted to [Indiana Courts](#)

## **26.10. [IND. GOVT. - "ZOELLER WINS STATE'S ATTORNEY GENERAL POST"](#)**

From the **NWI Times**, [a story](#) that begins:

INDIANAPOLIS | Republicans retained control of the Indiana attorney general's office Tuesday, as voters narrowly elected new GOP faces to replace long-serving incumbents stepping down this year.

Republican Attorney General Steve Carter will be replaced by his chief deputy, Greg Zoeller, who beat Democrat Linda Pence. Carter is leaving his post after 8 years.

See also [this story](#) by the **AP's** Deanna Martin. A quote:

Zoeller and Pence, meanwhile, disagreed on the role of the attorney general's office.

Pence, a feisty Indianapolis trial attorney, pledged to investigate gas prices in Indiana and wanted the attorney general to do more to help local prosecutors who need additional resources. Zoeller — a cousin of golfer Fuzzy Zoeller — said Pence was misleading the public into thinking the role is that of a prosecutor. It's the job of local prosecutors to go after criminals, he said, while the attorney general defends the state on appeals to make sure those criminals stay behind bars.

Jon Murray of the **Indianapolis Star** has [this report](#) that begins:

Hoosiers faced a clear choice for attorney general: the insider vs. the crusader.

Election returns Tuesday evening showed a close race most of the night. But the insider, Republican Greg Zoeller, pulled out the win led against Democrat Linda Pence.

Zoeller, the chief deputy to outgoing Attorney General Steve Carter, ran on promises to expand on programs such as the popular do-not-call list.

He also pledged to adopt Carter's low-key style against a challenger proposing top-to-bottom changes that would bring flash and a higher profile to the office.

But heading into Tuesday's election, there was little indication which way the scales might tilt. Recent polls found many likely voters undecided.

Posted by Marcia Oddi on [Wednesday, November 05, 2008](#)

Posted to [Indiana Government](#)

## 26.11. [IND. COURTS - "INDIANA HIGH COURT RETAINED BY VOTERS"](#)

So reads the **LegalNewsline** headline today to [a report](#) by Scott Sabatini that begins:

INDIANAPOLIS (Legal Newsline)--Change may be among the most prolific words used this campaign season, but Indiana voters stayed the course with a majority of state Supreme Court seats up for election.

According to early results provided by the Indiana Secretary of State, all three incumbents will overwhelmingly be approved by voters Tuesday night. The victory gives each justice another 10-year term.

Supreme Court Chief Justice Randall Shepard, along with fellow Justices Brent Dickson and Theodore Boehm enjoyed wide margins in their respective "retention" elections.

Early polling numbers showed voters all three justices with roughly 70 percent of voters choosing yes to retain them on the ballots.

Posted by Marcia Oddi on [Wednesday, November 05, 2008](#)

Posted to [Judicial Retention](#)

## 27. [Tuesday, November 04, 2008](#)

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### 27.1. [COURTS - "AN 'ORGY OF NEGATIVITY' IN MICHIGAN JUDICIAL RACE"](#)

Marcia Coyle of **The National Law Journal** [reports](#) today in a story that begins:

Michigan's Supreme Court race has turned into the nation's nastiest judicial campaign, according to a nonpartisan organization that monitors judicial races.

Bert Brandenburg, executive director of the Justice at Stake Campaign, said recent and numerous television ads in the race between Republican Chief Justice Cliff Taylor and his Democratic challenger, longtime trial judge Diane Hathaway, have created an "orgy of negativity."

The ads have depicted Taylor as asleep on the bench and a "good soldier" of big business, and Hathaway as a goldbricking, terrorist sympathizer who gives light sentences to sexual predators, according to Brandenburg.

Posted by Marcia Oddi on [Tuesday, November 04, 2008](#)

Posted to [Courts in general](#)

## 27.2. [ABOUT THIS BLOG - NOTABLE ITEMS CONCERNING THE ILB](#)

- **Election Law.** Last Friday a Marion County trial court issued a ruling on how absentee challenges would be handled today - election day - in Marion County. Appellants filed an emergency motion for stay pending appeal and requested a schedule for expeditious resolution of the motion to stay. At 11:45 that night, the COA issued an order setting 9 AM yesterday (Monday) as the deadline for response to the motion for stay. The **ILB** was able to post these documents during the weekend, thanks to **ILB** readers who forwarded copies. Yesterday was even more remarkable, the **ILB** was able to follow events and post relevant documents within minutes of submission to, or issuance by, the Court of Appeals and Supreme Court. Thanks here go not only to participants, but to the Courts themselves and to the new public information officer, Kathryn Dolan, who didn't waste a minute in getting the Courts' rulings out to the media. What [all this](#) shows, I think, is how well a blog such as the **ILB** is able to deal with the speed of the news cycle, when called upon to do so. And an added benefit is that the materials in this case are now archived via the **ILB**, affording the public easy availability in the months and years to come. [**Note:** I continue to regret not receiving copies of the appellate briefs in the Lake County case. BTW - it not too late ....]
- **Judicial Retention.** Yesterday, the **ILB** had nearly 5,000 page views in one day, a record. Checking the stats, I found that a large number of people had reached the **ILB** last evening while searching for variations of the phrase "randall t. shepard". Of course! -- they were preparing for their visit to the polls today, and wanted more information before they cast their votes on the judicial retention question.
- **The ILB / ReaMatch Law Jobs Connection.** [A few days back](#), the **ILB** announced:

The **ILB** has agreed to act as a host for the **RealMatch** job network -- providing access to Indiana legal jobs for both job seekers, and employers. You will shortly be able to access the network from the **ILB** and just look around, or submit your resume, or advertise an opening, all at no cost. And because **RealMatch** is nationwide, your access will extend to the national job market, should you so choose. Watch for this!

**And now it is here** - check the link near the top of the right-hand column of the **ILB** to learn your options as a job seeker or employer, OR scroll down to the bottom of the right-hand column of the **ILB** to find direct links to job ads. I hope that your firm or business will turn to the **ILB / ReaMatch** connection to find your next employee, and I hope that you job seekers will sign up. Not only will it be to your advantage, but it may help to assure the continuation of the **ILB**.

- **ILB Supporters.** Finally, I want to take a moment to express appreciation for the **ILB**'s supporters, the [Indiana State Bar Association](#), and [DoxPop](#), and to urge those of you associated with some of the State's larger law firms to think about [adding your firm](#) to the **ILB** Supporters list.

Posted by Marcia Oddi on [Tuesday, November 04, 2008](#)

Posted to [About the Indiana Law Blog](#)

## 27.3. [IND. GOVT. - 5-YEAR MITCHELL CITY COUNCIL MEMBER MAY NEVER HAVE LIVED IN THE CITY](#)

Krystal Slaten of the **Bedford Times-Mail** has [an interesting report](#) - some quotes:

MITCHELL — The issue hotly debated during Monday night's city council meeting in Mitchell was whether or not Everett Ferrel, a five-year veteran of the council, could rightfully serve in his elected capacity.

That's because Ferrel recently learned he does not live in the city limits.

He doesn't pay city taxes. However, he's afforded city services and votes in municipal elections.

Ferrel said his property was supposed to be annexed into the city in 1979, and he assumed that happened. Not long ago, however, he attempted to sign property over to his daughter and learned his home was not within city boundaries.

"I'm going to see my attorney tomorrow," Ferrel said after the council meeting. "It's going to come to a lawsuit. I am not vacating my seat. We'll fight this.

Monday night's council meeting started off with prayer and the Pledge of Allegiance. Before taking the roll call, however, Mitchell Mayor Dan Terrell read a prepared statement about Ferrel's council qualifications.

"Within the past week, one of the council members has informed me that he does not reside within the city limits of Mitchell," Terrell read. "Last week, Everett Ferrel told me that for a number of years he believed he lived within the city limits, but that he now knows his residence is not inside the city.

"... Under Indiana Code section 36-4-5-3, as the mayor, I am required to enforce the ordinance of the city and statutes of the state. With the information I have, and upon advice of the city attorney, I believe I must take action on this matter. Accordingly, as Mr. Ferrel has ceased to be resident of the city of Mitchell, by the terms of the Indiana Code, he forfeits his office. I declare his office vacant, and I will notify the county clerk at my next opportunity."

Ferrel took the opportunity to clarify.

"I haven't moved, and I am not vacating this seat," he said. "This was a clerical, man-made error. I have a signed affidavit from Jerry Hancock (Mitchell's mayor from 1968-2000) saying that property was supposed to be annexed into the city in 1979."

Terrell said he believes the affidavit means little.

"You must have something in writing from that time period," Terrell said. "We have found nothing existing saying that was supposed to be annexed or that was the intention of the council at that time. Anyone can swear 30 years later that it was supposed to be that way, but if there's nothing in writing from that time period, then there's not much to go on."

Dale Simmons, co-general counsel for the Indiana Election Division for the Secretary of State's office in Indianapolis, said that "residency is a requirement that applies throughout the term of someone who holds office as a common councilman." He cited Indiana Code 36-4-6-2 as the statute that applies in this situation. It reads, "... A member of the legislative body must reside within ... the city as provided in Article 6, Section 6 of the Constitution of the State of Indiana; and ... the district from which the member was elected, if applicable. ... A member forfeits office if the member ceases to be a resident of the district or city."

"Once a person has assumed office and is currently holding office illegally because of their lack of residency, then there are several possible remedies," Simmons wrote in an e-mail response to the Times-Mail, "however, none of these specifically indicate that it is the right or duty of the county election board to pursue these remedies. Any remedy at this point must be one pursued in court."

If the court decides Ferrel must vacate the office he's held for the past five years, it does not discount the work he's done while on the council, Simmons noted.

"Even if someone was removed from office by a court action because they failed to meet the residency requirements for holding that office that does not mean all the actions taken by that person while holding office would be invalidated," Simmons wrote. "The court cases considering this issue indicate that a person who takes office under a claim of right and holds that office is a de facto office holder and their actions are valid until removed."

Interesting. There is more, and also a side-bar.

Posted by Marcia Oddi on [Tuesday, November 04, 2008](#)

Posted to [Indiana Government](#)

#### [27.4. IND. LAW - "IMPACT OF PHOTO IDENTIFICATION AT THE POLLS THROUGH AN EXAMINATION OF PROVISIONAL BALLOTS"](#)

**A new and timely election law article** (40 pp., including 18 pp. data), forthcoming in the **Journal Law and Politics**, authored by Michael J. Pitts, Associate Professor, Indiana University School of Law - Indianapolis, [may be accessed here](#) via SSRN. The abstract:

Despite the Supreme Court's opinion from last term in *Crawford v. Marion County Election Board*, it seems like the debate over laws that require prospective voters at the polls to present government-issued photo identification will continue to rage in both legislatures and courtrooms throughout America. However, one of the fundamental missing pieces in this debate is an empirical assessment of how many prospective voters are unable to cast a countable ballot because of photo identification laws. This article analyzes data related to the 2008 Indiana primary election to determine: (1) how many voters arrived at the polling place without a photo identification and then cast a provisional ballot; and (2) how many of the photo identification-related provisional ballots were ultimately counted. Importantly, the analysis presented here takes a unique empirical approach because as part of this research actual documents related to provisional ballots were obtained. In the end, it is estimated that at the 2008 primary election nearly 400 persons cast provisional ballots because they lacked photo identification and the vast majority (80% of those ballots) were not counted. After presenting the numbers, this Article concludes with a discussion of the limits of this study and how opponents and proponents of photo identification might employ this research in the ongoing debate over photo identification.

Posted by Marcia Oddi on [Tuesday, November 04, 2008](#)

Posted to [Indiana Law](#)

#### [27.5. LAW - "AS BUILDING PROJECTS COLLAPSE, SUITS PILE UP"](#)

Lynne Marek of **The National Law Journal** [reported yesterday](#) on the legal aspects of the commercial building crisis. Some quotes:

Litigation is cropping up across the country over multimillion-dollar hotel, condominium and manufacturing building developments that unraveled as U.S. financing tightened during the past year, leaving financiers, developers and contractors to fight over who should pay for the failed deals.

Although many developments have fallen into foreclosure in the past few years with courts sorting out claims, others that stalled or stopped are now devolving into litigation as parties that invested money, labor and materials in the projects turn on each other to recoup what they can.

From a \$181 million hotel envisioned for Norfolk, Va., to a **planned \$530 million auto parts plant in Tipton, Ind.**, lawsuits are popping up over deals gone bad. At the same time, some companies are waiting in the wings, assessing whether to sue or hope that the improving credit market will solve their problems, said litigators being drawn into the real estate disputes. \* \* \*

The first step that construction companies and contractors often take when a development project stalls is to place liens against the developers. While liens don't always turn into litigation, it becomes more likely over time as the liens pile up and as claimants encounter their own financial pressures. Laws regarding liens vary from state to state, but generally a claimant has up to six months to file a lawsuit to enforce a lien.

In Chicago, liens are stacking up against two major developments that have slowed. The planned 1,200-

condominium building known as "The Chicago Spire" for its corkscrew shape, designed by Santiago Calatrava, is just a hole in the ground near the shores of Lake Michigan, and the luxury Shangri-la Hotel that's slated to open in downtown Chicago in 2011 has only 27 of its 90 stories completed.

Posted by Marcia Oddi on [Tuesday, November 04, 2008](#)

Posted to [General Law Related](#)

## **27.6. LAW - "ONLINE LAW GRADS: OLDER, NO SLACKERS"**

Karen Sloan of **The National Law Journal** has a long and interesting [story today](#) on online law schools. A sample:

Online schools still have something to prove when it comes to the performance of their graduates on standardized law exams.

Of the approximately 525 students who have graduated from Concord with juris doctor degrees since the school opened, slightly more than 200 have been admitted to the California Bar, said Skibbe. Some graduates opt not to sit for the bar, while others don't pass.

Concord, generally, has the highest bar passage rates among online and correspondence law schools, but it still has a significantly lower passage rate than ABA-accredited schools overall. For example, the passage rate for first-time test takers at ABA-accredited schools in California was 62 percent for the February bar. Concord had a first-time pass rate of 38 percent. Skibbe said Concord's overall pass rate is 50 percent.

The statistics for the baby bar also show room for improvement. Correspondence and online law school students had a 22 percent overall pass rate last October.

Like it or not, online law schools are here to stay. That's the opinion of Concord Dean Barry Currier, who said it's just a matter of time before distance-education law schools are eligible for ABA accreditation.

Online and correspondence law schools don't meet current ABA-accreditation standards. That's because ABA standards measure factors such as libraries, facilities, clinical experience and interaction between students and professors, Askew said. It's virtually impossible to measure those elements when it comes to online schools, thus the standards would have to be dramatically modified to cover those programs.

Online coursework is slowly becoming more accepted in the law school community. The ABA modified its accreditation standards in 2003 to allow students to take 12 of the 90 credit courses required for a juris doctor degree online.

That limit could increase in the future, but that discussion hasn't taken place, Askew said.

"Distance education is growing dramatically at the graduate level. Who knows what will happen five years from now?" he said.

Posted by Marcia Oddi on [Tuesday, November 04, 2008](#)

Posted to [General Law Related](#)

## **27.7. COURTS - "JUSTICES AGREE TO CONSIDER DNA CASE"**

Adam Liptak [reports today](#) in the **NY Times** that the SCOTUS "agreed Monday to decide whether people convicted of crimes have a constitutional right to test DNA evidence that could prove their innocence." More:

The case pits the value of finality in criminal cases against the possibility of proving an inmate's innocence long after trials and appeals are concluded.

In April, the United States Court of Appeals for the Ninth Circuit, in San Francisco, ordered prosecutors in Alaska to turn over DNA evidence that had been used to convict William G. Osborne of kidnapping and

raping a prostitute. The appeals court said that biological evidence — hairs and semen — could be subjected to more sophisticated DNA testing than had been used by the prosecution to implicate Mr. Osborne. \* \* \*

The federal government and 44 states — but not Alaska — have laws allowing post-conviction DNA testing. \* \* \*

The Supreme Court has in earlier cases left open the question of whether people convicted after fair trials may nonetheless file federal claims based solely on evidence that they are in fact innocent.

Barry Scheck, a director of the Innocence Project at Cardozo School of Law, which represents Mr. Osborne, said he could not understand why prosecutors in Alaska have opposed testing.

“The State of Alaska concedes that DNA testing could prove William Osborne’s innocence, while fighting his right to testing,” Mr. Scheck said. “Why would anyone be afraid to learn the truth in this case? There is no rational reason to deny DNA testing that could prove innocence or confirm guilt.”

For more, see [this entry](#) from **The Volokh Conspiracy** blog.

Posted by Marcia Oddi on [Tuesday, November 04, 2008](#)

Posted to [Courts in general](#)

## **[27.8. IND.COURTS - "CHALLENGED ABSENTEE BALLOTS SHOULD BE SET ASIDE FOR LATER REVIEW, HIGH COURT FINDS"](#)**

In the **Indianapolis Star** today, Jon Murray gives [an overview](#) of [yesterday's election challenges](#). Some quotes:

Conflicting court rulings handed down Monday gave Marion County election officials whiplash as they tried to keep up with a legal fight over how to handle absentee ballots challenged at the polls today.

But when the dust cleared, the upshot remained the same: If you’ve already cast an absentee ballot and your eligibility to vote is challenged today at your precinct, your ballot will be set aside until a bipartisan team can review it later this week.

That was decided by a unanimous decision Monday evening by the Indiana Supreme Court, which sided with the Marion County Republican Party. The ruling brought quick criticism from county Democrats.

It came less than two hours after an Indiana Court of Appeals panel, voting 2-1, issued a stay halting a Circuit Court ruling from taking effect. In its decision, the Supreme Court vacated the stay.

The high court let stand Marion Circuit Judge Theodore Sosin’s ruling Friday that the Election Board would violate Indiana law by telling poll workers to decide the merits of absentee challenges immediately.

Instead, Monday’s ruling means any ballots that are challenged won’t show up in tonight’s results but will be added later if they are deemed valid.

A record 93,000 Marion County voters have submitted absentee ballots at early voting centers or by mail -- about 13 percent of all registered voters. \* \* \*

The dispute between the Republicans and the Election Board centers on conflicting readings of Indiana law.

The statute does not fully spell out when absentee challenges should be handled or by whom, but it refers to the provisional voting process used when a walk-in voter’s residency or eligibility is challenged.

In concurring opinions, two Supreme Court justices noted the law’s murkiness.

“Thus, on the one hand the statute suggests that a challenged vote must be treated as a provisional ballot and counted later if at all, while on the other hand a challenged absentee vote must be counted at the

precinct polling place so long as the affidavit shows the voter is a legal voter of the precinct," Justice Robert D. Rucker wrote. "These provisions are at least ambiguous and at most simply irreconcilable."

But most Indiana counties follow the Republicans' interpretation, and Marion County also has in the past.

Rucker cited as compelling an election handbook put out this year by the Indiana secretary of state and the Indiana Election Division. It also advises setting challenged absentee ballots aside to be counted after Election Day.

In [a related story](#) today, Maureen Grope of the **Star** Washington Bureau reports:

Six months after its primary-day embarrassment, Lake County has taken steps to avoid a repeat of its slow tally, though its ballot counting could still be delayed by the volume of votes and the way absentee votes will be counted.

Lake County election officials say increased staff and more machine counters are some of the changes that will enable them to have 98 percent of the vote counted by 11 p.m. EST today. \* \* \*

Northwest Indiana's Lake County is still the state's only urban county that counts its absentee ballots in a central location. That's slower than counting them at multiple precincts, according to Secretary of State Todd Rokita. \* \* \*

Rokita said he's not going to judge Lake County's decision, because it could have good reason for wanting a central location, one close to the county's bipartisan election board, which can handle any disputes.

"The fact of the matter is, counties have up to 10 days to legally report their results to us," Rokita said. "And I am not going to sacrifice fairness or accuracy for speed."

Lake County's early voting has already generated controversy. The Indiana Court of Appeals stepped in last week to uphold the legality of early-voting sites in three Lake County cities. Republicans had sued to close the sites, saying they violated local election rules and created a risk for voter fraud. Democrats accused Republicans of trying to suppress the vote.

Lake County stumbled into the national spotlight during Indiana's primary when it took far longer to report its vote totals than Indiana's 91 other counties.

Posted by Marcia Oddi on [Tuesday, November 04, 2008](#)

Posted to [Ind. Sup.Ct. Decisions](#)

## [28. Monday, November 03, 2008](#)

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### [28.1. IND. COURTS - NO LAST WORD YET IN MARION COUNTY EARLY VOTING CASE?](#)

**BREAKING:** The Supreme Court has granted transfer and vacated the just-issued earlier this afternoon Order of the Court of Appeals imposing the stay. "The trial court's Order granting the injunction is reinstated and remains in effect pending final resolution of this appeal or further order from the court." Per Randall T. Shepard, Chief Justice.

The new case number: 49S00-0811-CV-586.

MORE? Yes, just received the Supreme Court's 5-page Order, filed at about 5:20 PM. Interestingly, it is 5-0. [Access it here.](#)

In his concurring opinion, Justice Sullivan notes:

Given that there has been no allegation in this case of any fraudulent absentee voting taking place, that tendering a fraudulent absentee ballot is a crime, and that falsely challenging an absentee ballot is perjury, I expect few if any ballots to be implicated by this decision.

See earlier **ILB** entries from today [here](#), [here](#), and [here](#).

Posted by Marcia Oddi on [Monday, November 03, 2008](#)

Posted to [Ind. Sup.Ct. Decisions](#) | [Indiana Transfer Lists](#)

## **28.2. [IND. COURTS - YET MORE ON MARION COUNTY EARLY VOTING CASE](#)**

The Court of Appeals has just issued this ruling:

HAVING REVIEWED THE MATTER, THE COURT FINDS AND ORDERS AS FOLLOWS:

APPELLEES' VERIFIED MOTION TO CONTINUE TO HOLD THE BOARD'S EMERGENCY STAY REQUEST IN ABEYANCE UNTIL THE INDIANA SUPREME COURT RULES ON APPELLEES' PENDING APPELLATE RULE 56(A) MOTION IS DENIED.

APPELLANT'S EMERGENCY MOTION FOR STAY PENDING APPEAL IS GRANTED.

JOHN G. BAKER, CHIEF JUDGE BAKER, C.J., MATHIAS, J., CONCUR. BROWN, J., DISSENTS WITH OPINION.

[Here is the Order](#) in *Marion Co. Election Board v. Raymond J. Schoettle, Erica Pugh, et al.* Chief Judge Baker writes:

As another panel of this court said just last week, "in interpreting Indiana's election laws, we respect the franchise: "In the absence of fraud, election statutes generally will be liberally construed to guarantee to the elector an opportunity to freely cast his ballot, to prevent his disenfranchisement and to uphold the will of the electorate," *Curley v. Lake County Board of Elections and Registration*. No. 45A03-08IO-CV-512. slip op. p. 17 (Ind. Ct. App. Oct 31, 2008) (quoting *Brown v. Grzcskowiak*. 230 Ind. 110. 128. 101 N.F.2d 639. 646 (1951) ). Thus. we must view the arguments before us with eyes that are lightly focused on the electorate and the franchise that are the heart of American government.

The statutes at issue contemplate a variety of problems that may arise with absentee ballots and explain how to resolve those problems. \* \* \*

Before us now. however, are are the legislature's instructions on how to proceed if a written, emailed, or in-person absentee ballot is challenged prior to being placed in the ballot box on Election Day. Before Election Day. a challenge to the signature contained on the absentee ballot is resolved under Indiana Code sections 3-11-10-4. -5. -6. and -7. On Election Day, an absentee ballot challenge is made "for the reason that the absentee voter is not a legal voter of the precinct where the ballot is being cast. I.C. § 3-11-10-21. \* \* \*

We hold that residency-based challenges to absentee ballots that occur on Election Day are to be resolved by the precinct boards according to the procedures outlined in Article 3-11.7: in other words, precinct boards are to take the same steps on Election Day regarding challenged absentee ballots as the county election board must take in the days following Election Day to determine whether a challenged provisional ballot is valid and must be counted or invalid and must be discarded. Thus. we conclude that the trial court erred by finding that the appellees are likely to succeed on the merits and entering a preliminary injunction in their favor.

For all of these reasons, we hereby order that the preliminary injunction issued by the trial court is dissolved. Furthermore, we order that the declaratory judgment entered by the trial court is stayed pending an appeal thereof. Should the parties wish to submit full briefs and further authority in support of their respective positions on the declaratory judgment, we direct the appellants to submit their materials within fifteen days of this order and the appellees to submit their materials vviihin fifteen days of the filing of the appellants" materials.

Posted by Marcia Oddi on [Monday, November 03, 2008](#)

Posted to [Indiana Courts](#)

### [28.3. COURTS - "JUROR IN STEVENS CASE: MY FATHER IS NOT DEAD"](#)

This is not something the **ILB** would ordinarily cover, but it is too bizarre to miss. [This entry](#) from the **Blog of Legal Times** begins (but be sure to read the rest of it):

The juror in the trial of Alaska Sen. Ted Stevens who abruptly left the panel before a verdict was reached lied when she told the court her father had died. The real reason she said she could not deliberate further? The juror wanted to attend an event in California—the 2008 Breeders' Cup World Championships at Santa Anita Park.

Posted by Marcia Oddi on [Monday, November 03, 2008](#)

Posted to [Courts in general](#)

### [28.4. IND. COURTS - STILL MORE ON MARION COUNTY EARLY VOTING CASE](#)

Updating [this ILB entry](#) last updated late this morning, Jon Murray has posted on the **Indianapolis Star** site [a good overview](#) of what is going on, that begins:

The Indiana Court of Appeals or the state Supreme Court are likely to weigh in today on a Marion County judge's ruling directing poll workers on Election Day to set aside any challenged absentee ballots.

More from the story:

In an order issued Friday evening, Circuit Judge Theodore Sosin agreed with the Marion County GOP in ruling against the Marion County Election Board, led by Democratic Clerk Beth White. The Republicans argued that any absentee ballot that is challenged based on the voter's eligibility in that precinct should be considered along with provisional ballots later in the week -- and not reflected in Tuesday's vote totals.

Such ballots instead would be examined by bipartisan teams later in the week and then have their votes added to election results.

The Election Board, however, is seeking to have challenged absentee ballots fed through counting machines at the polls as long as a majority among the precinct inspector and partisan judges agree the challenge is without merit.

Each side has disputed the other's reading of Indiana law.

The Court of Appeals accepted the Election Board's appeal just before midnight Friday, and both sides filed briefs arguing their cases this morning. The Election Board is seeking an emergency stay of Sosin's order, which would keep it from taking effect.

Also today, the county GOP asked the Indiana Supreme Court to take the case on an emergency basis because time is running out.

All the documents are available via the earlier **ILB** postings.

Posted by Marcia Oddi on [Monday, November 03, 2008](#)

Posted to [Indiana Courts](#)

### [28.5. COURTS - "SUPREME COURT HEARS CASE INVOLVING DRUG LABELS" \[UPDATED\]](#)

Today the SCOTUS hears oral arguments in the case of *Wyeth v. Levine* (see a list of [earlier ILB entries](#) here). Earlier this morning **NPR's** Nina Totenberg had an excellent, nearly 8 minute, report on the case. [Listen here.](#)

**[Updated 11/4/08]** Here is Tony Mauro's [report](#) on the oral argument in the **Legal Times**. It begins:

The Supreme Court appeared torn Monday over whether a federal law on drug labeling should pre-empt a jury's \$7 million verdict against Wyeth in the case of a Vermont woman who lost her arm to gangrene after

being given a Wyeth drug for a migraine headache.

The case, *Wyeth v. Levine*, has been billed as a major milestone in the effort by the pharmaceutical and other industries to free themselves of unpredictable state court tort litigation by embracing instead a single federal regulatory regime -- in short, federal pre-emption.

But based on the [hour-long argument](#) Monday, the case could be decided narrowly, giving little guidance about broader pre-emption issues beyond the area of drug labeling.

Posted by Marcia Oddi on [Monday, November 03, 2008](#)

Posted to [Courts in general](#)

## 28.6. [IND. COURTS - MORE ON MARION COUNTY EARLY VOTING CASE \[UPDATED\]](#)

**[Note: This entry has been UPDATED and moved to the top of the list.]**

Updating [this ILB entry from Friday, Nov. 1](#), we are awaiting the Plaintiffs' response to [the COA order issued late Friday](#) that Plaintiffs respond to the Marion County Election Bd.'s [motion for emergency stay](#) by 9 am Monday.

**[More]** Sorry, the earlier Cause # was wrong, it was from one of the documents I posted this weekend. The correct one is 49A02-0810-CV-979.

**I now have the Plaintiff/Appellees' documents.** They have requested that the Indiana Supreme Court take the case and filed with the COA a 38-page "*Verified Motion to Continue to Hold the Board's Emergency Stay Request in Abeyance until the Indiana Supreme Court Rules on Appellees' Pending Appellate Rule 56(A) Motion & Response to the Board's Stay Request*" ([here](#)) and with the Supreme Court a 52-page "*Emergency Verified Appellate Rule 56(A) Motion To Accept Jurisdiction Over Appeal*" ([here](#)).

**[More]** Here is [the Docket as of 10/2/08](#).

**[Updated at 11:35 AM]** [Here is the 8-page](#) *Marion County Election Board's Response to Appellee Rule 56(A) Motion and to Appellees' Opposition to Stay Pending Appeal*.

Posted by Marcia Oddi on [Monday, November 03, 2008](#)

Posted to [Ind. App.Ct. Decisions](#)

## 28.7. [IND. LAW - "IT'S THE LAW" TODAY EXAMINES ELECTION LAWS](#)

Ken Kosky's "*It's the Law*" [column](#) in the **NWI Times** this week focuses on election laws. From the article:

A huge voter turnout is expected Tuesday because the presidential race Indiana holds key votes for the first time in decades.

But with extra people heading to polls -- many of them first-time voters -- there's an increased chance for violations of election law. In an effort to prevent problems, officials are reminding voters, candidates and supporters about what is expected of them.

First and foremost, "Nobody gets in their place of voting without first showing a valid photo ID. That could be a driver's license, a state ID or a passport," said Kathryn Kozuszek, Democratic director for voter registration.

Procrastinators can get an ID from the Bureau of Motor Vehicles today or tomorrow and still vote, she said. **[ILB - see below]**

Next, Kozuszek reminds voters that electioneering -- which essentially means campaigning -- is prohibited inside polling places or along the 50-foot chute leading into the polling place.

That means candidates must stand more than 50 feet away to hand out flyers, buttons or other items. And

such items can't be brought inside. Kozuszek said people who show up wearing candidate shirts need to turn them inside out, and they need to stuff buttons and flyers into their pockets.

The 50-foot chute will play a larger role this election than just a buffer from campaigning. Kozuszek said poll workers will, at exactly 6 p.m., identify the last person in line to vote. Anyone who arrives after that will be turned away.

As for vote fraud, Kozuszek doesn't anticipate any problems.

"In Porter County, out of all those new registrations -- close to 5,000 since this spring -- only two were questionable," she said.

Kozuszek does want to remind voters that if they have moved, they can't vote at their old precinct without filling out a form at the Voter Registration office.

**Re obtaining an ID from the BMV** - don't go unprepared. [Here is the BMV page](#) on what kind of ID documentation you need in order to be issued a BMV identification card. Here is [the simplified list](#).

Posted by Marcia Oddi on [Monday, November 03, 2008](#)

Posted to [Indiana Law](#)

### **28.8. [IND. DECISIONS - TRANSFER LIST FOR WEEK ENDING OCT. 31, 2008](#)**

[Here](#) is the just issued transfer list for the week ending Oct. 31, 2008. It is 3 pages long.

One transfer was granted last week, in the case of *Mahmoud M. Basileh v. Arwa G. Alghusain* - see [the ILB summary of the 7/28/08 opinion here](#).

A notable decision denied transfer was the John Meyer II appeal - see [ILB entry here](#) from Oct. 31st.

**Over 4.5 years of Transfer Lists:** For other weekly transfer lists (going back to Feb. 2, 2004), check "Indiana Transfer Lists" under "Categories" below, or in the right column.

Posted by Marcia Oddi on [Monday, November 03, 2008](#)

Posted to [Indiana Transfer Lists](#)

### **28.9. [IND. DECISIONS - UPCOMING ORAL ARGUMENTS THIS WEEK](#)**

**This week's oral arguments before the Supreme Court:**

**This Thursday, Nov. 6th:**

9:00 AM - ***Keith Myers v. Wesley C. Leedy*** - Following a bench trial on a tenant's complaint for damages against a land sale vendor, after forfeiture of the vendee-landlord's interest, the trial court entered judgment in favor of the tenant. The Court of Appeals reversed in an unpublished decision, holding that the tenant's interest in the property did not survive the forfeiture of his landlord's interest. *Myers v. Leedy*, No. 85A02-0711-CV-999 (Ind. Ct. App. 4/30/2008), vacated. [See [ILB summary here](#) - 3rd NFP opinion.] The Supreme Court has granted a petition to transfer the case and has assumed jurisdiction over the appeal.

Attorney for Myers: T. Andrew Perkins, Rochester, IN. Attorney for Leedy: Jeffry G. Price, Peru, IN.

9:45 AM - ***Brandon Stanley v. Danny Walker*** - Following a trial, the Johnson Superior Court entered a judgment for plaintiff Walker in this personal injury case. The Court of Appeals affirmed and held that the trial court correctly applied the Collateral Source Statute to preclude the defendant Stanley from introducing evidence that the amount of the plaintiff's original medical bills had been reduce by "write-offs" negotiated between the plaintiff's health insurance company and medical service providers. *Stanley v. Walker*, 888 N.E.2d 222 (Ind. Ct. App. 6/3/2008), vacated. [See [ILB summary here](#).] The Supreme Court has granted a petition to transfer and has assumed jurisdiction over the appeal.

Attorneys for Stanley: Mark A. Holloway and Bradley D. Pippin, Indianapolis, IN. Attorneys for Walker: David W. Stone, IV,

Anderson, IN. Michael Phelps, Bloomington, IN. Attorneys for Amicus Curiae Defense Trial Counsel of Indiana: Donald B. Kite, Sr. and Kelly R. Eskew, Indianapolis, IN. James D. Johnson, Evansville, IN. Attorneys for Amicus Curiae Ins. Institute of Indiana, Inc.: Bryan H. Babb and Kelly Scanlan, Indianapolis, IN. Attorney for Amicus Curiae Indiana Trial Lawyers Association: Mark A. Scott, Kokomo, IN.

10:30 AM - **R.J.G. v. State of Indiana** - The Porter Circuit Court, Juvenile Division, adjudicated R.J.G. a delinquent and entered a dispositional order committing R.J.G. to the Department of Correction ("DOC") and placing him on probation upon his release from the DOC. R.J.G. appealed, arguing the court could not enter a single dispositional order that both commit him to the DOC and placed him on probation upon his release. The Court of Appeals affirmed. *R.J.G. v. State*, 888 N.E.2d 213 (Ind. Ct. App. 5/29/2008), vacated. [See [ILB summary](#) here - 2nd case] The Supreme Court has granted a petition to transfer the case and has assumed jurisdiction over the appeal. Attorney for R.J.G.: T. Edward Page, Merrillville, IN. Attorney for State: Ellen H. Meilaender, Indianapolis, IN.

**Webcasts will be available [here](#).**

#### **This week's oral arguments before the Court of Appeals that will be webcast:**

##### **This Wednesday, Nov. 5th:**

2:00 PM - **Karen Long & Clifford Thorson vs. Biomet, Inc., et al** - On September 21, 2006, the plaintiff shareholders brought a derivative action against the former directors and board members of Biomet, Inc., alleging their improper backdating of stock options from 1996 - 2000. They appeal the dismissal of their action subsequent to the sale Biomet, Inc. on September 25, 2007. The Scheduled Panel Members are: Judges Friedlander, Darden and Barnes. [**Where:** *Indiana Supreme Court Courtroom*]

#### **This week's oral arguments before the Court of Appeals that will NOT be webcast:**

##### **This Tuesday, Nov. 4th:**

12:00 PM - **Mercho-Roushdi-Shoemaker-Dilley-Thoraco-Vascular Corporation vs. Dr. James W. Blatchford, III & Dr. Eve Cieutat** - Mercho-Roushdi-Shoemaker-Dilley Thoraco-Vascular Corporation (MRSD) hired Dr. James Blatchford III (Blatchford) and Dr. Eve Cieutat (Cieutat) to provide surgical services. Blatchford and Cieutat signed agreements that contained covenants not to compete with MRSD. The relationship between the parties deteriorated, and Blatchford and Cieutat began practicing in competition with MRSD. Blatchford and Cieutat filed a lawsuit against MRSD, and MRSD filed a counterclaim, alleging that Blatchford and Cieutat were practicing in violation of the covenants not to compete. The trial court granted summary judgment in favor of Blatchford and Cieutat on MRSD's counterclaim, concluding that the covenant not to compete was unreasonably restrictive and therefore unenforceable. MRSD now appeals the trial court's decision. The Scheduled Panel Members are: Judges Riley, Bailey and Bradford. [**Where:** *Scottish Rite Cathedral, 650 North Meridian Street, Indianapolis, Indiana*] **Note: I double-checked the date.**

##### **This Thursday, Nov. 6th:**

10:30 PM - **Brandon Philson vs. State of Indiana** - This case deals with Indiana Code 31-30-1-4, which vests automatic jurisdiction over juveniles at least sixteen years old in adult court for certain offenses, including rape and any offense that is based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan under Indiana Code 35-34-1-9(a)(2). Here, Brandon Philson was charged with rape, and charges of child molesting (which were not listed in Indiana Code 31-30-1-4) were joined with it. Philson was then acquitted of rape but convicted of one of the joined charges. The question is whether the adult court retains jurisdiction or whether jurisdiction vests in the juvenile court. This appears to be a question of first impression in our state. The Scheduled Panel Members are: Judges Kirsch, Vaidik and Crone. [**Where:** *Indiana Court of Appeals Courtroom*]

Posted by Marcia Oddi on [Monday, November 03, 2008](#)

Posted to [Upcoming Oral Arguments](#)

**29. [Sunday, November 02, 2008](#)**

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### 29.1. LAW - "WAS THERE A LOAN IT DIDN'T LIKE?"

The **NY Times** Pulitzer-winning business and finance editor Gretchen Morgenson has [a long column today](#) about the testimony of former Washington Mutual senior mortgage underwriter, Keysha Cooper:

Ms. Cooper is one of 89 employees whose stories fill a voluminous complaint filed against officers of the company by the Ontario Teachers' Pension Plan board, a big shareholder. Topping the list of defendants is Kerry K. Killinger, the WaMu chief executive who was ousted in mid-September.

WaMu was seized by federal regulators in late September, the biggest bank failure in the nation's history. It was sold to JPMorgan Chase for \$1.9 billion.

The shareholder complaint depicts WaMu's mortgage lending operation as a boiler room where volume was paramount and questionable loans were pushed through because they were more profitable to the company.

When underwriters refused to approve dubious loans, they were punished, she says.

Posted by Marcia Oddi on [Sunday, November 02, 2008](#)

Posted to [General Law Related](#)

### 29.2. IND. COURTS - "LAGRANGE FARM SUED OVER HEIFERS: MANAGER SAYS OHIO COMPANY KNEW COWS IT BOUGHT WERE STERILE"

Rebecca S. Green of the **Fort Wayne Journal Gazette** had [a fascinating story](#) Oct. 30th that the **ILB** nearly missed:

A LaGrange County farm is at the center of a federal lawsuit filed by an Ohio farm, alleging hundreds of thousands of dollars in damages because of the sale of nearly 300 sterile cows.

But the manager of Brigitte Holmes Livestock Co. in Shipshewana said the Ohio farm knew exactly what it was buying and that there are signatures to prove it.

In a lawsuit filed late last week in U.S. District Court in Fort Wayne, officials with LDT Keller Farms in Fort Recovery, Ohio, sued Brigitte Holmes Livestock Co., Brigitte Holmes, Samuel Holmes and Mervin Mishler, all of LaGrange County.

Three Loogootee farmers – Levi Graber, Joseph Graber and Freeman Raber – are also named as defendants.

According to court documents, Brigitte Holmes Livestock bought 284 Holstein heifers between May 10, 2006, and Jan. 31, 2007, and all but three of the cows turned out to be sterile.

Each of the heifers had a male twin. In such situations, females are almost always sterile and are known as "freemartins." LDT Keller Farms alleges that Brigitte Holmes Livestock bought the heifers for less than \$50 apiece.

Brigitte Holmes Livestock then sold the heifers directly to LDT Keller Farms or to the Grabers and Raber, who then sold them to LDT Keller Farms, according to court documents.

In total, LDT paid \$480,000 for the 284 cows. In the 10-count lawsuit, LDT Keller Farms alleges multiple counts of breach of contract, breach of warranty fitness for a particular purpose, violation of the federal packers and stockyard act and fraud.

LDT seeks \$480,000 in compensatory damages and punitive damages of more than \$1.4 million.

The attorney for Brigitte Holmes Livestock Co. declined to comment on the pending litigation, but Samuel Holmes, manager of the company, said LDT Keller Farms' allegations are false and that he has the paperwork to back it up.

"He bought them not to be good, to be 'iffys,'" Holmes said. "It's wrote all over the bills, 'breedability not guaranteed.' We have our evidence in black and white. He knows how he bought 'em."

Brigitte Holmes Livestock plans to countersue LDT Keller Farms, Samuel Holmes said.

Well, yes, I wanted to know more, and found [this information](#) from a genetics site at **Colorado State University**:

**Chimeric cattle are not at all rare.** When a cow has twins, it is almost inevitable that anastomoses (areas of joining) develop between the fetal circulatory systems early in gestation. This leads to exchange of blood between the two fetuses. Fetal blood contains hematopoietic stem cells, and each fetus is permanently "seeded" with stem cells from its twin. The result is that both animals are hematopoietic chimeras. A variable fraction of all their cells that are derived from hematopoietic stem cells (peripheral blood cells, Kupffer cells in the liver, lymphocytes and macrophages in lymph nodes and spleen, etc) are from the twin.

**Major clinical significance is seen when one fetus is a female and one a male.** In such cases, the female fetus is exposed to hormones from the male and is masculinized. **Such female cattle are called freemartins.** The external genital tract of a freemartin looks like a female, although usually infantile. The degree to which the internal genital tract is masculinized varies, but typically, the vagina is very short and uterine horns are rudimentary. Pretty obviously, these animals are sterile. Freemartins are seen occasionally in other species, although much less commonly than in cattle, probably because those animals do not have the propensity seen in cattle to form vascular anastomoses among fetuses early in gestation.

The case is *LDT Keller Farms LLC et al v. Brigitte Holmes Livestock Co Inc et al*. Here is the [27-page complaint](#), filed 10/17/08. Here is a [10/21/08 order](#): "Plaintiffs are ORDERED to file an amended complaint forthwith that adequately articulates the citizenship of each party, tracing the citizenship of all unincorporated associations through all applicable layers of ownership."

Posted by Marcia Oddi on [Sunday, November 02, 2008](#)

Posted to [Indiana Courts](#)

### [29.3. IND. COURTS - "JUDGMENT CALL: 3 JUSTICES ARE ON THE BALLOT"](#)

[An article today](#) by Jon Murray of the **Indianapolis Star**:

Hoosier voters will have a chance to throw out a majority of the Indiana Supreme Court on Tuesday.

If history is a guide, the justices shouldn't be sweating.

Three of the five Supreme Court justices are up for retention votes, joining one Indiana Court of Appeals judge and the State Tax Court judge.

It's possibly the least-noticed portion of the ballot this year. As long as at least half of the voters mark "yes," all will keep their jobs for additional 10-year terms.

While voters still elect county judges, since 1972, Indiana's appellate judges have been appointed by the governor and then faced periodic retention votes. No judge has lost such a vote.

Up for retention on Election Day are Supreme Court Chief Justice Randall T. Shepard and justices Brent E. Dickson and Theodore R. Boehm; Appeals Court Judge Carr L. Darden; and Tax Court Judge Thomas G. Fisher.

The five Supreme Court justices and 15 appeals court judges face retention in staggered election cycles.

For most voters, the unfamiliar names are unlikely to provoke much consideration in the voting booth.

Even so, said Noblesville attorney Douglas Church, "I think it's important that they vote. . . . We have a

highly competent and qualified group of judges up for retention."

If you don't trust Church's assessment, a survey by the Indiana State Bar Association showed wide support for the judges among other lawyers. Approval rates of the five judges ranged from 83 percent to 90 percent among 1,500 attorneys who cast ballots. The survey had an 18 percent response rate.

"These are the people who actually have day-to-day exposure to the opinions (issued by the judges)," said Church, who is the bar association's immediate past president.

In some states -- including all four surrounding Indiana -- appellate judges are elected by voters, often in contested races. They sometimes run TV ads and stump for votes.

Indiana's system is a hybrid meant to reduce politics on the benches of the Supreme Court and Court of Appeals, which have the power to set precedent and reverse trial court decisions. The Indiana Supreme Court is the state's court of last resort.

Here is [the ILB entry reporting the ISBA poll results](#). And by clicking [the link in the upper right-hand corner of the ILB](#), you can find a list of all **ILB** entries on this year's retention election, including links to newspaper stories and editorials.

Posted by Marcia Oddi on [Sunday, November 02, 2008](#)

Posted to [Indiana Courts](#)

#### **29.4. NOT LAW BUT - "JG EDITORIAL STAFF 'BEST IN SHOW'"**

From today's Fort Wayne Journal Gazette:

The Journal Gazette's editorial page staff won first place last week in the Editorial Excellence Contest sponsored by the University of Kansas on behalf of the Inland Daily Press Association.

Editorial page editor Tracy Warner and editorial writers Karen Francisco and Stacey Stumpf competed against newspapers with circulations of more than 25,001 and also won the Sweepstakes. That means their editorials were the best in show in all categories. \* \* \*

The judges wrote: "The Journal Gazette's editorials were hard-biting and clearly the product of a watchdog newspaper that holds government accountable to serve the public good. Each of the five pieces submitted had a strong focus, made well-supported arguments, and presented a logical and practical proposal for action. As importantly, they were written with flair. Praise to the editors for imbuing the tone and turn of phrase that evokes images of a neighbor who is thoughtful and skeptical, rather than knee-jerk and strident."

Well deserved, IMHO.

Posted by Marcia Oddi on [Sunday, November 02, 2008](#)

Posted to [General News](#)

#### **30. Saturday, November 01, 2008**

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##### **30.1. IND. COURTS - DOCUMENTS IN: "MARION CO. GOP SEEKS BALLOT SCRUTINY" [CORRECTED]**

**[Updated and revised at 6:50 PM]**

Updating [this entry from earlier today](#) on the arguments in Circuit Judge Theodore Sosin's courtroom Friday, here is [the judge's 10/31/08 ruling](#) in *Schoettle, et al v. Marion County Election Bd.*

Here are the pleadings filed thereafter in the Court of Appeals Friday afternoon: the 14-page [Emergency Motion for Stay Pending Appeal](#) and the 3-page [Request for Schedule](#) ("requests that this Court set a schedule for disposition of the motion for stay pending appeal so that the motion is decided before the polls open on November 4, 2008.")

And here is [Court of Appeals 2-page Order](#) granting Appellant MCEB's Request for Schedule (requiring the Republican Plaintiffs to respond to the motion for emergency stay by 9 am Monday) and holding in abeyance Appellant's Emergency Motion for Stay Pending Appeal. A source reports "[the COA] put this out electronically at 11:45 p.m." Friday.

There is no appellate docket available yet. The number is 49A05-0810-CV-637.

Posted by Marcia Oddi on [Saturday, November 01, 2008](#)

Posted to [Ind. Trial Ct. Decisions](#)

### [30.2. IND. COURTS - ANSWERS TO QUESTIONS ON THE JTAC CASE MANAGEMENT SYSTEM](#)

JTAC, the Indiana Supreme Court's Judicial Technology and Automation Project Committee, has a blog with occasional entries - [access it here](#).

The Oct. 3rd entry announces: "We have just posted a new document to our website listing answers to frequently asked questions about the Odyssey CMS." [Access the FAQ here](#). It is interesting reading. The front page states that the following "Questions regarding the May 13, 2002 Indiana Supreme Court Policy Statement on Trial Court Case Management Systems" are answered within the document, namely:

- Is the May 13, 2002 Indiana Supreme Court Policy Statement on Trial Court Case Management Systems still applicable? (Page 3)
- Section 4 of the Supreme Court Policy Statement states that "Any county that elects, at its expense, to upgrade substantially an existing or acquire a new case management system other than the statewide case management system may do so only with the written permission of the Division." What is an "upgrade" in the eyes of the Division? (Page 4)
- What is the process for receiving approval from the Division for upgrading a system? (Page 4)
- What is the process for receiving approval from the Division for purchasing a new system? (Page 5)
- If I intend to utilize the Odyssey CMS, should I consider upgrading my system in the meantime? (Page 5)
- Are there any other Supreme Court Rules that I need to be aware of when contemplating upgrading or purchasing a CMS? (Page 6)
- May I receive financial assistance from JTAC to help upgrade my legacy system? (Page 6)

The answers begin on p. 4.

Posted by Marcia Oddi on [Saturday, November 01, 2008](#)

Posted to [Indiana Courts](#)

### [30.3. LAW - MORE ON: JUDGE ORDERS MICHIGAN TO ALLOW WINE SHIPPING BY OUT-OF-STATE RETAILERS](#)

Dan & Krista Stockman, authors of *Uncorked - A column for those who want to love wine, but don't know how*, that appears weekends in the **Fort Wayne Journal Gazette**, wrote [a column this week](#) that updates [this ILB entry](#) from Oct. 3rd. The Stockmans begin:

The landmark Supreme Court case in 2005 that threw the already confused system into absolute chaos dealt only with wineries shipping their product to consumers, and did not address another, maybe equally important player in the game: wine stores.

But recent court cases in Texas and Michigan may change that.

The column ends:

After the 2005 Supreme Court decision, many state legislatures responded by banning shipping altogether. Some of the proposed laws – like Indiana's – appeared to be written by the liquor lobby itself. The General Assembly, which claims to be pro-small business, pro-family business, pro-farm and pro-free market, took a bill to regulate both in-state and out-of-state shipping, gutted it, and replaced it with language that would have essentially shut down Indiana's wine industry. If the court decisions continue on letting wine stores ship directly to consumers, you will see similar efforts all over again.

Why do you need to be able to buy wine from any store in the country and have it shipped to you?

Because wines are unique in their vintage – this is what fuels wine collectors. Here's an example: A few years ago, Krista bought Dan a bottle of Port from the year he was born, 1970. While a few stores in the area sell fine vintage Port, they carry only what their wholesaler ships them, and wholesalers carry only the current vintage. If you want an old Port, you'll need to find a store that specializes in old, vintage Port. Under the law of most states, if that store is across a state line, you're out of luck. In many states, including Indiana, even in-state stores can't use a third-party shipper.

What all this means is that the market remains tied up by government regulations, which means less competition, higher prices and fewer choices for consumers.

Posted by Marcia Oddi on [Saturday, November 01, 2008](#)

Posted to [General Law Related](#)

#### **30.4. [IND. COURTS - STILL MORE ON: "MARION CO. GOP SEEKS BALLOT SCRUTINY"](#)**

Updating [this ILB entry from yesterday](#), Jon Murray of the **Indianapolis Star** [reports today](#):

A Marion County judge ordered Friday that absentee ballots challenged at the polls on Election Day be set aside for review by bipartisan teams later in the week.

County Republicans said the ruling, issued in response to their lawsuit, is likely to end up affecting few ballots and would follow a process in place in Marion County under the previous clerk.

But it means that any ballots facing challenges won't be counted Tuesday or show up in election results that night.

Circuit Judge Theodore Sosin, a Republican, stressed after hearing four hours of arguments Friday that all valid ballots would eventually be counted.

At the center of the dispute are tens of thousands of early votes cast by mail or in person in an election drawing record interest.

Those ballots will be sent in sealed envelopes to the voters' precincts Tuesday to be counted. Republicans didn't like the way election officials, led by Democratic County Clerk Beth White, planned to advise poll workers to deal with any challenges of those votes, allowing some to be counted immediately.

A statement issued late Friday by White said the Election Board would comply with Sosin's order but planned to request an immediate review by the Indiana Court of Appeals. Sosin denied a motion by the Election Board to stay his ruling.

Sosin's order said the process White and Election Director Andy Mallon planned to use for challenged absentees would violate Indiana law.

They had said a "precinct board" -- made up of one inspector and a judge from each party -- should address on the spot any challenge based on a voter's eligibility to vote in the precinct. If a majority agrees the ballot is valid, Mallon said, they should feed it into the counter.

But Sosin wrote that the process would provide no remedy if the voter turned out to be ineligible, since

ballots fed into a machine can't be tracked.

He wrote that the order applied to mail-in ballots, but those are lumped in with absentee ballots cast early in person before they're sent to the precincts.

The judge agreed with Republican Party attorney David Brooks, who argued the law's intent was that absentee ballots drawing challenges be treated the same as challenges of in-person voters Tuesday.

If their residency or eligibility is in question, such voters' ballots are set aside as provisional. After Election Day, the Election Board convenes bipartisan teams to examine voter registrations and decide whether to count the ballots.

A handbook put out by the Indiana secretary of state and the Indiana Election Board advises treating challenged absentee ballots as provisional.

Former County Clerk Doris Anne Sadler, a Republican, said Marion County followed the same rule and set aside all challenged absentee ballots when she oversaw elections, through 2006. Sadler attended Friday's hearing.

Sosin's order said the Election Board should attempt to notify absentee voters whose ballots are set aside.

Posted by Marcia Oddi on [Saturday, November 01, 2008](#)

Posted to [Ind. Trial Ct. Decisions](#)

