By Marcia J. Oddi

Can you rely on the Indiana Code?

Part I – Noncode sections

TO ELABORATE

Background

In a 2006 *Res Gestae* article, referring to the online version of the Code and a proposal to make it the official version of Indiana statute law, I wrote that the online version, which is the only version immediately accessible to most users, has numerous failings. Among these are the failure to include any editorial materials, the presence of numerous obvious errors, the fact that for part of each year the online Code is not current, and the fact that prior versions of the Code are not retained online and are very difficult to access elsewhere.[1]

In a 2007 article, I wrote that at this vantage, it looks like there is a long way to go to create an authentic and official online version of the Indiana Code of which the courts could take judicial notice. I again noted that the online Indiana Code makes no statement as to how current it is; on what it is based; and what, if any, claims are made as to authenticity.

Despite this, the online Indiana Code is generally taken by the public to be official, up-to-date, accurate and authentic, and has been referenced in at least one Court of Appeals opinion as "the official version" of the Indiana Code. I concluded:

> In short, the online Indiana Code currently meets none of the requirements ... for trustworthy state-level primary legal resources on the Web: Are they official? Are they authentic? Are they permanently accessible? Are they secure?
>
> Yet most users of the Indiana Code ... are unaware of this, and consider the online Indiana Code to be trustworthy. Furthermore, the online Indiana Code is now the only available recourse to the laws of Indiana for most people. Printed versions of the Indiana Code are no longer available to either the public directly or to most libraries.[2]

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More problems with the Indiana Code

The problems outlined above are peculiar to the *online* version of the Indiana Code. This article looks at problems that transcend the medium used for publication – these new, insofar as these discussions are concerned, problems exist with *both* the online and the printed versions of the Indiana Code. This article will suggest to the Indiana attorney that:

> (1) Simply finding a provision in the Indiana Code is not enough. Due diligence may require you to, at a minimum, study the provision's history in an annotated version of the Indiana Code, or look back to the original enrolled acts.
>
> (2) In certain areas of the law, the Indiana Code no longer may be relied upon for all the substantive law of the state on a particular topic. You will need to look elsewhere, and it may not be easy.

Noncode sections

The first situation described above concerns *language that is in the Code*, but that is impacted by other provisions included in the act that added or amended the Code provision, that are not codified. These noncode provisions are generally referred to as noncode sections. This topic will be the focus of Part I.

Noncode acts

The second situation concerns *language that has substantive impact of its own, but is not in the Indiana Code.* For the most part, this language is found in budget bills and in certain so-called temporary acts.

The biennial budget bills are hundreds of pages long and replete with noncode language on a variety of topics. The budget bill does not contain only appropriations; over the years more and more substance has been added. The budget bill is always the subject of many compromises, pulled together under the umbrella of one bill. Some of these provisions will directly amend the Code. Many others, however, stand by themselves as noncode provisions.

Other acts passed by the General Assembly may contain significant chunks of substantive law, drafted to ensure that they do not become a part of the Indiana Code, even though they concern subject matters apparently codified. Most often these acts include an expiration date, stating that the noncode act or portions thereof will expire five years, or sometimes more, into the future. Sometimes these expiration dates are amended in later sessions to continue the separation of these laws from the Indiana Code.

What has resulted is a growing, separate, uncodified body of law, inaccessible for all practical purposes except to the cognoscenti. My preliminary review of noncode provisions from the past two sessions shows this particularly to be the case with laws relating to Medicaid and health insurance, and election law. This will be the subject of Part II.

Looking back at the 1971 Indiana Code

History

A 1970 *Report of the Statute Revision Commission to the Indiana Legislative Council* included, beginning on p. 8, a section titled "Future Ramifications." It warned that after the Revised Statutes of 1852 were approved, laws passed by the next several General Assemblies were incorporated into the revision. But within a few years the practice

was abandoned. Soon it was necessary again to refer to the individual volumes of each session's laws, in conjunction with the 1852 Revised Statutes, to determine the applicable statute law.

This situation compounded for the next 118 years, until 1971 when the General Assembly passed the bill for the Indiana Code, containing what the Indiana Statute Revision Commission[3] had determined to be the entire body of permanent statutory law in effect at that time, and repealing, with a few specific exceptions, all other Indiana statute law.[4]

Process

To reach this point, the Commission and staff had spent the two previous years reviewing, section by section, every act that had been passed in Indiana since 1852. Decisions of what was to be included in the Indiana Code were painstakingly made. The written record of that work, memo by memo, vote by vote, still exists.

Looking back over the work of the Commission, as a general rule provisions were included in the bill for the Indiana Code unless they had been repealed or amended in previous years, were expired appropriations, were provisions that had expired by their terms, or were curative, validating or legalizing acts.

A memo from July 14, 1970 summarized the Commission's decisions on how to treat temporary legislation that had been enacted between 1853 and 1969. Temporary legislation was defined as any of the following:

(a) A statute containing a specific termination date.

(b) Transitional implementary provisions in an otherwise permanent act.

(c) Legislation which terminates by implication when the purpose of the act is fulfilled or ceased to exist.

The Commission decided on the following standards for the treatment of temporary legislation falling within the above categories:

(a) Legislation with a specific termination date:

(1) which had expired prior to Jan. 1, 1971, would be deleted from the codification.

(2) which had not expired on Jan. 1, 1971, but which will have expired prior to Jan. 1, 1973, would be "carried." *[i.e., it would not be included in the codification, and would expire by its own terms.]*

(3) which would not have expired prior to Jan. 1, 1973, would be reenacted. *[In other words, an existing "temporary" provision of more than two years would become part of the 1971 Indiana Code.]*

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(b) Transitional implementary provisions would be deleted if no longer necessary.

(c) Executed provisions of legislation which terminates by implication would be deleted.

By following these rules, the initial Indiana Code was free of thousands of provisions that did not belong in a codification of the permanent law of the state.

Result

The bill for the Indiana Code of 1971 repealed all statutes (not contained therein) which had been enacted prior to the 1971 session of the General Assembly, except for a list of specific exceptions. These included certain pre-1852 acts of incorporation, then-pending constitutional amendments, and a specific list of appropriation sections.[5]

Post-1971

What about future laws that amended the Code? The same rationale applied to both amendatory and new legislation. From the guidelines for new legislation, as set out in the *Draftsman's Manual to the Indiana Code of 1971*:[6]

> All new legislation (*i.e.*, that which does not propose to modify any existing sections of the Code) must also be made amendatory of the Code so that when the document is updated it will continue to contain all the statutory law of Indiana. There is only one exception to this rule. Just as there are certain sections which should be designed to "fall-away," there are certain types of acts which should also be so designed.
>
> This category of "fall-away" acts is made up for the most part of laws of a temporary nature. An act creating a temporary study committee, for example, should not become a permanent part of the Indiana statute law. To avoid this, the bill is simply drafted as an entity of itself – no reference is made to the Code. Thus, when the Code and the laws amending the Code are merged at some later date,[7] this temporary act will "fall away." To further avoid confusion, it is wise to add an expiration section to the end of the bill: "This act shall expire on Jan. 1, 1973."
>
> Appropriations generally are also laws of a temporary nature. The general budget bill appropriates funds for a period of two years. At the end of that term, it expires, and a new general budget bill is enacted. Therefore, this act should not be made amendatory of the Code, but should be designed to fall away. The so-called "one-shot" appropriation sections should be similarly treated. Funds are appropriated by such sections for a one- or two-year period.

Other types of laws which should be written to fall away are those which retroactively legalize certain activities, authorize public officials to transfer or purchase property, etc. The rationale here is the same as that of one shot appropriations, once an action has been accomplished under the authority of a statute then in existence – *i.e.*, money has been appropriated, prior actions are validated, land is transferred – the subsequent repeal of the authorizing statute will not invalidate activities conducted under the statute while it was in effect.

The problem of language that is in the Code, but that is impacted by a noncode section

Now, for Part I. First, for those not familiar with how bills are drafted for the Indiana General Assembly: An individual section of a bill is designated as a SECTION, distinguishing it from a "Section" or "Sec." in the Indiana Code. A SECTION of a bill may set forth an amendment to the Indiana Code, or it may set out noncode language, such as an emergency clause.

A working definition on a noncode provision is found in the Legislative Services Agency's (LSA) bill drafting manual:[8]

> Noncode provisions are acts or parts of acts that are not included in the Indiana Code. Provisions that are not part of the general and permanent statute law of Indiana are ordinarily excluded from the Code.
>
> ...
>
> Noncode provisions are sometimes called "fall-away" SECTIONS, since these SECTIONS are included in the bound session laws (Acts), but "fall away" after that and are not included in the Indiana Code or its supplements. Noncode SECTIONS are often set forth in annotated, unofficial publications of the Indiana Code (published by West and Burns) in notes following the related Code sections.

What follows are examples of how this can go wrong, when language of substantive import affecting provisions in the Indiana Code is drafted in a way to keep it out of the Code.

Example 1

P.L.82-2008, which went into effect March 19, 2008, but which was not yet, as of this writing,[9] *in the online Indiana Code.*

S.E.A. 28, SECTION 1 added a new IC 22-14, Chapter 7, "Reduced Ignition Propensity Standards for Cigarettes." Sec. 21 provides at subsection (d):

> (d) Notwithstanding subsection (a), the state fire marshal may accept as evidence of compliance with this chapter a certification issued to:
>
> (1) the New York State Department of State's Office of Fire Prevention and Control; or
>
> (2) the responsible entity of another state that has:
>
> (A) substantially equivalent certification requirements relating to reduced ignition propensity cigarettes; and
>
> (B) the same test method and performance standard requirements as provided in sections 13 and 15 of this chapter.

SECTION 2, a noncode provision, reads:

> (a) IC 22-14-7-21(d), as added by this act, applies to certifications issued not more than three (3) years before the date on which this act takes effect.
>
> (b) This SECTION expires July 1, 2011.

Readers of the Indiana Code will never see the qualification provided by SECTION 2. They will only see it if they read the enrolled act itself, or if they read an annotated version of the Indiana Code which happens to pick it up in the comments area. Why was this qualification not drafted so that it would be part of the Indiana Code?

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Example 2

P.L.18-2008, which goes into effect July 1, 2008, but is not yet in the online Indiana Code.

A law passed this year, S.E.A. 46, amends IC 32-20-3-2 to provide that marketable record title is subject to the following:

> (6) All interests of the department of environmental management ~~in land used for the disposal of hazardous wastes~~ arising from the recording of a restrictive covenant under ~~IC 13-22-3-3~~. IC 13.

If you read this subsection in the updated Indiana Code, it will simply provide:

> (6) All interests of the department of environmental management arising from the recording of a restrictive covenant under IC 13.

When you read it, will you know that the following "clarifications," found in the noncode language added by S.E.A. 46, SECTION 3, apply:

> (a) IC 32-20-3-2, as amended by this act, applies only to determinations of marketable record title (as defined in IC 32-20-2-2) after June 30, 2008.
>
> (b) Under IC 32-20-3-2, as amended by this act, marketable record title (as defined in IC 32-20-2-2) is subject to all interests of the department of environmental management arising from the recording of a restrictive covenant under IC 13, regardless of whether the recording occurred before July 1, 2008.

Interestingly, unlike the other examples, this noncode language, which was part of the introduced bill, contains no expiration date. In subsequent years, how will you know about this clarifying language, as it will not be a part of the Indiana Code? How will you know even to look for it? Do you need to do this with every section you read?

Frequently Burns and West annotations carry selected noncode provisions in agate type. In this case, the noncode section makes sense only when read in conjunction with text setting out the amendment itself, setting out the specific changes using stricken type and boldface. Of course, you may look to the enrolled act itself, if it remains accessible. In past years, you could look to the session laws, which were printed and available in libraries throughout the state. But, as noted before, the Acts of Indiana are no longer published.[10]

Example 3

P.L.119-2008, which goes into effect July 1, 2008, but is not yet in the online Indiana Code.

S.E.A. 258, at SECTION 10, amends portions of IC 11-13-3-4, but does not amend subsection (j), which provides:

> (j) As a condition of parole, the parole board:
>
> (1) shall require a parolee who is a sexually violent predator under IC 35-38-1-7.5; and

(2) may require a parolee who is a sex or violent offender (as defined in IC 11-8-8-5);

to wear a monitoring device (as described in IC 35-38-2.5-3) that can transmit information twenty-four (24) hours each day regarding a person's precise location.

Nevertheless, SECTION 20 of the Act provides:

(a) Notwithstanding IC 11-13-3-4(j), the parole board is not required to require a parolee who is a sexually violent predator under IC 35-38-1-7.5 to wear a monitoring device (as described in IC 35-38-2.5-3) that can transmit information twenty-four (24) hours each day regarding a person's precise location unless the parolee was released to parole after June 30, 2009.

(b) The parole board may require a parolee described in subsection (a) to wear a monitoring device (as described in IC 35-38-2.5-3) that can transmit information twenty-four (24) hours each day regarding a person's precise location, even if the parolee was released to parole before July 1, 2009.

(c) This SECTION expires Jan. 1, 2010.

In addition, SECTION 21 provides:

IC 35-38-1-7.1, as amended by this act, and IC 35-42-4-12 and IC 35-52-4-13, both as added by this act, apply only to crimes committed after June 30, 2008.

Again, readers of the Indiana Code will likely never see the qualifications provided by SECTIONS 20 and 21.

Example 4

P.L.129-2007, which does not go into effect until July 1, 2008, but is already in the online Indiana Code.

Introduction. Previous examples showed language of substantive import drafted as noncode provisions. This example shows how an incorrectly drafted effective date section can have substantive impact.

IC 24-4-15, a chapter headed "Automated External Defibrillators in Health Clubs," was added to the Indiana Code by Senate Enrolled Act (SEA) 134 of the 2007 General Assembly[11] and, by its terms, took effect July 1, 2007.[12]

Reading IC 24-4-15 in the online Indiana Code provided by the General Assembly,[13] one sees the requirement in Sec. 5 that an owner or operator of a health club shall ensure that a defibrillator is located on the health club premises and is easily accessible. Sec. 8 provides that a violator commits a Class C infraction.

The logical assumption would be that the defibrillator requirement is in effect. But that would be wrong.

Although each section of the new law went into effect July 1, 2007, the General Assembly added a noncode SECTION 4 to SEA. 134, which reads:

(a) Notwithstanding IC 24-4-15, as added by this act, a health club is not required to comply with IC 24-4-15, as added by this act, before July 1, 2008.

(b) This SECTION expires Dec. 31, 2009. *[emphasis added]*

The effective date provision. Until the mid-1990s, one of the uses of a noncode SECTION was to provide when the other SECTIONS in an act would take effect. This might be as simple as:

SECTION __. This act shall take effect July 1, xxxx.

Or it might be more complicated, along the lines of:

SECTION __. SECTION 1 and 8 of this act shall take effect July 1. xxxx; SECTION 4 shall take effect Jan. 1, xxxx; the remaining SECTIONS shall take effect upon passage.

The 1999 bill drafting manual formally replaced the use of noncode SECTIONS to determine the effective date of an act with inclusion of that information in the lead-in line to each SECTION.[14] Here is an example from the drafting manual of the approved style:

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SECTION __. IC 1-2-3-4, AS ADDED (AMENDED) BY P.L .__ - 19__, SECTION__, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2000]:

A simple example of a properly drafted bill with a delayed effective date is HEA 1288 from 2008.[15] It has a single SECTION, with the lead-in line stating "EFFECTIVE JULY 1, 2009," followed by the addition of a new Article, IC 25-41, re: Behavior Analysts, to the Indiana Code.[16]

A more complex example is HEA 1555 from 2007, a 99-page securities bill. This 2007 bill also illustrates how delayed effective dates are handled in the Indiana Code, so that the user is informed when a provision is not yet in effect.

SECTION 1 of HEA 1555 from 2007 amended IC 4-4-11-41, and the lead-in line reads "EFFECTIVE JULY 1, 2008." Calling up IC 4-4-11-41 online,[17] one sees that two versions are included, with the pre- and post-amendment language:

IC 4-4-11-41 Version a

Bonds, guarantees, and securities; exemption from securities registration laws

Note: This version of section effective until 7-1-2008. See also following version of this section, effective 7-1-2008.

Sec. 41. Any bonds issued by the authority pursuant to this chapter, any guarantees by the authority pursuant to the guaranty program, and any other securities issued in connection with a financing under this chapter shall be exempt from the registration and other requirements of IC 23-2-1 and any other securities registration laws.

As added by Acts 1982, P.L.16, SEC.1. Amended by P.L.11-1990, SEC.57.

IC 4-4-11-41 Version b

Bonds and securities; exemption from securities registration laws

Note: This version of section effective 7-1-2008. See also preceding version of this section, effective until 7-1-2008.

Sec. 41. Any bonds issued by the authority pursuant to this chapter and any other securities issued in connection with a financing under this chapter shall be exempt from the registration and other requirements of IC 23-19 and any other securities registration laws.

As added by Acts 1982, P.L.16, SEC.1. Amended by P.L.11-1990, SEC.57; P.L.27-2007, SEC.1; P.L.162-2007, SEC.13.

When the Indiana Code is updated this year with the 2008 legislation, "Version a" will be dropped.

How the defibrillator bill should have been drafted. The proper way to have drafted the defibrillator bill, therefore, would have been to state in the lead-in line to the SECTION adding the new Chapter 15 to the Indiana Code that the new chapter was "EFFECTIVE JULY 1, 2008."

Instead, the lead-in makes the new chapter effective July 1, 2007. Then SECTION 4 contradicts this by stating:

SECTION 4. [EFFECTIVE JULY 1, 2007] (a) Notwithstanding IC 24-4-15, as added by this act, a health club is not required to comply with IC 24-4-15, as added by this act, before July 1, 2008.

(b) This SECTION expires Dec. 31, 2009.

The end result is that the defibrillator chapter went into the Indiana Code with no notation of a delayed effective date, since the new chapter did, in fact, take effect July 1, 2007, even though, by virtue of the noncode provision statement, health clubs are "not required to comply" before July 1, 2008.

What can be done to prevent this from happening? A look at the history of SEA 134 shows that the introduced version was written to take effect July 1, 2007. There was

no noncode section in the introduced bill. The noncode section stating that health clubs did not need to comply with the requirements until July 1, 2008, was added to the Senate bill in House committee.

Following the LSA drafting manual is not mandatory on the General Assembly. Even if it were made so by the House and Senate rules, it is very unlikely that a law could be successfully challenged later for failure to follow those rules; the courts have held that the General Assembly is the arbitrator of its own internal procedures.

How to protect oneself from Part I issues?

Do not rely solely on the General Assembly's online Indiana Code. Examine the relevant enrolled acts. Begin with the history line, which appears at the end of each section of the Code.

Here, for example, is the history line for IC 16-20-5-1, through the 2007 session: *(As added by P.L.2-1993, SEC.3. Amended by P.L.1-1996, SEC.74.)*

The individual enrolled acts of each session currently are archived online going back at least through the 2002 General Assembly.[18] For earlier years, you will need to review the volumes of the Acts of Indiana. Or use an annotated version of the Indiana Code, and read the fine print carefully – of course there is no assurance the editors will have picked up the applicable noncode provisions.

Even these precautions may not reveal every potential problem. For instance, there may be a provision in another law, such as the budget act, that reads: "In lieu of the provisions of [your section], the following shall apply."

Part II will set out some suggestions for long-range, across-the-board solutions.

Coming in Part II

The original Indiana Code of 1971 and the bill drafting manual written that year to accompany it contemplated that noncode provisions would have a duration of two years or less. I have been unable to find the intervening history, but the 1999 bill drafting manual now in use extends that period to five years, stating:

> If a provision has a general application, but is not permanent law, it is considered "temporary" legislation and may be drafted as a noncode provision. Generally, temporary provisions include those that:
>
> (a) contain a specific termination date that is within five (5) years of the date of passage of the act;
>
> (b) provide for transitional or implementary matters in an otherwise permanent act; or
>
> (c) terminate by implication when their purpose is fulfilled or ceases to exist.
>
> The drafter should not place a temporary, transitional, or self-terminating provision in the Indiana Code unless there are compelling articulable reasons (including time constraints during critical points during the legislative session) for doing so.[19]

This mandate to keep laws of general application out of the Indiana Code when they are written with an expiration date of five years or less has resulted in the creation of a growing, separate, uncodified body of law, unindexed and inaccessible through normal search techniques.

1. "The General Assembly's role in making Indiana Rules and Statutes available to the public," 50 *Res Gestae* 1 (July/August 2006), pp. 19-26.
2. "Assuring authentic legal information in the digital age: Part I – the Acts of Indiana and the Indiana Code," 50 *Res Gestae* 10 (June 2007), pp. 20-25.
3. Membership of the Statute Revision Commission, created May 21, 1969: Senators Phillip Gutman (chair), Martin Edwards, Marshall Kizer, Marlin McDaniel, Robert O'Bannon, Wilfrid Ullrich; Representatives Joseph Anderson, Frederick Bauer, John Cox, Richard Lesniak (vice chair), Ray Richardson, James Robison; Lay members Lewis C. Bose, Judge George B. Davis, Prof. F. Reed Dickerson, Dean Cleon H. Foust, Patricia J. Gifford, Judge Richard M. Givan, James Quinn, Edwin K. Steers and James M. Yater.
4. Because of a Supreme Court ruling in 1971, in the case of *State ex rel. Pearcy v. The Criminal Court of Marion County*, 257 Ind. 178, 183, superseding opinion, 262 Ind. 9, 16,

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274 N.E.2d 519, 522 (1971), the 1971 Indiana Code was reenacted again in 1975, but that is irrelevant for the purposes of this discussion. For more information on Pearcy, *see* my article, "Enforcing Indiana's constitutional requirement that laws be limited to one subject," 44 *Res Gestae* 9 (2001), p. 12.

5. IC 1-1-1-2 contains a similar list from when the 1971 Code was reenacted in 1975. IC 1-1-1-2.1 covers noncode (not compiled) laws enacted from 1975 to 1985, declaring that they are repealed, except for the following: "What follows is a brief list of about two dozen citations relating to judicial proceedings, appropriations, special provisions, and transitional provisions."
6. Authored by Marcia J. Oddi and Margaret C. Attridge, pp. 46-47.
7. At the time the Indiana Code of 1971 was enacted, it was available as a printed set for sale to the public and was also distributed to libraries throughout the state. The Acts of Indiana for each session were similarly available. The plan was to enact an updated Indiana Code every few years so that users would not have to consult both the Code and a number of supplemental volumes.
8. *Form and Style Manual for Legislative Measures*, Legislative Services Agency, Sept. 23, 1999, p. 42 (p. 53 of the PDF version).
9. May 7, 2008.
10. The Legislative Services Agency at some point made a very limited effort to provide online the noncode provisions from some prior sessions. Take a look here and see if you think this will help you: *http://www.in.gov/legislative/ic/noncode*. The most recent available, the 2006 noncode provisions, are 77 pages long; the 2005 are 244 pages long, etc. No table of contents is provided, and I ran into numerous errors messages trying to access these.
11. Now referenced as P.L.129-2007. *See* SEA 134 here: *http://www.in.gov/legislative/bills/2007/PDF/SE/SE0134.1.pdf*
12. The lead-in line to each SECTION of SEA 134 includes the notation "[EFFECTIVE JULY 1, 2007]."
13. *http://www.in.gov/legislative/ic/code/title24/ar4/ch15.html*
14. *Form and Style Manual, supra*, p. 26 (p. 37 of the PDF version).
15. *http://www.in.gov/legislative/bills/2008/PDF/HE/HE1288.1.pdf*
16. Note that the online Indiana Code has not yet been updated with 2008 legislation.
17. *http://www.in.gov/legislative/ic/code/title4/ar4/ch11.html#IC4-4-11-41*
18. *http://www.in.gov/legislative/session/archives.html*
19. *Form and Style Manual, supra*, p. 42 (p. 53 of PDF version).

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