Vol.1-9, Nov. 6, 2017 View in browser

Indiana Law Blog Newsletter

Thank you for subscribing to the ILB Newsletter. Invite your friends and colleagues to sign up to receive this free weekly newsletter, emailed every Monday morning. The issues are intended to bridge the gap between the former **Indiana Law Blog** and its anticipated replacement. Because it is a weekly, the **ILB Newsletter** (unlike the blog) will not be able to bring you the news *as it happens*. But it will highlight news you may have missed, and provide some depth on news you may have had questions about. Because it is a newsletter, length will be limited to what I believe the normal reader can tolerate. (BTW, feedback and suggestions are encouraged - send to ilb.newsletter at indianalawblog.com.)

New this week: By popular demand, I've added an archive of easily *printable* back issues - PDFs with clickable links. Access them here.

Judge Tanya Walton Pratt blocks military judge from having U.S. marshals seize Indianapolis defense attorney Richard Kammen

"Defense lawyers quit. Not so fast, says war court judge, who orders them to Guantánamo." That was the headline to an Oct. 23rd story by Carol Rosenberg of the **Miami Herald** that began:

> In a new test of the reach of the Guantánamo war court, a military judge has ordered three civilian lawyers who quit the USS Cole defense team to come to court at the remote U.S. Navy base in Cuba next week.
>
> Attorneys Rick Kammen, Rosa Eliades and Mary Spears quit their jobs on Oct. 11 as lawyers for the man accused of orchestrating al-Qaida's warship attack. They obtained permission to do so from the chief defense counsel, Marine Brig. Gen. John Baker, who found "good cause" for their resignations. They cited a cascading ethical conflict over a lack of confidence in the confidentiality of their privileged conversations with Abd al Rahim al Nashiri at Guantánamo, but the details are classified.
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> But the case judge, Air Force Col. Vance Spath, wrote in an Oct. 16 order that, while Baker "purported to find good cause" to approve their leaving the case, Spath, as judge, has not. "Accordingly, Mr. Kammen, Ms. Eliades, and Ms. Spears remain counsel of record in this case, and are ordered to appear at the next scheduled hearing," Spath wrote.

Next, commission judge Spath held Gen. Baker in contempt and sent him to jail, as Marcia Coyle reports in this Nov. 2nd National Law Journal story:

> A commission judge held [General] Baker in contempt and ordered him confined for 21 days for refusing to rescind his Oct. 11 decision to excuse three civilian lawyers from their defense of Saudi Abd Al-Rahim Al-Nashiri, charged with organizing the bombing of the U.S.S. Cole in Yemen in 2000. * * *
>
> The three defense lawyers, including **capital defense counsel Richard Kammen of Kammen & Moudy in Indianapolis**, sought to withdraw from the Al-Nashiri case because of alleged breaches of attorney-client and work-product privileges. To continue their representation, they said, would be a violation of ethical rules.

Then late Saturday afternoon (Nov. 4th), reporter Rosenberg wrote in the Miami Herald, in a story datelined Guantanamo Bay Navy Base, Cuba:

> Rick Kammen, the long-serving war court defense attorney who quit the USS Cole case over a secret ethics conflict, has obtained a federal order preventing U.S. Marshals from snatching him in the United States and forcing him to appear at the Guantánamo war court by teleconference. * * *
>
> Spath this week found Marine Brig. Gen. John Baker guilty of contempt of court for disobeying an order to return Kammen to the case — and ordered Baker confined to his quarters in a trailer park behind the court. A senior Pentagon official, the chief defense counsel for military commissions, freed [General] Baker after 48 hours while the punishment is under review.

Here is Judge Pratt's 3-page, Nov. 3rd order.

Some movement in filling the vacancies on 7th Circuit and Indiana federal district courts

7th Circuit:

Until June there were just two vacancies on the 11-member 7th Circuit, the seats formerly filled by Judge John Tinder, who retired in 2015, and the seat of Judge Terence Evans, who took senior status in 2010.

- President Obama nominated Myra Selby of Indianapolis to fill the traditionally-Indiana Tinder vacancy, but the nomination never moved out of the Senate Judiciary Committee and died with the election of President Trump.
- Trump nominated Amy Coney Barrett of Notre Dame Law to the post, she was confirmed by the Senate last Tuesday, Oct. 31st.
- On Aug. 3rd Trump nominated Michael B. Brennan of Wisconsin to fill the traditionally-Wisconsin seat. The nomination is in the Judiciary Committee.

Two additional vacancies. In June, Judge Ann Claire Williams took senior status and in September, Judge Richard Posner retired.

Current status of the 11-member court: Three vacancies (one with a nominee pending), 8 active judges, six judges with senior status. See Wikipedia for CA7 charts.

Southern District of Indiana:

There is currently one vacancy on the 5-member Court. That is misleading because an additional judgeship has long been urged by the Judicial Conference, but Congress has not acted.

- The four current judges are: Chief Judge Jane Magnus-Stinson, Judges Richard Young, William Lawrence, and Tanya Walton Pratt.
- Larry J. McKinney, who took senior status in 2009, was replaced by Magnus-Stinson in 2010. Senior Judge McKinney died earlier this year.
- Sara Evans Barker took senior status in 2014. In 2016 President Obama nominated Winfield Ong of Indianapolis to fill the seat; the nomination was endorsed and sent to the floor by the Senate Judiciary Committee, but died with the election of President Trump. On Nov. 1st, President Trump announced his nomination of James R. Sweeney II of Indianapolis to fill the vacancy.

Current status of the 5-member court: One vacancy (with a nominee pending); 4 active judges. One judge with senior status. See Wikipedia for SD charts.

Because of its high caseload/judge, the court has been under a judicial emergency for some time. Most recently, it was announced that a senior judge from the Northern District of Indiana, Robert Miller, Jr., will sit by designation on the Southern District, at least through December 31, 2018 .

In an order issued last week, Magistrate Judge Tim Baker wrote:

> ... [T]he Southern District of Indiana is operating under a judicial emergency, which has been exacerbated by the recent deaths of Senior District Judge Larry J. McKinney and Magistrate Judge Denise K. LaRue. District Judges and Magistrate Judges from across the Seventh Circuit have generously given their time to travel to this district to help the judges here with their caseloads during this challenging period.

Northern District of Indiana:

There are two vacancies on the 5-member Court.

- The three current judges are Chief Judge Theresa Springmann, Judges Philip Simon and Jon DeGuillio.
- There are 5 senior judges: William Lee, James Moody, Robert Miller Jr., Rudy Lozano, and Joseph Van Bokkelen.

- The most recent retirements: Judge Miller assumed senior status Jan. 11, 2015, Judge Van Bokkelen Sept. 29, 2017.

Current status of the 5-member court: Two vacancies; three active judges. Five judges with senior status. (As noted in the Southern District section, it was announced Nov. 3rd that Sr. Judge Miller will sit by designation on the Southern District, at least through December 31, 2018.) See Wikipedia for ND charts.

Deer hunting on public lands redeux, again . . .

I thought I'd said all there is to say about the 2016 statute that limits deer hunting with a rifle to private lands, via the last two issues of the *ILB Newsletter* (10-30-17 and 10-23-17).

It appears that no one was aware of the new restriction during the 2016 rifle deer hunting season, and DNR did not enforce it.

The section (codified at IC 14-22-2-8) was amended in 2017, but the restriction was not changed. It remains: "**The use of a rifle** is permitted only on privately owned land."

Last week's newsletter reported on a public letter from a state senator urging that the governor issue an executive order directing "the appropriate agencies to follow the law as it existed *prior* to the consequential change" created by the 2017 act.

I commented: (1) the "consequential change" also appears in the 2016 version, and (2) the governor does not have the constitutional authority to pick and choose what laws to enforce, citing Art. 1, s. 26 of the Indiana Constitution.

Here is commentary on this provision, as it appears in the treatise, The Indiana State Constitution, by William P. McLauchlan, Oxford University Press, p. 62:

> **SECTION 26**
>
> **Suspension of Operation of Law.** The operation of the laws shall never be suspended, except by the authority of the General Assembly.
>
> This section specifies that once enacted, the operation of a law will continue unless that is suspended by an action of the General Assembly. This requires an act of the legislature to suspend the operation of a law that it has already enacted. Thus, neither the governor nor any administrator, and certainly no citizen (*Cain v. Allen*, 1906), can suspend the enforcement of a statute, for any reason. This provision does not permit a permanent or a temporary suspension by any actor except the legislature. Any special statute which arguably does suspend the operation of law is to be strictly construed and scrutinized by any reviewing court (*Highland Sales Corp. v. Vance*, 1962).

Note: "Thus, neither the governor nor any administrator ... can suspend the enforcement of a statute for any reason." - except by the authority of the General Assembly. For an example of legislative authority, see IC 10-14-3-12, *Disaster emergency; emergency gubernatorial powers*.

On Friday DNR, an administrative agency, issued this news release:

DNR emergency rule for 2017 deer hunting season

An emergency rule signed today by the DNR, filed with the Natural Resources Commission and the Legislative Services Agency, states the following:

"Rifle cartridges that were allowed in previous years on public land for deer hunting are allowed on public land again this year during the deer firearms season, the reduction zone season (in zones where local ordinances allow the use of a firearm), special hunts on other public lands such as State Parks and National Wildlife Refuges, and special antlerless season.

This means that the rifle cartridge must fire a bullet of .357-inch diameter or larger, have a minimum case length of 1.16 inches, and have a maximum case length of 1.8 inches if used on public land. Full metal jacketed bullets are illegal."

For more information on rifle requirements for deer hunting on private land, visit wildlife.IN.gov/7389.htm and click on "Equipment."

DNR's rationale, which appears to be that "rifle cartridges" and "rifles" are synonymous, is set out in the deer hunting equipment page linked in the news release. The pertinent provisions:

The Department of Natural Resources has received numerous questions regarding recent legislation that legalizes certain rifles for deer hunting beginning in November of 2017.

Equipment on Private Lands

House Enrolled Act 1415 allows some additional rifle cartridges to be used on private land during the deer firearms season. * * *

All the rifle cartridges that were legal in recent years are legal now only on private land.

Rifle cartridges that are legal under this new law (HEA 1415) include, but are not limited to, the following: * * *

Equipment on Public Land

All the rifle cartridges that were legal in recent years are still legal on Public Land, "Public land" includes both state and federal property.

Lawyers coding

Bob Ambrogi, nationally-know law blogger, posted a brief entry on Friday headed : *"So You're A Lawyer Who Wants to Learn to Code? Well, Which Language Should You Learn?"* There were a number of responses. Javascript seemed to be the most recommended, with Python in second place.

But it depends on what you want to do with your code. If you want to create webpages,

HTML is enough for basic pages; the addition of CSS will allow much more sophisticated results. Neither are languages, HTML is used to create the structure of a webpage, CSS adds the style.

Adding Javascript, which is a language, will permit users to interact with your webpage - fill out forms, etc. The combination of HTML/CSS/Javascript is enough to qualify you as a "front-end developer."

Another way to go if all you want to do is web pages is to set up a WordPress site on a server. This provides rapid gratification. You can then slowly start delving into its innards, learning and making refinements.

Python is the most versatile language if you are looking to write scripts to solve problems, to parse reams of documents, to automatically pull information off of web pages, etc. An example would be a script to pull all your hundreds of Kindle or Audible records from the web and manipulate them in various ways, adding a flexibility that the Kindle and Audible websites don't provide for.

For learning Python, I recommend Programming for Everybody (Getting Started with Python) - U. of Michigan - a series of free courses available through Coursera. It is taught by Prof. Charles Severance, and he is outstanding.

For HTML/CSS/Javascript, I recommend the dozens of Udemy courses, such as: *The Complete Web Developer Course 2.0: Learn Web Development by building 25 websites and mobile apps using HTML, CSS, Javascript, PHP, Python, MySQL & more!* or *The Web Developer Bootcamp*. (A word to the wise - the same Udemy course may be $200 one time when you check, and the next time, or using a different browser, it may be $10, or $18!)

All of these courses let you set your own timetables, you can do as much as you want whenever you have the time.

1/ Do you enjoy this Newsletter? Do you miss the ILB? I'm looking for support for an all-new and even better Indiana Law Blog.

2/ Could your organization or firm use some help with a challenging short or long-term project? Then let's talk.

Ind. Courts - Amicus Briefs in Indiana: Rare but Welcomed and Impactful

The Sept. 18, 2017 edition of the ILB Newsletter had two articles on amicus briefs, one lengthy (*"Amicus briefs: How do Indiana's attorneys general decide when to author or sign on to amicus briefs, and where can we learn about them?"*) and one shorter (*"Amicus briefs: What could possibly go wrong?"*) Back in 2014, the ILB published an article on Indiana amicus briefs by Joel Schumm, professor at Indiana University's Robert H. McKinney School of Law. Here, with the permission of the author, is much of that article.

Amicus briefs in Indiana: Rare but welcomed and insightful

Imagine you are an Indiana Supreme Court justice faced with a stack (yes, we're still waiting on electronic filing) of briefs in about 20 cases for the weekly conference. You are trying to decide which of those cases present issues of statewide significance worthy of the Court's limited time and docket space on "important" issues under Appellate Rule 57(H).

About once or twice a month the stack looks a little different. An interested group, not a party to the case, has filed a friend-of-the-court or amicus brief explaining why the case presents an issue worthy of Supreme Court review. You'd probably take notice.

Analyzing data from 2013, this post considers the infrequency of amici briefs filed in the Indiana Supreme Court, the entities that submit them, and their apparent impact.*

Rare

Last year [2013] the Indiana Supreme Court considered whether to grant transfer in 775 cases. Just 17 of those cases (a little over 2%) included an amicus brief. Ten of those 17 cases included just one amicus brief. **

The largest number of amici in a transfer case (four separate briefs) were filed in *Smith v. Delta Tau Delta*. Two briefs were filed in five cases; three were filed in one.

That's a mere 27 briefs in all transfer cases, which pales in comparison to the more than 30 briefs filed in just one Seventh Circuit case (the same-sex marriage challenge) earlier this year. Or the more than 800 amici filed with the U.S. Supreme Court in 2013-14, which was a decline from more than 1,000 the previous term.

Unlike the U.S. Supreme Court's two stage process of petitions (and responses) for discretionary review, followed by a second round of briefing on the merits, Indiana has a one-step, combined process. Thus, amici must almost always become involved in a case before knowing if the justices are interested, which could suppress amici interest.

Welcomed

The Indiana Supreme Court welcomes amici participation. I'm not aware of a request to file an amicus brief being denied, and even late requests appear to be routinely permitted.

Motions to strike amici by an unhappy party appear to be routinely denied. For example, in the right to work case, the Court wrote in an order:

> Summarizing, Appellees request that the court reconsider allowing amicus participation because the NFIB's brief provides inapplicable citations from other states not relating to this case or the Indiana Constitution, the NFIB individuals are "pursuing their own agenda" by raising irrelevant issues, certain persons and entities were denied permission to participate as amici by federal district courts, and ILF's brief is "openly partisan" and adds nothing unique to the State's position argued in its brief. The Court, however, generally welcomes participation of amicus curiae, though such participation does not commit the court to addressing issues raised by amicus. Furthermore, Appellees have an opportunity to present their own argument in their brief, including a response to arguments presented by amici.

Some opinions have even included a grateful footnote: “We thank all amici for their helpful briefs.”

Impactful

Transfer was granted in 65% (11/17) of the 2013 transfer cases with one or more amici briefs. This is nearly seven times the overall grant rate of about 9%. The odds of a grant of transfer were highest in civil cases with a published Court of Appeals’ opinion (about 25%), and cases with amici easily beat those odds. (And with one exception, the 17 transfer cases were all from published opinions in civil cases; *Brewington* was the only criminal transfer case.)

Even with a thorough understanding of all the briefs, issues, and opinions, it would be difficult in many cases to pinpoint the impact of the amici. One notable exception, however, is *Drake v. Dickey*, where the Court granted transfer solely to address a statement in a footnote in the Court of Appeals’ opinion, which was the sole subject of the amicus brief filed by the Indianapolis Bar Association, Appellate Practice Section.

Amicus Entities

Although the content of a brief is almost always its primary contribution, the endorsing entities cannot be overlooked. No one is going to be surprised if the Hoosier State Press Association Foundation weighs in on a freedom of press issue or the Insurance Institute of Indiana is concerned about an issue involving insurance coverage. But some cases have included amici from some unlikely suspects, such as the *Brewington* blogger intimidation case, which drew the following collection of entities and individuals on the same brief: Eagle Forum, the Hoosier State Press Association, the Indianapolis Star, The Association of Scholars, the Coalition for Open Government, the James Madison Center For Free Speech, NUVO, James W. Brown, Anthony Fargo, and Sheila S. Kennedy.

Beyond that case, which also included an amicus brief from the ACLU of Indiana, the following filed amici briefs with the Indiana Supreme Court in 2013: [list of 22 entities omitted]

I’ve filed many pro bono amici briefs over the years, and I’m sure many other lawyers are willing to help provide a voice to interested groups on important issues pending before the

Indiana Supreme Court. The justices appear to welcome the input, which can and not infrequently does make a difference in a case.

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*The focus of this post is the Indiana Supreme Court. Amici briefs were filed in eight Court of Appeals' cases (all civil) in 2013. Two briefs were filed in three of the cases; one was filed in the other five. Seven of the eight were decided by published opinions.

**Amicus briefs were also filed in two other, non-transfer Indiana Supreme Court cases. Five separate amici were filed in *Zoeller v. Sweeney* (the right to work case), which was a direct appeal, and two were filed after a grant of transfer and upon direction (State Public Defender) or invitation (Indiana Tech Law Professors) in *Wilson v. State*, a pro se criminal appeal.

Oral arguments before the Indiana Supreme Court this week of November 5, 2017

Thursday, Nov. 9th:

- 9:00 AM - ***Elizabeth Roumbos v. Samuel G. Vazanellis, et al.*** (45S03-1710-CT-00635)(Lake) Elizabeth Roumbos sued attorney Samuel Vazanellis and the Thiros & Stracci law firm ("the Law Firm") for malpractice after they failed to file her negligence lawsuit within the statute of limitations. The Lake Superior Court entered summary judgment in favor of the Law Firm, finding Roumbos failed to prove she would have recovered on her negligence complaint if not for the Law Firm's negligence. The Court of Appeals reversed, finding a genuine issue of fact as to the viability of Roumbos's negligence claim. *Roumbos v. Vazanellis*, 71 N.E.3d 64 (Ind. Ct. App. Feb. 24, 2017), *aff'd on reh'g* (June 13, 2017), *vacated*. The Supreme Court granted Vazanellis's petition to transfer and has accepted jurisdiction over the appeal, and Defense Trial Counsel of Indiana has entered an appearance as *amicus curiae*.
- 9:45 AM - ***Brandon McGrath v. State of Indiana*** (49S04-1710-CR-00653) (Marion) After an anonymous call to CrimeStoppers, a police officer surveilled McGrath's home for a possible marijuana grow operation. The officer obtained a search warrant permitting infrared thermal imaging of the home, which showed high heat signatures. The officer obtained a second warrant, and a search of the home revealed an elaborate marijuana grow operation. The Marion Superior Court denied McGrath's motion to suppress the evidence obtained pursuant to the search warrants and, following a bench trial, convicted McGrath of dealing in marijuana as a Class D Felony and possession of marijuana as a Class D Felony. A majority of the Court of Appeals reversed, holding there was no probable cause to issue the first search warrant. *McGrath v. State*, 81 N.E.3d 655 (Ind. Ct. App. 2017), *vacated*. The Supreme Court has granted a petition to transfer and assumed jurisdiction over the case.

The briefs and lower court opinions may be accessed via the links above. Webcasts of the Supreme Court's oral arguments are available here.

Recommended this week

- *How to Set Up Two-Factor Authentication* - somewhat complex but worthwhile. Article covers most major applications. TechGuys Labs.
- "If you do end up getting hacked, the first thing to do is create a new email address." Another brief article from TechGuys Labs.
- *An amazing iPhone and iPad trick you never knew existed*. BGR.com. How to use Find on the iPad! I use "find" constantly to search documents on my desktop. So I googled until I dug up obscure directions on how to do the same on the Safari browser screen of my iPad. Try it, it works!
- *How to Move Apps, Navigate and Organize Your iPad*. Lifewire. Basic stuff.