

REFLECTIONS ON A DECADE AT THE INDIANA SUPREME COURT, 1987-1997

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The Supreme Court of Indiana entered the 1990s freed from the numbing onslaught of direct criminal appeals which had characterized the previous decades and crowded out both civil appeals and managerial tasks. With the voters' approval of Proposition Two, an amendment to the Indiana Constitution,¹ an expanded Indiana Court of Appeals began reviewing all criminal appeals with sentences of less than fifty years. Death penalty cases and cases with sentences of fifty years or more remained within the direct jurisdiction of the five members of the Supreme Court.

It is perhaps fitting, although it is not a source of pride, that we will end the 1990s in much the same shape as we began. The number of direct criminal appeals is again trending upward and threatening once again the Court's ability to review important civil cases. Despite that shadow, which will require serious attention in the near future, the past ten years have been marked by notable success and spread with seeds that will grow into positive results in the years to come.

I. BENEFITS TO THE COMMUNITY, ACCESS AND EDUCATION

Several broad themes mark the Court's work over the past ten years. The Court has made partnerships with a good many people interested in the welfare of the legal system, producing great benefit to the community at large, providing greater access to justice for many Hoosiers, and enhancing the education and training of our state's attorneys and judges.

For example, we have issued new rules opening up the process of attorney discipline, sweeping away much of the mystery that has surrounded the workings of Disciplinary Commission.² To get a better feel for how the public views attorneys and their conduct, this Court also expanded the Disciplinary Commission to nine members to include two lay members who are not attorneys.³ Through the work of many members of the Indiana State Bar Association, the Court is on the brink of amending the Rules of Professional Conduct to allow an Interest on Lawyers Trust Account program. Revenue from that project will underwrite a statewide pro bono initiative that will enable people of modest means to find competent, free legal help. The Indiana program for mandatory continuing legal education, about to mark its tenth anniversary, places lawyers and judges in classrooms some 150,000 hours a year. Most recently, we amended the CLE rules

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1. IND. CONST. art. VII, § 4.

2. The file on pending cases will now be open for inspection in the office of the Clerk of the Supreme Court. Moreover, we have strengthened the rules on open attorney discipline hearings. In the past, these hearings, while presumptively opened to the public, had usually been closed in practice. Our new rule change makes it expressly clear that the public will be able to attend these hearings in all but the most unusual circumstances. IND. ADMIS. DISC. R. 23, § 22.

3. *Id.* § 6(b).

to require at least three hours of ethics or professionalism training during each three-year legal education period.⁴ This change, I believe, will help remind all of us of our duty to clients and to the public.

The public now has greater access to justice through several other changes approved by the Supreme Court. Through collaboration with our colleagues in the Indiana State Bar Association, the Court has prompted a greater use of Alternative Dispute Resolution as a means of resolving legal disputes. The Court's new rules on mediation, arbitration, and other techniques have affected a major shift in the means by which we solve client problems. A new, state-wide list of qualified mediators maintained by the staff of the Commission for Continuing Legal Education will make it easier for trial judges and litigators to select mediation instead of following the traditional route through the court room.

The Court has also tried to bring its own operations closer to the people it services in three ways. On a regular basis, the Court has left the State House and held oral argument in high school auditoriums, court rooms, civic auditoriums and city council chambers. In fact, between September 1996 and November 1997, the Court traveled to Evansville, Fort Wayne, South Bend, Merrillville and the Marshall County community of Bourbon. On an experimental basis, our oral arguments may now be recorded by the news media, both by video camera and still photography. Overall, the response to this experiment has been positive. On another electronic front, Indiana appellate opinions are now available over the Internet—a move that puts the Indiana judicial system into the den or living room of anyone with a computer and a modem. The number of times each week that someone sitting in Pokagon or Pakistan downloads one of our opinions continues to amaze me.

II. SECOND WIND FOR THE INDIANA BILL OF RIGHTS

One of the noteworthy developments the last ten years that is particularly gratifying to me is the rejuvenation of the Indiana Constitution and its Bill of Rights. Like many state constitutions, this state's constitution frequently offers greater protections to individual freedom than can be found in the U.S. Constitution. For example, one hundred and nine years before the U.S. Supreme Court determined that a criminal defendant had a right to an attorney at public expense in the landmark case of *Gideon v. Wainwright*,⁵ the Indiana Supreme Court had already reached the same conclusion.⁶ This is but one of many similar stories.⁷ As new cases come to our Court, we see Hoosier litigants more frequently asserting claims grounded in the Indiana Constitution as well as the U.S. Constitution. We on the Court believe this is a healthy trend and that the Indiana Supreme Court is the best place to do it. After all, as has been said

4. IND. ADMIS. DISC. R. 24, § 3(a).

5. 372 U.S. 335 (1963).

6. *Webb v. Baird*, 6 Ind. 13, 18 (1854).

7. See generally Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989).

colloquially, "It's a mighty sorry frog that won't croak in its own pond." My colleague Justice Brent Dickson and former Justice Jon D. Krahulik have both given their time to teach courses on state constitutional law in Indiana's law schools. The Court itself promoted such study with its decision to include state constitutional law on the bar examination.

III. PROPOSITION TWO: "DEJA VU ALL OVER AGAIN"

One of the great joys of recent years has been the ability of the Court to delve more substantially into questions of civil law that had not been given their due consideration because of the crush of direct criminal appeals from defendants who had the automatic right to challenge any sentence of ten years or more. Although matters of criminal law are of great importance to the individual defendants and to victims, the issues asserted usually centered on a handful of regularly litigated, common issues. Committing the time of the Supreme Court to the resolution of these cases did little to resolve conflicts between the panels of the Court of Appeals or fashion Indiana criminal law into a more relevant existence.

The results of the 1988 constitutional referendum were dramatic and quick. A few statistics reveal this story quite succinctly. In 1986, fully ninety-three percent of our cases were direct criminal appeals. By the end of 1989, this court was able to double the number of civil legal opinions it issued to forty-two. In 1992, I proudly announced to the Indiana General Assembly that our backlog had been "whipped." By 1995, it took an average of just 5.8 months to prosecute an appeal before the Indiana Supreme Court. The Court blossomed during this period and offered substantial justice to many people who waited far too long for answers to nagging civil legal questions.

That positive news is overshadowed by some troubling numbers. The number of direct criminal appeals of sentences of more than fifty years is beginning to creep upward again. The legislature has recently decided that fifty-five years should be the standard prison term for murder.⁸ Accordingly, the number of direct appeals jumped fifty-one percent in 1996 alone. To my chagrin, it is quite likely that we will have to revisit the issue of direct criminal appeals in the near future.

IV. SUPREME COURT OPERATIONS: CHANGING PEOPLE AND PROCEDURES

The past ten years also saw the departure of four justices and the arrival of three new ones. There were also substantial changes in policy and procedure and the birth of a half-dozen new programs. During this period, two of the veteran workhorses of the Supreme Court, Richard Givan and Alfred Pivarnik, left the Court. Justice Givan, a long-time Chief Justice, once said he personally knew one-third of the justices of the Indiana Supreme Court. That is a record that will not likely be matched. This period was also marked by the departure of Justice Roger DeBruler in the summer of 1996 after more than a quarter century of service from the bench of the Indiana Supreme Court. His wisdom and wit, bolstered by solid Hoosier common sense, was a valuable commodity.

8. IND. CODE § 35-50-2-3(a) (Supp. 1996).

The bench was refreshed from the private sector, however, when respected attorney Jon D. Krahulik joined the court to replace the retiring Justice Pivarnik. When Justice Krahulik departed after a brief but energetic stay, Governor Evan Bayh tapped his former budget director, Frank Sullivan, Jr., to take his place. When Justice Givan later ended his career, Governor Bayh made history by selecting Myra C. Selby to become the first woman and African-American to sit on the Indiana Supreme Court. Finally, completing the transition to our current Court, well-known attorney and civic leader Theodore "Ted" Boehm was named to take the place of Justice DeBruler.

This succession of capable leaders made progressive changes in how the Court manages the legal system. Rule changes were made to bring closure to capital punishment cases more quickly. Our court limited the number of successive post-conviction relief hearings that could be filed. We also streamlined the process for setting an execution date by removing several ministerial steps that normally followed the denial of a petition for post-conviction relief. We also required attorneys to prepare a case management plan that is designed to move the case along at an appropriate speed.⁹ We also applied technology in the battle against delay. By making use of computer-aided transcription techniques, we reduced the length of time it takes to prepare the record of proceedings in a capital case from eighteen months to just ninety days.

Accompanying these reforms aimed at speedier disposition, our Court also determined that Indiana defendants facing society's ultimate penalty would not risk death without the assistance of competent counsel. Indiana became the second state to specify the qualifications an attorney must have before he or she can represent a defendant charged with the death penalty¹⁰ or prosecute a convicted death row inmate's appeal.¹¹ We also directed trial court judges to weigh an attorney's workload before assigning a death penalty case to insure that the attorney has adequate time to devote to the case.¹² All of these changes came before the Anti-Terrorism and Effective Death Penalty Act of 1996¹³ put restrictions on federal habeas petitions.

The Supreme Court and its staff, commonly with help from the profession and the other branches of state government, also established a wealth of new programs that affected Hoosiers every day through statewide programs and though internal changes to the day-to-day operations of the Court. Between 1987 and 1997 the Court:

- ◆ Created a records management program in the Division of State Court Administration
- ◆ Formed the state's first guardian ad litem program

9. IND. CRIM. R. 24(H).

10. IND. CRIM. R. 24(B)

11. IND. CRIM. R. 24(J).

12. IND. CRIM. R. 24(B)(3).

13. Pub. L. No. 104-132, §§ 101-108, 110 Stat. 1214, 1217-1226 (codified at 28 U.S.C.A. §§ 2244, 2253-2254, 2261-2266 (West Supp. 1997)).

- ◆ Staffed the Indiana Public Defender Commission created by the legislature
- ◆ Issued formal guidelines for the certification of probation officers
- ◆ Established rules for issuing limited law licenses to Foreign Legal Consultants
- ◆ Developed guidelines for Indiana's paralegals
- ◆ Joined a twenty-state study of minority student law school and bar examination performance
- ◆ Helped establish an American Inn of Court in Indianapolis
- ◆ Created a summer internship program for Indiana law students
- ◆ Employed professional librarians for the Supreme Court law library
- ◆ Hired former Indianapolis Star reporter David J. Remondini to handle special projects, work with the news media and oversee the day-to-day operations of my office.

We also undertook, in a historic first, management of the office of the Clerk of the Supreme and Appellate Courts when former Clerk Dwayne Brown was under indictment for misconduct in office. It was task that we did not seek, but think it was handled responsibly.

V. OUTREACH TO THE COMMUNITY

One of the Court's hallmarks for the last ten years, I like to think, has been its efforts to bring the judicial system closer to the public. This has been accomplished in several ways. The primary way we interact directly with the public is through the use of oral argument. Frequently, these sessions change at least one vote on a given case. It is an excellent way to flesh out a question or gain a new perspective on a well-litigated issue. This Court has also made a commitment to hold oral argument in *every* death penalty case. The number of arguments has doubled over the last decade.

As noted earlier, the Court voted in the summer of 1996 to try a one-year experiment allowing cameras and recorders into its oral arguments. This effort was greeted by a torrent of coverage in the early days of the experiment. Reporters came to the courtroom in part because they could bring their equipment. Coverage has subsequently dropped off dramatically, a reflection of reporters' estimates of the newsworthiness of a given oral argument. This experiment has also not come without controversy or disruptions. Allowing video cameras into the oral argument when the Court traveled to some cities raised an already high-profile case to an even higher level. In the process, the emotions of some of the victims' families were bruised by television promotions and newscasts surrounding the argument.

During two oral arguments, journalists violated the Court order limiting movement during the argument. There was minimal disruption in the first situation but in the second, the television news photographer was chastised from the bench for attempting to walk up onto the stage where the Court was seated. On balance, however, the experiment has been successful, and I anticipate that the Court of Appeals will soon make a decision on whether to allow cameras into its arguments.

This Court also expanded its commitment to hold arguments outside its Indianapolis court room.¹⁴ On many occasions as we traveled around the state, we were able to take questions from the audience and interact directly with the people we serve. This is particularly interesting when we appear before a group of students. The candor and perception of their questions is frequently invigorating. It has also been gratifying to see how these young people, especially the young women, respond to Justice Selby. Clearly, she has become a strong symbol of accomplishment to them.

Like any organization, the Supreme Court has been swept up in the electronic information age. At times, the choices and opportunities connected with this new era seem overwhelming, but the Court has taken advantage of these opportunities to make its operations more accessible. The Indiana judicial system now has its own home page¹⁵ with links to our Court, the Indiana Court of Appeals, the Indiana Tax Court, some of Indiana's trial courts, and the appellate decisions maintained by the Indiana University School of Law—Bloomington.

Through cooperation with the Clerk of the Supreme and Appellate Courts, appellate decisions can be reached via an electronic bulletin board as well. Parties to an appeal may also ask the Clerk to transmit orders and opinions by facsimile.¹⁶ This has solved the long-standing problem experienced by lawyers whose clients first heard the news of the decision in their cases over radio or television.

Many of us on the Court have had to become quite familiar with the newest technology, as each of us have been issued laptop computers. These latest acquisitions are part of the network of some 200 instruments in use by judges, law clerks, secretaries, and record keepers. Ten years ago, most Indiana appellate opinions were prepared on typewriters.

VI. RULE CHANGES THAT PROTECT CLIENTS AND AID THE COMMUNITY

The Court has also worked to improve its own rules and procedures concerning the practice of law. With the help of hundreds of volunteers, ancient rules have been updated to reflect the modern practice of law and entirely new programs have been created.

We have toughened the rules attorneys must follow to get admitted to the bar of Indiana by adopting detailed standards for determining character and fitness. We also decided to permit only graduates of accredited schools to sit for our bar examination. Finally, we required every applicant to take the Multistate Professional Responsibility Examination (MPRE). The MPRE is a far more rigorous test of ethical considerations than the previous test that we had used for many years.

For the first time in many years, the Indiana Bar Examination has been re-

14. During the decade, we have held court in Gary, Merrillville, Valparaiso, South Bend, Notre Dame, Fort Wayne, Lafayette, Rochester, Bourbon, Terre Haute, Bloomington, Columbus, Clarksville, and Evansville.

15. *The Indiana Judicial System* <<http://www.air.org>>

16. IND. APP. R. 12(F).

formatted. Bar examinees will now answer twenty questions instead of twenty-five. Beginning in 1998, a question on family law replaces the question on equity. The Court concluded that a question on family law was far more relevant to today's practitioners and clients than a question on the somewhat arcane subject of equity.

One rule change implemented recently is a new requirement for the financial institutions which maintain attorney trust accounts. These accounts hold client funds and need to be monitored scrupulously.¹⁷ It has been our experience, and the experience of other states, that a series of "bounced" checks on an attorney trust account is a signal of a possible problem with the account or the attorney who maintains it. Beginning in 1997, all financial institutions with attorney trust accounts were required to tell our Disciplinary Commission if a check drawn on that account was dishonored.¹⁸ We believe this change will protect clients and the funds they entrust to their attorneys.

In another change that affects trust accounts, Indiana became the fiftieth state in the nation to approve in principle an Interest on Lawyers Trust Account (IOLTA) program. Normally, small amounts of client funds held for a short period in a lawyer trust account do not generate enough interest to cover the administrative costs of figuring the interest, mailing a check to the client, and reporting that interest to the Internal Revenue Service. In light of those practical problems, client funds are normally held in non-interest bearing accounts. Under an IOLTA program, the interest from these trust account funds is pooled, collected, and used for a beneficial public purpose. In Indiana, our Court has determined that the funds should underwrite a statewide Pro Bono Initiative that will encourage attorneys to provide free civil legal help to people of modest means.

Three teams of attorneys and legal service professionals have worked since the fall of 1995 to craft both the IOLTA and Pro Bono programs. In 1997, the Court opened negotiations with the Indiana State Bar Association and the Indiana Bar Foundation with the hope that those organization would be willing to run both programs. The discussions are still underway but there is every reason to believe they will be successful.

As part of an overall effort to encourage pro bono work, the Court's Pro Bono Initiative Committee has proposed asking attorneys to report the number of pro bono hours they work. The same committee has also recommended that the Rules of Professional Conduct be amended to suggest an aspirational goal of contributing at least fifty hours of pro bono work each year. The Court hopes to tackle these rule changes yet this year.

One epic rule change that has made trial court operations more orderly is the adoption of the Indiana Rules of Evidence in 1994. Teams of attorneys and law professors worked tirelessly to codify 175 years of common law into a single, concise format. Both lawyers and the public should find this set of rules easier to use.

17. IND. R. PROF. COND. 1.15(a).

18. IND. ADMIS. DISC. R. 23, § 29.

This Court also changed the Indiana Rules of Trial Procedure to prohibit parties from demanding any specific monetary amounts in lawsuits. This change ended the practice of listing phenomenal amounts of damages in complaints that often prompted headlines that read, "\$50 Million Dollar Lawsuit Filed," thus helping lower the din against our profession.

This Court also, through a rule change, voted to allow federal district courts to certify questions of state law to the Indiana Supreme Court. This has permitted early resolution of a number of important questions.¹⁹

VII. LEGAL EDUCATION CHANGES THAT PRODUCE BETTER LAWYERS AND JUDGES

Reflecting the changes in modern society, this Court made alterations to the rules on legal education that it believes will produce better lawyers and judges. For all legal practitioners, bench and bar alike, the Court adopted mandatory Continuing Legal Education requirements. The Court also sponsored in 1996 a conference that was designed to teach CLE presenters how to use the most effective training techniques for adult education. Indiana became one of the first states to adopt the American Bar Association's Model Rules of Professional Conduct. Earlier this year, the Court supported the Conclave on Legal Education, which was designed to bridge the gap between law school education and the actual practice of law.

With respect to judges, the Court directed a more efficient organization of the Commission on Judicial Qualifications, adopting a unified set of procedural rules and employing full-time counsel to the Commission. The Commission also began publishing reports about judicial discipline cases and it created a system of Advisory Opinions. For the first time in a generation, we revised the Code of Judicial Conduct.

One of our finest achievements with regard to the education of judges has been the two-year Judicial Graduate Studies Program for judges. Competition for the thirty slots has been intense, and many judges who have taken part in this substantive two-year program wish a third year would be added. The Indiana Judicial Center has also continued its fine tradition of educating the state's judges through its regular conferences and seminars.

VIII. TRIAL COURT OPERATIONS

One of the Court's constant goals over the last ten years has been to improve the management and efficiency of Indiana's trial courts. We have done this through changes in how records are managed and stored, as well as by campaigning for a pay raise that has had a positive effect on recruitment and retention of our trial court judges.

Through the efforts of the Division of State Court Administration, the Court has directed a massive project to standardize the way trial court records are kept on computers. The Automated Information Management System (AIMS) will

19. IND. APP. R. 15(O).

make it easier for courts and other government agencies to transfer records and information electronically.

In an effort to make better use of Indiana trial court judges in special judge cases, the Court adopted a new rule that allows trial judges in each of the state's fourteen judicial administrative districts to design its own plan to handle special judge issues more efficiently.²⁰ These multi-court plans follow successful similar efforts on criminal case assignment and facsimile filings.

In the records management area, the entire judicial system has made great gains in getting a handle on the paperwork monster that generates about 20 million court documents each year. We have been able to separate the wheat from the chaff and systematically dispose of 5400 file cabinets worth of paper in the last ten years. In an effort to keep the flow of paper from growing even larger, we have adopted rules that will allow certain portions of appeal records to be filed in computer disk format. We are also preceding with an experiment for computer-assisted transcription at the trial court level.

In addition to managing paperwork and people better, we now have a tool to better manage the entire court system. Late last year, the first Weighted Caseload Study was presented to the Court by a committee chaired by Wayne Superior Court Judge Thomas P. Snow. It confirmed what many of us knew intuitively. Some trial courts were far busier than others. This new tool will now make it easier for us to make informed decisions about where new trial courts are needed.

The sometimes contentious issue of child support also became part of the Court's responsibility over the last ten years. A candid and thoughtful discussion between the three branches of Indiana government led to a consensus that the court system was better situated to establish child support guidelines. Those guidelines were adopted for the 1992-1996 cycle, and they are now under review again.

During the last ten years many civic-minded people fought for an increase in judicial pay. Indiana traditionally ranked near the lowest in terms of judicial compensation. Low pay was one of the reasons that just fourteen out of 5800 lawyers in the second district applied for a previous opening on the Court of Appeals. After the legislature approved increased pay, the number of applicants for openings on the Supreme Court jumped, in part because the increased salary expanded the pool of lawyers willing to consider the judiciary as a career. This same phenomenon at the trial court level made the 1996 class of new judges the largest in two decades.

IX. PROBATION

In the last ten years our Court has made a concerted effort to professionalize the delivery of probation services in Indiana. A strong probation system is central to public safety: at any one moment more than 100,000 people are on probation in Indiana. Through the efforts of many people the Court helped develop a uniform system used to determine the appropriate level of supervision that a person on probation should receive. The Judicial Conference also adopted

20. IND. TR. R. 79(H).

minimum compensation standards for probation officers. Indiana also joined the Interstate Probation Compact, allowing Indiana to send and receive probationers with other states.

X. JUVENILE PROGRAMS

Problems facing children have always been a great concern to our Court. Justice Frank Sullivan, Monroe County Judge Viola Taliaferro and I lead a commission that is reviewing everything the legal system does with respect to children who are abused or neglected. I believe our work will soon provoke important changes in the way our courts handle children. Our Court has also supported mandatory divorce counseling for families with children. We believe that this type of training will help families cope with the problems associated with divorce.

Through the efforts of local and state officials, the Court has advocated finding a better way to purchase foster care placement services. By being a better buyer of these services, the Court has been able to help state and local governments save money. A gubernatorial task force chaired by Justice Frank Sullivan when he was budget director fashioned several proposals that have already been implemented.

The Supreme Court and the Court of Appeals have also taken steps to make sure that problems facing children are given quick attention. Appeals involving children are now moved to the front of the line. In general, one of these appeals only takes about five months to complete, about half the time required just two years ago.

XI. MINORITIES, WOMEN & PEOPLE OF LIMITED MEANS

The Supreme Court during the past ten years has worked to put minorities and women into positions of responsibility. It has done so with staff positions within the Supreme Court as well as with the appointments it makes to various Supreme Court boards and commissions. When we appoint special judges and hearing officers, we try to make sure that the people in those positions reflect the makeup of our community. The Court has also been gratified to see increases in the number of women on the bench. In 1985, there were just eighteen women judges. But, by 1990 that number had increased to thirty-two. A few of these first came to judicial office by Supreme Court appointment. Still, more work needs to be done. The number of African-American judges is still far too low. In the hopes of rectifying this situation, the Supreme Court, during the last legislative session, advocated the creation of an Indiana version of the Conference for Legal Education Opportunities (CLEO). We hope that this will enable many more people from limited economic backgrounds to enter the practice of law.

XII. LOOKING TO THE FUTURE

Most of what I have written here is retrospective, and I do not mean to suggest that we have by any measure "finished" the work that needs doing on Indiana's system of justice. There are hosts of important reforms that will fill our agenda for

years to come. If anything, this decade of change has seemed to generate interest and support for addressing our problems and opportunities more rapidly. This account of our collective record over the last decade suggests a legal community committed to sensible and substantial change. The bench and bar have every reason to be proud of this record and every reason to be confident as we tackle new challenges.

