

# Health Care Law: A Survey of Recent Developments

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## INTRODUCTION

During the 1990 survey period, several judicial and legislative developments significantly affected health care providers within the state. Judicial opinions addressed a number of issues related to health care entities' liability for lack of informed consent, premises liability, vicarious liability for employees' criminal acts, and breach of contract. Judicial opinions affecting the practice of medicine involved physicians' scope of practice, physician-patient privilege, and exhaustion of administrative remedies as a precondition to obtaining reimbursement. The 1990 Indiana General Assembly enacted statutory amendments affecting access to mental health records and health care provider health protection measures. This survey Article will examine recent court decisions and discuss significant developments affecting health care.

### I. JUDICIAL OPINIONS

#### A. *Hospital Liability*

1. *Hospital Liability Related to Informed Consent.*—*Payne v. Marion General Hospital*<sup>1</sup> is a case of first impression in Indiana in which the plaintiff, the estate of Cloyd Payne (Payne), sought to hold the attending physician and the hospital liable for issuing a "No Code" order with regard to the patient. The plaintiff's principal contention was that ordering a "No Code" status for the patient was inappropriate without first obtaining the patient's informed consent.

Payne, a sixty-five-year old man suffering from alcoholism and related complications, allowed his condition to deteriorate to a point requiring hospitalization. On June 6, 1983, he was admitted to the hospital with a diagnosis of malnutrition and uremia. His condition worsened. On June 11, Payne became febrile and his respirations became rapid and labored. Even so, Payne remained awake and alert at times.

On June 11, nurses contacted Payne's sister and described Payne's condition. After Payne's sister arrived at the hospital and observed her

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1. 549 N.E.2d 1043 (Ind. Ct. App. 1990).

brother, she stated that she did not want Payne resuscitated. A nurse contacted the attending physician and informed him of Payne's condition and of his sister's request. After consulting with the nurse and talking to Payne's sister, the physician authorized the entry of a "No Code" order on Payne's medical chart which designated that no efforts were to be made to give Payne cardiopulmonary resuscitation in the event that Payne began to expire. The order was placed in the medical chart according to hospital policy. The hospital continued to give Payne palliative and supportive care. Although Payne's condition continued to worsen, he remained conscious and capable of communicating with the nurses until moments before his death. On June 12, 1983, Payne died and no cardiopulmonary resuscitation was attempted.

Subsequently, the attending physician sued Payne's estate for his fees. The estate counterclaimed, alleging that the physician committed malpractice when he issued the "No Code," and that the hospital was negligent for failing to provide proper procedural safeguards when the physician issued the "No Code" order. The trial court granted summary judgment in favor of the hospital, the physician, and his clinic. The estate appealed.<sup>2</sup>

In response to the estate's claims that the hospital did not have written policies concerning the issuance of "No Code" orders and that it failed to ensure that the doctor obtained Payne's informed consent before issuing the "No Code," the court found that the estate presented no evidence of policies used by other hospitals nor made a cogent argument as to how the hospital's policies concerning "No Code" orders were deficient.<sup>3</sup> The court continued by saying that in order to establish that the hospital fell below the standard of care in its treatment of Payne, the estate must overcome the opinion of the medical review panel. The panel determined that the hospital was not negligent because the estate failed to present evidence specifying how the hospital's actions fell below the requisite standard of care.<sup>4</sup> Although the estate had presented evidence that the hospital had no written policy concerning "No Code" orders, it failed to demonstrate that other hospitals used written policies or that the absence of a written policy was relevant, and thereby failed to establish a measurable standard of care. Therefore, with regard to the hospital, the court held that summary judgment was appropriate since no evidence existed in the record from which a jury could reasonably conclude that the hospital failed to meet its standard of care.<sup>5</sup>

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2. *Id.* at 1045.

3. *Id.* at 1051.

4. *Id.*

5. *Id.*

With regard to the estate's claim against the physician, the court found that material issues of fact existed concerning whether Payne was incompetent and terminally ill so as to permit his attending physician, without first obtaining his informed consent, to issue a "No Code" order.<sup>6</sup> The estate's evidence indicated that Payne was competent at the time the "No Code" was ordered, and that the physician failed to obtain Payne's informed consent before he issued the "No Code" order. The estate also challenged the physician's determination that Payne was terminally ill, pointing to evidence indicating that the physician had treated Payne for precisely the same conditions approximately one year earlier. The court found that since Payne had previously survived the same condition, whether Payne was terminally ill could not be resolved by reference to undisputed facts.<sup>7</sup> Therefore, the court held that these material issues of fact precluded summary judgment for the physician.<sup>8</sup>

The decision in *Payne* does not depart from the long-established principal that if a patient is competent, he must make the decisions regarding his care and treatment. The court also intimated that had the plaintiff presented evidence regarding the use of written policies and the relationship of such policies to the issues in the case, the hospital might have been liable.<sup>9</sup>

2. *Hospital Liability Related to Premises Liability*.—Two cases decided in Indiana during this survey period emphasize that Indiana's Medical Malpractice Act (Act)<sup>10</sup> is not so broad as to cover every patient claim. As a matter of law, the Indiana Court of Appeals has held that the Act does not extend to cases of ordinary negligence or premises liability.<sup>11</sup> A complaint must allege a "failure of appropriate care" and relate to a scheme of health care in order to fall within the Act.<sup>12</sup> Claims supporting allegations of ordinary negligence, therefore, are not subject to medical review panel determinations.

In *Methodist Hospital of Indiana, Inc. v. Ray*,<sup>13</sup> a patient brought an action against the hospital alleging that during his hospitalization for a kidney stone removal, the hospital negligently permitted its premises to become infected with the deadly Legionella Pneumonia virus. The dispositive issue in the case was whether Ray's complaint sounded in

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6. *Id.* at 1050.

7. *Id.*

8. *Id.*

9. *Id.*

10. IND. CODE ANN. § 16-9.5-1-1 to -9-10 (West 1974).

11. See *Methodist Hospital of Indiana, Inc. v. Ray*, 551 N.E.2d 463 (Ind. Ct. App. 1990).

12. *Id.*

13. *Id.*

ordinary negligence for premises liability or whether it asserted a failure to provide the type of care that would bring the claim within the Act, thereby requiring dismissal for lack of subject matter jurisdiction. The court found that the complaint did not allege "failure of appropriate care," and that the allegations did not relate to any type of health care.<sup>14</sup> Rather, it alleged negligent maintenance of the premises unrelated on its face to any scheme of health care.<sup>15</sup> Accordingly, the Court of Appeals affirmed the trial court's denial of the hospital's motion to dismiss on the basis that the plaintiff's case first should have been submitted to a medical review panel pursuant to the Act.<sup>16</sup>

The Court of Appeals again considered this issue in *Harts v. Caylor-Nickel Hospital, Inc.*,<sup>17</sup> when a patient brought a claim against the hospital based upon ordinary negligence for an injury sustained when he fell out of bed. In *Harts*, the patient was admitted to the hospital for upper gastrointestinal distress. One day, as Harts attempted to turn himself, he reached for the bed rail but the railing was not placed in an upright position. As a result, Harts fell from the bed and broke his hip.

The jury returned a verdict for Harts, but the trial judge set aside the jury's verdict and entered an order providing in part that the court lacked jurisdiction to proceed because the plaintiff had not followed the Act's required procedure.<sup>18</sup> The defendant hospital contended that the Act mandates that the plaintiff submit a proposed complaint to the Insurance Commissioner for a review and opinion from the Medical Review Panel prior to filing a lawsuit.<sup>19</sup> The plaintiff contended that the raising and lowering of bed rails is merely a ministerial function that can be performed by any individual and consequently fell outside the purview of the Act and squarely within premises liability.<sup>20</sup> Therefore, the plaintiff proceeded under the theory of premises liability and brought suit directly.

The Court of Appeals found that the Act is not sufficiently broad as to require that every patient claim be brought under it, and concluded further that Harts's complaint clearly supported an allegation of ordinary negligence.<sup>21</sup> The court was persuaded that Harts did not allege any breach of duty directly associated with medical negligence that was

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14. *Id.* at 466.

15. *Id.*

16. *Id.*

17. 553 N.E.2d 874 (Ind. Ct. App. 1990).

18. *Id.*

19. *Id.* at 876.

20. *Id.* at 879.

21. *Id.* at 878-79.

integral to rendering medical treatment and which would subject his claim to the Act's provisions. Because the court found that Harts's claim was not subject to medical panel review, the court held that the trial court erred in setting aside the jury's verdict and in granting the hospital's motion for judgment on the evidence.<sup>22</sup> The court reversed the judgment with instructions that the jury's verdict be reinstated.<sup>23</sup>

Judge Sullivan, dissenting in *Harts*, argued that the court in *Ray* stated somewhat broadly that the manner in which the issue is framed is crucial, and that if the complaint sounds in ordinary negligence for premises liability, rather than for failure to provide health care, it is outside the scope of the Act.<sup>24</sup> In analyzing *Harts*, Judge Sullivan stated that the majority focused upon the aspect of "ordinary negligence" involved with the hospital personnel's failure to properly secure a bed-rail.<sup>25</sup> He noted that the majority seemed to hold that a claim does not fall within the coverage of the Act unless the breach of duty is "directly associated with . . . medical negligence," and that the term "health care" should not be so narrowly construed.<sup>26</sup> Bedrails, suggested Judge Sullivan, are features that exist for the facilitation of care and treatment and as a protective mechanism for the patient. Thus, they are integral parts of medical care.<sup>27</sup> Judge Sullivan considered the allegations of negligence concerning the positioning of the bedrails to be within the purview of the Act.<sup>28</sup>

These cases are significant because the court has found that the Act does not extend to cases of ordinary negligence or premises liability even if the allegations relate to acts or omissions of a health care provider with respect to a patient. Although the hospital in *Ray* argued that the court's decision deviated from a "consistent line of reasoning,"<sup>29</sup> the court distinguished several previous cases. The *Harts* court, also citing earlier decisions, stated that portions of the Act "are ambiguous as to whether a claim for premises liability by a patient is within the scope of the Act."<sup>30</sup> The Act defines malpractice as "any tort or breach of

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22. *Id.* at 879.

23. *Id.*

24. *Id.* at 880.

25. *Id.*

26. *Id.*

27. *Id.* at 881.

28. *Id.*

29. *Ray*, 551 N.E.2d at 466 (citing *Winona Memorial Foundation of Indianapolis v. Lomax*, 465 N.E.2d 731 (Ind. Ct. App. 1984) and *Methodist Hospital v. Rioux*, 438 N.E.2d 315 (Ind. Ct. App. 1982)) (court distinguished two "slip and fall" cases finding that if a complaint sounds in ordinary negligence it does not fall within the purview of the Act).

30. *Harts*, 553 N.E.2d at 877. The court noted that court in *Ogle v. St. John's*

contract based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient."<sup>31</sup> The Act also defines a tort as "any legal wrong, breach of duty, or negligent or unlawful act or omission proximately causing injury or damage to another."<sup>32</sup> The *Harts* court cited Judge Miller's explanation of the difference between "health care" and "maintenance of safe premises," which concluded that

the conditions that were the impetus for the legislature's enactment of the Medical Malpractice Act had nothing to do with the sort of liability any health care provider — whether a hospital or a private practitioner — risks when a patient, or anyone else, is injured by negligent maintenance of the provider's business premises.<sup>33</sup>

3. *Health Care Institutional Liability for Acts of Employees.*—The Indiana Supreme Court, in *Stropes v. Heritage House Childrens Center*,<sup>34</sup> held that a health care entity may be vicariously liable for the acts of its employees under the common carrier exception to the respondeat superior doctrine.<sup>35</sup> The court found that the Center, which cared for mentally retarded children, assumed a nondelegatable duty to provide protection and care for residents within its charge.<sup>36</sup>

David Stropes was a severely mentally retarded fourteen-year old with the mental capacity of a five-month old infant, who was placed in the Center as a ward of the Marion County Welfare Department for his maintenance, security, and well-being. A male nurse's aide employed by the Center was expected to feed, bathe, and change the bedding and clothing of the residents, including David. At the time in question, the

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Hickey Memorial Hospital, 473 N.E.2d 1055 (Ind. Ct. App. 1985), the court correctly determined that a psychiatric patient in the defendant's hospital was subject to the provisions of the Act when she was beaten and raped by another patient. The Act applies because the provision of suitable confinement is an act of medical care the Indiana Legislature expressly recognized as it drafted the health care definition. *Harts*, 553 N.E.2d at 878. Likewise, the court in *Winona Memorial Foundation of Indianapolis v. Lomax* correctly concluded that the plaintiff's claim was exempt from the Act "when it established that Lomax, a patient at the hospital, tripped and fell on a protruding floor board at a time when she was not under care or treatment of the medical staff. 465 N.E.2d 731 (Ind. Ct. App. 1984).

31. *Harts*, 553 N.E.2d 877 (quoting IND. CODE § 16-9.5-1-1(h) (1989)).

32. *Id.* at 878 (quoting IND. CODE § 16-9.5-1-1(g) (1989)).

33. *Id.* (quoting Judge Miller writing for a unanimous court in *Lomax*, 465 N.E.2d at 739).

34. 547 N.E.2d 244 (Ind. 1989).

35. *Id.*

36. *Id.* at 254.

nurse's aide entered David's room to perform a bed and clothing change. After the aide stripped off the sheets, he allegedly got into bed with David and performed oral and anal sex upon him. This incident was seen and reported by another employee. The aide was charged with and pleaded guilty to criminal deviate conduct and child molestation.<sup>37</sup>

David, through his representatives, filed a complaint against the Center and the nurse's aide seeking compensatory and punitive damages based in part upon a claim that the Center, as the aide's employer, was responsible for the acts committed by its employee while the employee was on duty. The Center moved for summary judgment, and the trial court granted the motion holding as a matter of law that the act of committing a sexual assault was outside the scope of the aide's employment and, as a result, the plaintiff could not recover against the Center based upon a theory of respondeat superior.<sup>38</sup> David amended his complaint and sought recovery under a theory of liability that would hold the Center responsible regardless of whether the acts were within the scope of employment.<sup>39</sup> David's motion to correct errors was denied and an appeal ensued. The Indiana Court of Appeals affirmed the decision of the trial court. David petitioned the Indiana Supreme Court, which granted transfer.<sup>40</sup>

The Indiana Supreme Court held that the respondeat superior issue would have to be submitted to a jury, and that the trial court erred in concluding as a matter of law that the acts of the aide were outside the scope of his employment. The Indiana Supreme Court found that although no obligation would otherwise exist, the theory of respondeat superior could lead to an employer's liability for the wrongful acts of its employee that were committed within the scope of employment.<sup>41</sup> "[A]n employee's wrongful act may still fall within the scope of his employment, if his purpose was, to an appreciable extent, to further his employer's business, even if the act was predominately motivated by an intention to benefit the employee himself."<sup>42</sup>

The court cited several Indiana cases holding employers liable for criminal acts of their employees on the theory that the criminal acts originated in activities so closely associated with the employment relationship as to fall within its scope despite the fact that the crimes were committed to benefit the employee.<sup>43</sup> Relying on these prior decisions,

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37. *Id.* at 245.

38. *Id.*

39. *Id.* at 246.

40. *Id.*

41. *Id.* at 247.

42. *Id.*

43. *Id.* at 247-49. The court cited and discussed *Gomez v. Adams*, 462 N.E.2d

the court found that the case should have gone to trial for a determination of whether the employee acted to further "to an appreciable extent, . . . his master's business."<sup>44</sup> Additionally, the court noted that the fact that the complained-of act was a sexual assault was not per se determinative of whether it fell within the scope of the employment.<sup>45</sup> "The nature of the wrongful act should be a consideration in the assessment of whether and to what extent the [aide's] acts fell within the scope of his employment such that [the Center as the employer] should be held accountable."<sup>46</sup>

The Indiana Supreme Court also considered the propriety of the trial court's dismissal of David's amended complaint in which David argued that by virtue of the nature of the defendant's business, the Center had assumed a nondelegable duty similar to that imposed on common carriers to care for and protect persons entrusted to them.<sup>47</sup> Thus, the Center may have subjected itself to the extraordinary standard of care that renders common carriers liable for injuries inflicted on passengers by employees regardless of whether those acts fall within the scope of employment. The court concluded that when the Center accepted David as a resident, it was fully cognizant of the disabilities and infirmities he suffered that rendered him unable to care for himself and which, in fact, formed the basis of their relationship.<sup>48</sup> The entire responsibility for David would be upon the Center, and the performance of necessary caregiving tasks would be delegated to employees.<sup>49</sup> The degree of David's lack of autonomy and his total dependence on the Center for care and protection, as well as the degree of the Center's control over David, led the court to conclude that the Center assumed a nondelegable duty to provide protection and care so as to fall within the common carrier exception.<sup>50</sup>

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212 (Ind. Ct. App. 1984) in which a security officer employed by a private security agency arrested Adams and confiscated his personal identification. Although officers were not authorized to retain items for their personal use, the officer kept Adams's confiscated identification past the end of his shift and later used it to cash a check. The guard forged Adams's name. The court held that the security agency did not escape liability for the conversion because sufficient evidence was presented to allow the jury to reasonably conclude that the officer was within the scope of his employment when he converted the check-cashing card for his own use. *Id.* at 217. The *Stropes* court found that although the judgment in *Gomez* was reversed, it was not because respondeat superior did not apply to these circumstances. 547 N.E.2d at 247-49.

44. *Id.* (quoting *Stropes*, 547 N.E.2d at 249).

45. *Id.*

46. *Id.*

47. *Id.* at 253-54.

48. *Id.*

49. *Id.*

50. *Id.* at 254.

In a vigorous dissenting opinion, Judge Givan noted that the majority opinion established a major difference in Indiana law that would virtually force every health care and custodial institution to be an insurer of the safety for persons under their care and control.<sup>51</sup> The ramifications of this case suggest that a higher standard of care for the protection and safety of patients may be imposed on health care entities. Prior to this decision, health care entities owed a duty to exercise reasonable care in protecting patients.<sup>52</sup> The common carrier exception imposes a much higher standard of care, comparable to that of a guarantor.

Based upon this holding, health care entities may be exposed to greater liability than in the past, particularly if they have patients who are especially vulnerable and dependant upon the facility for total care and protection.

4. *Expert Testimony Required to Establish Hospital Standard of Care.*—In *Kopec v. Memorial Hospital of South Bend, Inc.*,<sup>53</sup> the court held that a physician's affidavit was sufficient to provide expert testimony necessary to rebut a medical review panel's opinion that the defendant hospital's conduct met an appropriate standard of care.<sup>54</sup> In *Kopec*, the plaintiff filed a proposed wrongful death complaint naming, among others, the hospital. The medical review panel concluded that the evidence presented did not support the conclusion that the hospital failed to meet the applicable standard of care.<sup>55</sup> *Kopec* filed suit after the panel's decision was issued, and the hospital and doctor moved for summary judgment utilizing the opinion of the review panel as expert testimony that they were not negligent. Two days before the hearing on the motion for summary judgment, *Kopec* filed a memorandum in opposition supported by an affidavit from an expert witness, one Dr. Raff. The trial court denied the defendant doctor's motions, and granted the hospital's.<sup>56</sup>

*Kopec* appealed the summary judgment motion entered in favor of the hospital, contending that the trial court incorrectly granted the hospital's motion because *Kopec* demonstrated through Dr. Raff's affidavit that genuine issues of material fact existed as to whether the hospital's conduct fell below the appropriate standard of care, thus breaching its duty to the decedent, the late husband of the plaintiff. The court disagreed with the hospital's assertion that *Kopec* failed to

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51. *Id.* at 255 (Given, J., dissenting).

52. *Id.*

53. 557 N.E.2d 1367 (Ind. Ct. App. 1990).

54. *Id.* at 1370.

55. *Id.* at 1368.

56. *Id.*

establish the existence of a genuine issue of fact concerning any of the basic elements of her claim.<sup>57</sup>

The court instead found that the evidence clearly established that the hospital owed a duty to the decedent and that the hospital's duty arose from the decedent's status as a patient.<sup>58</sup> The court found that Dr. Raff's affidavit provided the necessary expert medical opinion concerning breach of duty and causation to demonstrate the existence of an issue for trial in the case.<sup>59</sup> While the court found that the affidavit lacked certain breadth because it failed to recite more factual data, Dr. Raff's affidavit did show that he had sufficient training and experience to qualify as an expert and that he was familiar with the standard of care that constituted the average level of skill practiced in the locality in question.<sup>60</sup> Because Dr. Raff established that he was familiar with the standard of care practiced in the locality, the court found that he was qualified to give his opinion that the hospital breached that standard of care.<sup>61</sup> Dr. Raff's affidavit asserted that the hospital failed to appropriately monitor the patient's condition while he was receiving antibiotic therapy and that such failure proximately caused the patient's death.<sup>62</sup>

Although the court emphasized that the detailing of factual circumstances would affect the weight and credibility to be given to expert statements, the court found that Dr. Raff's conclusory opinion was sufficient and would be admissible.<sup>63</sup> Because the hospital did not challenge Dr. Raff's qualifications as an expert, the court determined that the affidavit met the minimum standards for admissibility.<sup>64</sup> The motion for summary judgment in favor of the hospital was reversed.<sup>65</sup>

5. *Hospital Liability for Breach of Contract.*—Dr. Bain, the president of a corporation that supplied radiology services to a hospital, contested the grant of summary judgment in favor of the hospital in *Bain v. Board of Trustees of Starke Memorial Hospital*.<sup>66</sup> The court, agreeing with Bain, found that under the law of contracts and agency, genuine issues of material fact existed and thereby precluded summary judgment.<sup>67</sup>

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57. *Id.*

58. *Id.*

59. *Id.* at 1369.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 1370.

65. *Id.*

66. 550 N.E.2d 106 (Ind. Ct. App. 1990).

67. *Id.* at 110-11.

In November 1972, Bain, then president and shareholder of X-Ray & Nuclear Physicians, Inc. (X-Ray), first contracted with the hospital to provide radiology services. The contract was signed only by Bain and the hospital's executive director. Other contracts negotiated between 1975 and 1985 were signed only by Bain and the acting executive director of the hospital. In 1982, a three-year service contract was executed by Bain and the executive director, Spencer Grover.

In August, Bain received a "generic" proposed contract from Grover. During a September 1985 meeting, the hospital finance committee altered this contract and authorized Grover to submit it to Bain as a "final offer," which Grover did along with an explanatory letter. Although the letter did not indicate that further board action was required, Grover's affidavit stated that he told Bain that board approval would be required and that the contract provided a signature line for the hospital's chairman of the board. In his deposition, Bain stated that Grover did not inform him that board approval was required.

On September 13, 1985, Bain and Grover signed two copies of the contract, dating them September 24, 1985. Grover kept both signature pages. On September 24, 1985, the board voted not to ratify the contract, although the minutes did not specifically reflect that the contract was not ratified.

On October 30, 1986, Bain filed a complaint against the Board of Trustees of Starke Memorial Hospital and certain individual members of the board alleging, among other things, breach of contract. Without entering findings of fact, the trial court granted summary judgment in favor of the hospital.<sup>68</sup>

Bain appealed the trial court's decision, contending that summary judgment was improper because genuine issues of fact existed concerning the parties' intent, including whether the executive director had authority to bind the hospital, whether the finance committee had authority to extend an offer to Bain, and finally, whether the hospital executed the contract. The hospital argued that the summary judgment was proper, asserting that there was no execution by the hospital and no delivery of the contract to Bain.<sup>69</sup>

The court acknowledged that the question in this case concerned not actual authority, but apparent authority with regard to who had authority to contractually bind the hospital.<sup>70</sup> The court then concluded that Bain's belief in the apparent authority of Grover and the finance

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68. *Id.* at 108.

69. *Id.*

70. *Id.*

committee would not be unjustified.<sup>71</sup> Rather, the court found several facts that indicated that Bain could have reasonably believed these persons had authority to act on behalf of the board and the hospital.<sup>72</sup> The court seemed persuaded by the fact that previous contracts were signed only by Bain and the executive director and were honored by the hospital and the board.<sup>73</sup> The court dismissed the hospital's argument that Bain should have known that subsequent Board ratification was required because Bain had executed other contracts.<sup>74</sup> The court held that genuine issues of material fact existed as to whether Bain could have reasonably believed that the hospital's executive director had authority to execute a contract on behalf of the finance committee and bind the hospital, so as to preclude summary judgment on the issue of whether the contract existed pursuant to the doctrine of apparent authority.<sup>75</sup>

Regarding the question of whether the document in question could be an enforceable contract, the court determined that the facts allowed for the inference that proper formation of a contract had occurred.<sup>76</sup> The court noted that the facts did not preclude the possibility that the hospital extended an offer to Bain, who accepted it, thus forming a contract.<sup>77</sup> The court further stated that if the hospital had extended a "final offer" to Bain and Bain had accepted it, a contract would have come into existence at that time, and reacceptance and a second delivery by the hospital would be unnecessary.<sup>78</sup> Therefore, with regard to the question of whether a contract was formed, the court held that genuine issues of material fact existed as to whether the hospital extended the offer to Bain so as to preclude summary judgment.<sup>79</sup>

This case is significant because managers of various hospital departments are often involved in contract negotiations and communicate directly with parties who seek agreements. These parties may not be aware of which persons have sufficient authority to bind the hospital to contractual terms. Persons granted authority to contract need to be identified and the contract process should be established and clearly communicated to employees as well as outsiders. Otherwise, a contract based upon past dealings and the doctrine of apparent authority may be the unintended result.

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71. *Id.*

72. *Id.* at 109.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 110.

77. *Id.*

78. *Id.* at 111.

79. *Id.*

### B. Medical Liability Issues

1. *Scope of Practice—Medical Specialty.*—In *Dove by Dove v. Ruff*,<sup>80</sup> Nathan Dove, a ten-year old patient of Dr. Ruff, suffered a severe anaphylactic reaction which caused serious and irreversible brain damage, after receiving an injection of a drug prepared by Dr. Ruff. Dr. Ruff, an allergist, sold Nathan's parents injectable medication that he prepared from a combination of solutions from pharmaceutical companies. The medication was delivered to the parents in a multidose vial and was to be administered by a licensed practical nurse designated by the parents.

After Nathan's adverse reaction, his parents filed "an action against Dr. Ruff alleging products liability, strict liability in tort, and breach of warranty on a theory that Dr. Ruff compounded, manufactured, dispensed and sold a drug product that was in a defective condition and unreasonably dangerous."<sup>81</sup> Dr. Ruff moved for, and the trial court granted, summary judgment on the ground that the plaintiff's claims were covered under the Indiana Medical Malpractice Act (Act).<sup>82</sup> The Indiana Court of Appeals affirmed, finding that Dr. Ruff was acting within the scope of practice of an allergist when he compounded and dispensed the medication, and upheld the trial court's finding that any negligence in the performance of those functions properly fell within the scope and purpose of the Act.<sup>83</sup>

The Doves argued that the trial court erred in entering summary judgment because torts arising from compounding and dispensing of drugs are outside the practice of medicine and therefore are not covered by the Act. "The Doves contended that since compounding and dispensing of drugs is not specifically authorized by the descriptive terminology of the practice of medicine, it necessarily constitutes the unauthorized practice of pharmacy if undertaken by a physician."<sup>84</sup>

The court of appeals agreed with Dr. Ruff, and stated that statutory definitions such as the practice of medicine are descriptive, but not all encompassing.<sup>85</sup> Some overlap in responsibilities exists. The court cited the phrase in Indiana Code section 25-22.5-1-1.1(a)(1)(B) in which the practice of medicine is defined in part to mean "holding oneself out to the public as being engaged in the suggestion, recommendation or prescription or administration of any form of treatment, without limi-

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80. 558 N.E.2d 836 (Ind. Ct. App. 1990).

81. *Id.* at 837.

82. *Id.*

83. *Id.* at 841.

84. *Id.* at 838.

85. *Id.*

tation.”<sup>86</sup> The words “without limitation” suggested to the court that the scope of a physician’s responsibilities is not limited to those responsibilities specifically set out in the statute.<sup>87</sup> Additionally, the court looked to other statutory provisions, including the Indiana Legend Drug Act<sup>88</sup> which indicated that the legislature considered “that a physician might also engage in some activities which might be considered [to be] ‘manufacturing’ under most circumstances, but are not considered to be manufacturing . . . when a physician performs the acts while properly engaged in the practice of medicine.”<sup>89</sup>

The court considered whether the medication was a product destined for inclusion within Indiana’s Product Liability Act.<sup>90</sup> The court concluded that the incidental furnishing of supplies “during the course of medical treatment does not create a buyer-seller relationship between a patient and his physician which could give rise to an implied or express warranty.”<sup>91</sup> The court dismissed the theory of strict liability by determining that the seller of the product must be engaged in the business of selling that item for there to be any liability. Here, the physician treating and diagnosing a patient was not generally selling a product, but selling a service. In the court’s judgment, when Dr. Ruff mixed and provided a medication for Nathan, he was performing an act that was authorized under the statutory definition of the practice of medicine.<sup>92</sup> Thus, the sale of the medication was incidental to the delivery of medical services.<sup>93</sup>

The court also dismissed the notion that this case involved premises liability.<sup>94</sup> The court found that Dr. Ruff was acting within the scope of his practice as an allergist, and therefore his actions in administering the medication, including the preparation of the mixture and any failure to give warnings of side effects, fell within the scope of the Act.<sup>95</sup>

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86. *Id.* (emphasis in original).

87. *Id.*

88. IND. CODE ANN. § 16-6-8-1 (West 1989).

89. *Dove*, 558 N.E.2d at 838.

90. IND. CODE ANN. § 33-1-1.5-1 (West Supp. 1990).

91. *Dove*, 338 N.E.2d at 837.

92. *Id.* at 840.

93. *Id.*

94. *Id.*

95. *Id.* at 841. The majority noted that Dr. Ruff’s malpractice insurance covered the combining of medications to be used in the treatment of his patients. While recognizing that it was not bound by what the insurance company thought the law was, the court found that this provided some indication that the medical profession and the insurance industry regarded Dr. Ruff’s acts as within the practice of his medical specialty. *Id.* Judge Sullivan, while concurring in the majority opinion, remarked that insurance coverage was wholly irrelevant to the issue before the court and did not bear upon whether the conduct constituted the practice of medicine within the contemplation of the Act. *Id.* (Sullivan, J., concurring).

2. *Physician's Standard of Care and Use of Admissions.*—In *Farrar v. Nelson*,<sup>96</sup> the court held that it was for the jury to determine whether medical malpractice was committed, and so it must be permitted to consider all relevant evidence.<sup>97</sup> At issue was whether the opinion of the medical review panel should be admissible.<sup>98</sup> The court held that the trial court did not err in admitting the opinion of the medical review panel.<sup>99</sup>

The plaintiff, Farrar, was a patient of Dr. Nelson from 1971 to 1985. While being treated for a thyroid condition, he complained to Dr. Nelson of impotence, testicular atrophy, and loss of pubic and other hair. In 1985, he was admitted to the hospital for hypopituitarism.

The plaintiff filed a medical malpractice claim alleging that the defendant was negligent in his care. The medical review panel found in favor of the defendant. The jury found in favor of the defendant at trial. Appellants appealed from the adverse judgment, complaining that the medical review panel's opinion, which found that the evidence failed to support the conclusion that the defendant doctor did not meet the applicable standard of care, should not have been admitted.<sup>100</sup> Both parties conceded that any portion of the expert opinion of the medical review panel is admissible as evidence in a subsequent action. The appellants objected to the admission of the panel's opinion, claiming that it directly contradicted facts that were conclusively established by the defendant in his response to a request for admission.

Prior to admission of the medical review panel's opinion, the court admitted the defendant's responses to requests for admissions without objection. These admissions included statements by Dr. Nelson that he had a legal duty to consider the differential diagnoses that may have caused the patient's illness and that he should have considered, as one of the alternative diagnoses, a pituitary problem. Notably, Dr. Nelson's admissions also indicated that a reasonable standard of care did not mandate this alternative diagnosis.<sup>101</sup> Dr. Nelson denied that he should have considered, as one of the alternative causes for the plaintiff's impotence and related symptoms, a condition or malady that was affecting the pituitary gland.<sup>102</sup>

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96. 551 N.E.2d 862 (Ind. Ct. App. 1990) (court erroneously refers to the Medical Review Board rather than the Medical Review Panel as defined in the Indiana Malpractice Act. IND. CODE § 16-9.5-1 (1990).

97. 551 N.E.2d at 865.

98. *Id.*

99. *Id.*

100. *Id.* at 864.

101. *Id.*

102. *Id.* at 865.

The court stated that "a physician is required only to exercise reasonable and ordinary skill in administering reasonable and ordinary care."<sup>103</sup> Indiana recognizes that a physician's mistaken diagnosis does not constitute negligence when the physician used reasonable skill and care in formulating a diagnosis.<sup>104</sup> Mere proof that a diagnosis was wrong will not support a verdict for damages.<sup>105</sup>

The court determined that Dr. Nelson's admissions did not "irrefutably lead to a finding of medical malpractice."<sup>106</sup> Instead, the court concluded that Dr. Nelson's admissions were "at best, tantamount to an admission of a misdiagnosis" and "a misdiagnosis does not necessarily constitute medical malpractice."<sup>107</sup> Thus, the medical review panel's opinion in favor of the physician was admissible over plaintiff's objections.<sup>108</sup>

3. *Physician-Patient Privilege*.—The court of appeals in *State v. Robbins*<sup>109</sup> held that the Indiana statute specifying circumstances that permit the state to require a physician to obtain blood, urine, or a bodily substance sample from the subject of an investigation was a limit on the defendant's right to invoke the physician-patient privilege.<sup>110</sup> In *Robbins*, the court reversed the lower court's order suppressing the results of a serum blood alcohol test performed on the defendant following a one-car accident.<sup>111</sup> The defendant was charged with offenses related to the operation of a motor vehicle while intoxicated.<sup>112</sup>

Indiana Code section 9-11-4-6(g) permits the state to require a reluctant physician to draw a blood sample when certain conditions are met.<sup>113</sup> "Prior to the enactment of subsection (g), a physician or a member of the hospital staff could avoid turning evidence of intoxication over to the state by refusing to draw a blood sample or conduct a chemical test."<sup>114</sup> The statute, as amended, still permits a physician to refuse to perform a chemical test, even if subsection (g) is satisfied because subsection (f) states that "[n]othing in this section requires a physician or a person under the direction of a physician to perform a

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103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. 549 N.E.2d 1107 (Ind. Ct. App. 1990).

110. *Id.* at 1109-10.

111. *Id.* at 1110.

112. *Id.*

113. IND. CODE § 9-11-4-6(g) (1988).

114. *Robbins*, 549 N.E.2d at 1110.

chemical test."<sup>115</sup> Once the test is performed, however, subsection (a) requires that the test results be turned over to the state.<sup>116</sup>

In *Robbins*, the court found no evidence that the attending physician was reluctant to draw the blood sample; therefore, the court held that subsection (g) did not apply.<sup>117</sup> Because the blood alcohol test was performed, subsection (a) required that the results be turned over to the state.<sup>118</sup>

The clear import of this statute is to limit the defendant's right to invoke the physician-patient privilege to prevent disclosure of blood alcohol results that might otherwise be construed as privileged information. This statute narrows the scope of the physician-patient privilege, requiring a physician to divulge the results of a blood alcohol test when requested to do so by the state.

4. *Exhaustion of Administrative Remedies Required.*—The Indiana Court of Appeals has determined that a physician is required to exhaust administrative remedies by appealing to the Indiana Department of Public Welfare in order to obtain reimbursement under the Hospital Care for the Indigent Act.<sup>119</sup> In *Vandiver, M.D. v. Marion County*,<sup>120</sup> Dr. Vandiver brought an action against the Marion County Department of Public Welfare and county officials to obtain reimbursement under the Hospital Care for the Indigent Act. The circuit court entered summary judgment in favor of the defendants. The department's motion for summary judgment was premised in part upon the contention that Dr. Vandiver failed to exhaust administrative remedies.<sup>121</sup> The physician appealed.

In his complaint, Dr. Vandiver alleged that he was a member of a class of Marion County physicians entitled to compensation for medical services rendered prior to January 1, 1987 to certain indigent persons. Dr. Vandiver provided emergency medical treatment in a qualified hospital. Application was made for each of the patients, and the applications were investigated by the county welfare department. The department determined that the patients were eligible to receive assistance in the payment of their medical and hospital expense pursuant to Indiana's Hospital Care for the Indigent Act.<sup>122</sup> The department and county defendants refused to pay Dr. Vandiver for his services.

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115. IND. CODE § 9-11-4-6(g) (1988).

116. *Id.* § 9-11-4-6(a).

117. *Robbins*, 549 N.E.2d at 1110.

118. *Id.*

119. IND. CODE § 12-5-6-2 (1989) (repealed as amended by IND. CODE ANN. § 12-5-6-2 (West Supp. 1990)).

120. 555 N.E.2d 839 (Ind. Ct. App. 1990).

121. *Id.* at 843.

122. IND. CODE § 12-5-6-2 (1989) (repealed as amended by IND. CODE ANN. § 12-5-6-2 (West Supp. 1990)).

The court of appeals noted that Dr. Vandiver did not offer evidence that he appealed to the state welfare department for an administrative order directing the department to pay the reasonable costs of his services.<sup>123</sup> Additionally, Dr. Vandiver did not argue that under the circumstances, exhaustion of remedies was not required. Dr. Vandiver did contend that the defendants acted in bad faith and refused to pay a single provider claim according to the procedure provided by the Act.

The court of appeals found no evidence that an appeal to the state department would have been fruitless.<sup>124</sup> "To the contrary, the court indicated that Dr. Vandiver's own exhibits demonstrated that the state department interpreted the Act, before and after the 1986 amendment, to allow compensation directly to physicians for medical services rendered to an individual deemed to be eligible for Hospital Care for the Indigent benefits."<sup>125</sup>

Despite the determination that Dr. Vandiver's action was judiciable and that he had standing to request an interpretation of the Act, the court agreed with the department, and held that the trial court correctly refused to exercise jurisdiction.<sup>126</sup> Resort to the judicial process must be postponed until all administrative remedies capable of rectifying the claimed error have been pursued to finality. Indiana Code section 12-5-6-8 provides:

If any county department of public welfare . . . fails or refuses to accept responsibility for payment of medical or hospital care under this chapter; any person affected may appeal to the state department of public welfare . . . . [T]he state department of public welfare shall determine the eligibility of the person for payment of cost of medical or hospital care . . . and if found to be eligible, shall determine the responsible county and the reasonable costs of such care due the persons furnishing the care. A person aggrieved by the determination may appeal the determination under [Indiana Code section] 4-22-1.<sup>127</sup>

"Compliance with statutory requirements and an action for judicial review of an administrative adjudication [were] considered conditions precedent to the exercise of jurisdiction by a trial court."<sup>128</sup> A plaintiff who fails to avail himself of a statutory remedy is precluded from bringing an independent action for relief. The court concluded that the

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123. *Vandiver*, 555 N.E.2d at 843.

124. *Id.*

125. *Id.*

126. *Id.*

127. IND. CODE § 12-5-6-8 (1981).

128. *Vandiver*, 555 N.E.2d at 843.

record established that both the state welfare department and the county defendants were entitled to a dismissal as a matter of law because the exhaustion of administrative remedies was a prerequisite to the trial court's jurisdiction.<sup>129</sup>

*C. Miscellaneous Cases Impacting Health Law — Statutory Interpretation Related to Group Homes*

Within a six-month period, the Indiana Fourth District Court of Appeals decided two cases that presented the same issue regarding a 1988 amendment of the adult group home statute. The court in *Minder v. Martin Luther Home Foundation*<sup>130</sup> overruled the court's prior decision in *Clem v. Christole, Inc.*<sup>131</sup> holding that the 1988 amendment of a statute authorizing the location of group homes for the developmentally disabled and mentally ill in a single family residential subdivisions constituted a valid retroactive exercise of the state's police power.<sup>132</sup>

First, in *Clem*, property owners in a consolidated case, appealed judgments permitting developers to operate group homes for developmentally disabled persons in the residents' single family residential subdivision. The residents alleged that the location of group homes designed for the developmentally disabled violated subdivision restrictive covenants. While an appeal was pending, the Indiana General Assembly passed a law in 1989 which declared void as against public policy any restrictions against residential facilities for developmentally disabled or mentally ill persons.<sup>133</sup> This statute, in pertinent part, provides:

Sec. 14(a) This section applies to each restriction, reservation, condition, exception, or covenant that is created before April 1, 1988, in any subdivision plat, deed, or other instrument of, or pertaining to, the transfer, sale, lease, or use of property.

(b) A restriction, reservation, condition, exception, or covenant in a subdivision plat, deed, or other instrument of, or pertaining to, the transfer, sale, lease, or use of property that would permit the residential use of property but prohibit the use of that property as a residential facility as a residential facility for developmentally disabled or mentally ill persons:

- (1) on the ground that the residential facility is a business;
- (2) on the ground that the persons residing in the residential facility are not related; or

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129. *Id.*

130. 558 N.E.2d 833 (Ind. Ct. App. 1990).

131. 548 N.E.2d 1180 (Ind. Ct. App. 1990).

132. *Minder*, 558 N.E.2d at 834-35.

133. IND. CODE § 16-13-21-14 (West Supp. 1990).

(3) For any other reason;  
is, to the extent of the prohibition, void as against the public policy of the state.<sup>134</sup>

In light of these amendments, the court ordered the case remanded to the trial court for further consideration as a matter of judicial economy.<sup>135</sup>

The trial court vacated the former judgments and entered summary judgment for the developers, finding that the covenants were void against public policy pursuant to the statute. The subdivision residents appealed.<sup>136</sup>

The Fourth District Court of Appeals reversed the trial court's decision, and held that the statutory amendment authorizing the location of group homes for developmentally disabled and mentally ill persons in single family residential subdivisions was not a valid retroactive exercise of the state's police power.<sup>137</sup> Further, the court held that the proposed group homes violated certain subdivision covenants, and that allowing occupation to occur or continue unabated would violate the residents' fifth amendment rights to just compensation.<sup>138</sup> The court affirmed that the legislature may neither impose unnecessary restrictions upon lawful occupations nor arbitrarily interfere with private rights.<sup>139</sup> Retroactive application of laws is only allowed under limited circumstances.<sup>140</sup>

In *Minder*, subdivision residents brought an action for a declaratory judgment to prohibit, as a violation of restrictive covenants in their deeds, the presence of an adult group home in their subdivision. The trial court granted summary judgment in favor of the adult home, and the residents appealed. The appeals court sustained the trial court, thereby overruling its earlier decision in *Clem*.<sup>141</sup>

Judge Miller, the author of the court's majority opinion in *Minder*, quoted from his dissent in *Clem* in which he noted that the group homes did not violate the restrictive covenants contained in the respective deeds. He emphasized that there was no dispute that the group homes were the type of building (single family dwellings) permitted by the covenants. The uses of the group homes were residential and not the business uses prohibited by the covenants. Based on this argument, the constitutional issues raised in *Clem* were not significant, and even if they were, case

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134. *Id.*

135. *Clem*, 548 N.E.2d at 1182.

136. *Id.* at 1182-83.

137. *Id.* at 1185.

138. *Id.* at 1185-86.

139. *Id.* at 1183-84.

140. *Id.* at 1187.

141. *Minder*, 558 N.E.2d at 835.

law mandated that the retroactive provision in the statute did not violate due process and did not unconstitutionally impair the residents' contracts because it was a legitimate and narrowly drawn exercise of the police power of the state.<sup>142</sup>

The dissent in *Minder* argued that the restrictive covenants adopted when the subdivisions were created were valid and enforceable covenants limiting the areas to single family dwellings and residential purposes.<sup>143</sup> Commercial and business uses in the area were prohibited. The statute purports to declare all restrictions created prior to April 1, 1988 void to the extent that they prohibit the use of property as a residential facility for developmentally disabled or mentally ill persons.<sup>144</sup> The dissenting opinion quoted the Indiana State Constitution which expressly provides that "[n]o ex post facto law, or law impairing the obligation of contracts shall ever be passed."<sup>145</sup> Furthermore, the dissenting opinion reiterated that "the legislature may prohibit contracts that are against public policy, [but] it, nevertheless, may not impair previously legal contracts after the rights thereunder have vested."<sup>146</sup> It concluded that despite its salutary purposes, the 1989 statutory amendment violated the Indiana Constitution and therefore should not be permitted to stand.<sup>147</sup>

## II. LEGISLATIVE ENACTMENTS RELATED TO HEALTH CARE

### A. AIDS Legislation

Effective March 20, 1990, Indiana Code section 16-1-10.5-20 was amended to include the protection of health care personnel and emergency medical personnel against persons who pose a threat to their health.<sup>148</sup> The amendment allows a court to order a health officer or law enforcement officer to take a person into custody and transport the person to an appropriate emergency care or treatment facility for observation, examination, testing, diagnosis, care, treatment, and, if necessary, temporary detention when such action is necessary to guard the health and safety of a health care professional.<sup>149</sup> As amended, the statute broadens the list of situations in which a court may order a person to be taken

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142. *Minder*, 558 N.E.2d at 834.

143. *Id.* at 835.

144. IND. CODE § 16-13-21-14 (West Supp. 1990).

145. *Minder*, 558 N.E.2d at 835 (Gerrard, J., dissenting) quoting IND. CONST. art. 1 § 24.

146. *Id.* at 835 (Garrard, J., dissenting).

147. *Id.*

148. IND. CODE § 16-1-10-5-20 (West Supp. 1990).

149. *Id.*

into custody in order to determine whether the person poses a danger to the public health.<sup>150</sup>

In 1990, the Indiana General Assembly also amended Indiana Code section 16-8-7.5 by adding a new section, 6.5, that requires the State Board of Health to adopt rules providing for testing for sexually transmitted diseases prior to permitting practitioners to perform artificial insemination procedures.<sup>151</sup> This new law, which became effective July 1, 1990, directs the practitioner to perform an HIV test at least annually as long as artificial insemination procedures are continuing and not to perform artificial insemination unless the tests for the HIV antibody produce negative results. While the statute mandates that HIV testing be completed before a donation of semen may be used in artificial insemination, the statute removes the requirement for a number of bacterial and viral tests to be performed, thus bringing the statute in compliance with the American Fertility Society's guidelines.

### B. Access to Health Records

During the survey period, the Indiana legislature enacted two significant amendments affecting the access to health records statute.

1. *Access to Mental Health Records.*—The Indiana General Assembly enacted House Enrolled Act 1170 concerning access to mental health records.<sup>152</sup> This amendment, within the Access to Health Records law,<sup>153</sup> establishes a new procedure for access to mental health records effective July 1, 1990.

The amendment provides a definition of mental health and alcohol and drug abuse records that now includes "any recorded or unrecorded information concerning the diagnosis, treatment, or prognosis of a patient receiving mental health services or developmental disability training."<sup>154</sup> It delineates the procedure for access to mental health records by permitting the patient and certain individuals authorized by statute to obtain the record upon proper written request.<sup>155</sup> The statute stipulates what constitutes a proper written request and what the provider shall give the individual who makes a proper request.<sup>156</sup>

A provision in the Act has been created that permits disclosure of mental health records without first requiring a patient's consent.<sup>157</sup> A

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150. *Id.*

151. IND. CODE § 16-8-7.5 (West Supp. 1990).

152. 1990 Ind. Acts 119.

153. IND. CODE § 16-4-8 (1988).

154. *Id.* § 16-4-8-1.

155. *Id.* § 16-4-8-3.

156. *Id.* § 16-4-8-4.1.

157. *Id.* § 16-4-8-3.2.

dual hearing process has been established for persons seeking access to a patient's mental health records without the patient's consent.<sup>158</sup> This process permits the filing of a petition in court by one who has filed a lawsuit or is a party to a legal proceeding.<sup>159</sup> Importantly, a court order authorizing release of a patient's mental health records must:

- (1) [l]imit the disclosure to those parts of the patient's record that are essential to fulfill the objective of the order; (2) [l]imit disclosure to those persons whose need for the information is the basis of the order; and (3) [i]nclude other measures necessary to limit disclosure for the protection of the patient, the provider-patient privilege, and the rehabilitative process.<sup>160</sup>

If a patient's mental health records or testimony is offered or admitted in a legal proceeding, the court shall maintain the record or transcript of the testimony as a confidential court record.<sup>161</sup>

The apparent intent of this statute was to establish protection for mental health records comparable to that provided under federal law for alcohol and drug abuse records. This statute may, however, create confusion as to the extent of its application. For example, if a patient is admitted to a facility for nonmental health treatment and in the course of such treatment discloses that he or she is currently receiving mental health treatment services, and this fact is recorded in what would otherwise be considered a nonmental health record, the notation of this fact may render the health record a mental health record and require the provider to authorize its release pursuant to the mental health records provisions. The definition of mental health record, "information concerning the diagnosis, treatment or prognosis of a patient receiving mental health services," could be construed to mean that any mention of treatment for mental health services in a record converts that record within the definition of mental health record and subject to the provisions of the statute.

2. *Noncustodial Parent's Access to Child's Health Record.*—In 1990, the Indiana General Assembly also amended the access to health records law by including a provision granting noncustodial parents equal access to their children's health records effective July 1, 1990.<sup>162</sup> This provision permits equal access to records unless a court has issued an order limiting the noncustodial parent's access and the health care provider has received a copy of the court order or has actual knowledge

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158. *Id.* § 16-4-8-3.2

159. *Id.* § 16-4-8-3.2(c)(2).

160. *Id.* § 16-4-8-3.2(i).

161. *Id.* § 16-4-8-3.2(j).

162. *Id.* § 16-4-8-14.

of the court's order. Therefore, the provider is required to grant non-custodial parents the same access to their children's health records as the custodial parents so long as there is no court order or knowledge of such to the contrary and the party comports with statutory and provider requirements of written authorization, payment for copies, and related procedures. The statute also allows the provider to require the parent requesting equal access to the records to pay a fee to cover the cost of the additional expense of duplicative access.