

# BUILDING INDIANA'S LEGAL PROFESSION

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Surely one of the hallmarks of a profession is that it continually reforms the ways it seeks to achieve its core objectives in light of changing conditions. This has been one of the objectives of the Indiana Supreme Court in recent initiatives taken in cooperation with the practicing bar and the academy.

I focus here on three important reforms aimed at building the professionalism of our state's legal community. First, we have made the first organic changes in the bar admissions process since Indiana began giving a bar examination in the 1930s. Second, we have launched a nationally recognized project to expand pro bono representation at the grass roots level. Third, we have made major strides in improving the legal service afforded indigent defendants in criminal cases, especially in capital cases.

## I. BAR ADMISSIONS: LAWYERS AS PROBLEM-SOLVERS

For much of America history, it was customary for people to become lawyers without taking a bar examination or even going to law school.<sup>1</sup> In Indiana, this policy took the form of a constitutional provision that entitled any person of "good moral character" to apply to the courts for admission to the bar.<sup>2</sup> After a considerable struggle and multiple referenda, the voters deleted this provision in 1932,<sup>3</sup> and the Indiana Supreme Court began licensing lawyers who had attended law school and passed a bar examination.<sup>4</sup> Our Board of Law Examiners now gives the examination to some 720 applicants each year, passing about 600 of

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1. "In 1922, there was not one state that required attendance at law school." ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850'S TO THE 1980'S* 172 (1983). By 1987, there were only three states (Indiana, Georgia, and California) that permitted individuals to take the bar examination without graduating from a fully accredited law school. See Randall T. Shepard, *Classrooms, Clinics and Client Counseling*, 18 OHIO U.L. REV. 751 (1992). Indiana abolished this avenue of admission in 1993. See IND. ADMISSION AND DISCIPLINE RULE 13(V)(A) (amended effective Jan. 1, 1993).

2. The provision said: "Every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice." IND. CONST. art. VII § 21 (1816). It was the phrase "being a voter" that had served as the barrier to admitting women, until the Indiana Supreme Court's decision in *In re Leach*, 34 N.E. 641 (1893).

3. The validity of the amendment that deleted Article VII, section 21, was confirmed in an opinion written by Justice Walter E. Treanor. *In re Todd*, 193 N.E. 865 (Ind. 1935).

4. In 1931, the General Assembly enacted a provision giving the Indiana Supreme Court "exclusive jurisdiction to admit attorneys to practice law in all courts of the state under such rules and regulations it may prescribe." Act of Mar. 5, 1931, ch. 64 § 1, 1931 Ind. Acts 150. Pursuant to this authority the supreme court adopted a rule requiring bar applicants to take an examination "to determine his professional fitness." S. Hugh Dillin, *The Origin and Development of the Indiana Bar Examination*, 30 IND. L. REV. 391, 393 (1997). The statutory provision has since become a constitutional rule. IND. CONST. art. VII, § 4.

them.<sup>5</sup>

We view this admissions regime as resting largely on two foundations. The first is consumer protection. The legal environment in which clients find themselves grows ever more complex and pervasive, and the talent of lawyers who serve them must rise to the occasion. The requirements of graduation from an accredited law school, success on the examination, and certification of character and fitness help assure that only persons who meet a given minimum level of competency are "turned loose" on clients, many of whom are ill-equipped to evaluate the capabilities of lawyers whom they engage.<sup>6</sup> The second support for this regime is the public trust and confidence of the legal profession. A healthy and helping legal profession constitutes a central pillar in public support for the rule of law.<sup>7</sup>

To further these two interests, the Indiana Supreme Court began an examination of the examination. The end product of this review was the administration of two tests new to our examination arrangements, the Multistate Bar Examination (MBE) and the Multistate Performance Test (MPT), each given for the first time in February 2001. Both tests are products of the National Conference of Bar Examiners (NCBE). Founded in 1931, NCBE is a non-profit corporation whose mission is to "assist bar admission authorities by providing standardized examinations of uniform and high quality for the testing of applicants for admission to the practice of law . . . ."<sup>8</sup> Almost every jurisdiction in the United States utilizes at least one of the four examinations they provide. In addition to the MBE and the MPT, NCBE also offers the Multistate Essay Examination (MEE) and the Multistate Professional Responsibility Examination (MPRE).<sup>9</sup> The NCBE also publishes quarterly *The Bar Examiner*, a journal containing updates in various substantive and procedural areas of testing.<sup>10</sup>

Our court first took an interest in the MPT at a time when just a handful of states had adopted it. Our interest derived from the emphasis of the test on the problem-solving abilities of prospective lawyers. The traditional bar examination has been structured reasonably well for testing an applicant's knowledge of

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5. In 1998, 668 applicants took the Indiana Bar Examination, 583 passed. In 1999, of the 722 applicants, 572 passed. In 2000, there were 770 applicants, of which 649 passed.

6. Persistent grade inflation at the law schools makes the examinations even more important in this regard. See Deirdre Shesgreen, *Making the Grade: The Rising (Grade) Inflation Rate*, LEGAL TIMES, July 29, 1996, at 2; Karen Hall, *Paper Chase*, AM. LAW., Aug. 1999, at 24; Jonathan Yardley, *The High Cost of Grade Inflation*, WASH. POST, June 16, 1997, at C2.

7. See Randall T. Shepard, *Lawyer-Bashing and the Challenge of a Sensible Response*, 27 IND. L. REV. 699 (1994).

8. National Conference of Bar Examiners Mission Statement, available at <http://www.ncbex.org/AboutNCBE.htm> (last visited May 8, 2001).

9. The Indiana Supreme Court decided to add the MPRE as a bar admission requirement in 1991. IND. ADMISSION AND DISCIPLINE RULE 17, amendment of Sept. 3, 1991, in 574-76 N.E.2d XXXIII (1991).

10. This journal recently featured an article on the Indiana CLEO program. See Randall T. Shepard, *The Indiana CLEO Program*, BAR EXAMINER, Nov. 2000, at 38.

substantive law.<sup>11</sup> Of course, this is largely what most law school examinations do. Our court concluded that the bar admission examination should place greater emphasis on an applicant's capacity for solving client problems. The MPT is structured to test an applicant's ability to use basic lawyering skills in a realistic situation. It consists of three ninety-minute skills questions that cover legal analysis, fact analysis, problem solving, resolution of ethical dilemmas, organization and management of a lawyering task, and communication. For example, applicants may be instructed to draft a memorandum, brief, contract, or will; write a statement of facts or closing argument; devise a counseling plan, a proposal for settlement, a discovery plan, or a witness examination plan.

While we were examining whether to add the MPT, the court thought it would be timely to reexamine the possible use of the Multistate Bar Examination. It was NCBE's first test, created in 1973.<sup>12</sup> The MBE quickly became a national norm, such that when our court last considered adopting it in 1987, forty-six states already used it as part of their examination system.

The MBE is a six-hour test of legal knowledge, containing two-hundred multiple-choice questions, covering contracts, torts, constitutional law, criminal law, evidence, and real property. The MBE is structured to test an individual's ability to apply fundamental legal principles rather than local statutory or case law. It typically gives applicants a fact pattern and instructs them to analyze legal relationships or to take a position as an advocate. An applicant may provide only one answer to each question and is encouraged to answer every question because scores are based on the number answered correctly.

After several months of study, our Board of Law Examiners recommended that we make both the MPT and MBE part of Indiana's system. Regarding the MBE, the board observed that the examination will ensure an understanding of general legal principles, especially in light of the fact that many "traditional courses" are no longer required for graduation.<sup>13</sup> The board also noted that administering the MBE would increase the "portability" of Indiana lawyers because twenty-seven other states accept MBE scores from another jurisdiction. Thus, an Indiana lawyer seeking a Wisconsin license could more easily obtain it. Likewise, an Indiana firm hiring a young lawyer from Illinois could more easily get that lawyer licensed here.

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11. Indiana's examination, at the time we made the decision, covered the following subjects: administrative law, business organizations, commercial law, federal and Indiana constitutional law, contracts, criminal law and procedure, evidence, family law, pleading and practice, personal and real property, taxation, torts, and wills, trusts and estates.

12. See Beverly Tarpley, *NCBE Introduces New Feature to Bar Exam*, A.B.A. SYLLABUS, Mar. 1998, at 8.

13. Students attending Indiana law schools are only required to take six of the fifteen subjects previously tested on the bar examination. These subjects include: federal constitutional law, property, civil procedure, contracts, criminal law and torts. See IND. UNIV.-BLOOMINGTON SCH. L. ACAD. REG. & SELECTED POLICIES 1 (2000-2002); IND. UNIV.-INDPLS. SCH. L. STUDENT HANDBOOK 1-2 (2000); NOTRE DAME L. SCH. BULL. INFO. 8 (2000-2001); VAL. U. SCH. L. BULL. 49-50 (2000-2001).

In addition to portability, I believed that the regular validation of the MBE was a benefit of adding the test. The National Conference takes rather seriously, for example, the need to assure that the test is not skewed against minority bar-takers, and it conducts regular assessments of the test for this purpose.<sup>14</sup> A 1994 assessment of the MBE confirmed the validity and reliability of the examination and observed that “the test appears to be fair to all takers regardless of gender, race, or ethnicity.”<sup>15</sup> The best known assessment is the so-called Bar Passage Study conducted by the Law School Admissions Council, which sponsors the LSAT and other admissions activities. While it took into account other factors such as local tests, the Bar Passage Study concluded that minority students eventually pass bar examinations in proportions roughly equivalent to their performance in law school.<sup>16</sup>

This aspect of adopting the MBE thus compliments our efforts during the past year to make our bar more accessible to minority law students. The centerpiece of Indiana’s program, of course, has been the Indiana Conference on Legal Education Opportunity, launched with the passage of legislation during 1997.<sup>17</sup> The first CLEO students attended a summer institute during the summer of 1997 within a few weeks after the Governor signed the CLEO bill into law. These students were ready to graduate in May 2000, and the CLEO Advisory Committee began to investigate how we might assist those students in the challenge of passing the bar examination.

We eventually authorized the CLEO program to pay the full cost for one of the professional bar review courses. We also organized four separate review sessions that focused on writing successful examination answers. The net results of this effort were encouraging. Of the seventeen CLEO students who sat for the July 2000 Indiana bar examination, twelve passed either on first grading or on appeal to the Board of Law Examiners. Still, as one might have expected based on past bar passage studies, this rate was lower than the rate for all first-time takers in the same cycle, which was eighty-four percent.<sup>18</sup>

Attempting to improve on these results, I invited several score Indiana bar leaders to a meeting in November 2000 to hear a presentation by representatives of Minority Legal Education Resources (MLER), a non-profit organization in Chicago that seeks to improve the bar passage rate of minority law students. Created in 1975, the MLER program is operated by volunteer attorneys who provide educational services, professional guidance, and emotional support to minority bar candidates. Because the program concentrates on teaching study

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14. Rachel Slaughter et al., *Bar Examinations: Performance or Multiple Choice?*, BAR EXAMINER, Aug. 1994, at 7.

15. *Id.* at 14.

16. Katherine L. Vaughns, *LSAC's National Study Findings on Bar Passage Rates: Do They Augur the End of Old Debates and Controversies About Discrepancies in Bar Passage Rates Among Ethnic Groups?*, BAR EXAMINER, Nov. 1998, at 19.

17. Pub. L. No. 202-1997, § 3 (codified at IND. CODE § 33-2.1-12-2) (Supp. 2000)).

18. In July 2000, there were a total of 488 first-time takers of the Indiana Bar Examination, of which 412 passed.

methods and exam-taking techniques, MLER is intended to supplement a formal bar review course. In a few cases, however, the program has offered substantive tutoring.

The program consists of six weekly sessions that last about three hours each. Students work in small groups of eight or nine people, including an instruction leader and two assistants. The students in these groups take practice exams, review graded examinations and discuss relevant topics that arise. The program also endeavors to train students how to study "actively," by reading and listening to legal material while integrating it into a useful framework of analysis. The turnout and the enthusiasm of this meeting were considerable, and I hope that 2001 will produce an Indiana version of MLER.

## II. LAUNCHING THE INDIANA PRO BONO SYSTEM

Indiana is on its way to having the best organized, most widely embraced, and best financed pro bono program in the nation. We are the only state where fostering pro bono efforts is the central feature of the Interest on Lawyer Trust Accounts program.<sup>19</sup> During the past year, the Indiana IOLTA program began generating funds in earnest, under the auspices of the Indiana Bar Foundation. By the end of 2000, the Foundation was collecting interest at the rate of \$77,000 a month.<sup>20</sup> Some of this income, of course, will go to cover the Foundation's own costs in managing the IOLTA part of the IOLTA/Pro Bono effort. In addition, the Indiana Supreme Court's designation of the Foundation as the IOLTA sponsor provides incentives for maximizing the amount of funds raised for pro bono and permits the funds earned under these incentives to be used in support of the Bar Foundation's other charitable purposes.<sup>21</sup>

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19. Indiana Professional Conduct Rule 1.15(d)(8) provides:

All [IOLTA] interest transmitted to the [Indiana Bar] Foundation shall be held, invested and distributed . . . for the following purposes:

- (A) to pay or provide for all costs, expenses and fees associated with the administration of IOLTA program;
- (B) to establish appropriate reserves;
- (C) to assist or establish approved pro bono programs as provided in Ind.Prof.Cond.R. 6.5;
- (D) for such other programs for the benefit of the public as are specifically approved by the Supreme Court from time to time.

IND. PROF'L CONDUCT RULE 1.15(d)(8).

20. As of January 5, 2001, the Indiana Bar Foundation had deposited \$77,000 of IOLTA interest earned during the month of December 2000. Rachel McGeever, Remarks at the Meeting of the Indiana Pro Bono Commission (Jan. 8, 2001).

21. The Indiana Bar Foundation has a strong financial incentive to maximize returns to the Pro Bono Commission while holding down its own costs in collecting IOLTA interest. The Foundation will receive a payment of seventeen percent of the amount that is made available to finance the recommendations and administrative expenses of the Pro Bono Commission. Thus, the formula incentive payment to the Foundation is: (Interest Earned—Trust Account Costs) x

While this financial commitment makes Indiana unique, the best story of the past year is what the funds will do for people who need legal help. The remarkable activity set in motion by Indiana Admission and Discipline Rule 23(21)(c), the writing of pro bono plans in each of Indiana's fourteen judicial districts, has put us on a new path. In each district, the Supreme Court appointed a trial judge to lead this planning and organizing effort. Each of these judges assembled a committee consisting of local bar leaders, people active in pro bono programs, law school representatives where there were schools in the district and other judges. A typical committee has seventeen members.<sup>22</sup> Each committee undertook to assess the present state of pro bono in the counties of the district and devise a plan for improving the recruitment of lawyers, their training and placement, matching the intake of clients with the available lawyers, and so on. Where this required money, as usually it does, the district committee formulated a budget.

The plans for District Seven (an area around Clay and Putnam Counties) and District Thirteen (covering the area around Vanderburgh County) illustrate these efforts. The Seventh District Committee determined that the most formidable barrier to accessing justice within the district was "the lack of a formal pro bono delivery program and corresponding lack of attorneys committed to addressing the legal needs of [the poor]."<sup>23</sup> The committee identified this hurdle after examining the number of residents denied assistance from Legal Services Organization of Indiana, Inc. (LSOI) not due to ineligibility, but due to a lack of LSOI resources.<sup>24</sup> The committee also determined the percentage of people in

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seventeen percent. For example, if the Foundation raised \$100,000 in a year with costs of \$15,000, the Foundation would receive seventeen percent of the difference, or \$14,450. This would leave \$70,550 to fund the Pro Bono Commission's district plans. See *In re Ind. Prof'l Conduct Rule 1.15(d)(8)*, No. 94S00-0005-MS-331 (Ind. 2000).

22. For example, the Ninth District which includes Fayette and Franklin counties has the following committee members: Chairman Gregory A. Horn, Superior Court Judge, James R. Williams, Circuit Court Judge, Robert L. Reinke, Senior Judge, Brandon Griffis, Retired Superior Court Judge, Michael A. Douglass, Esq., Mary Butiste Jones, Esq., Amy Noe, Esq., John F. Strain, Esq., Stacie Terry, Esq., Courtney Laughlin, Paralegal, and six community at large members. See INDIANA PRO BONO COMM'N, DISTRICT NINE 2000 ANNUAL PRO BONO REPORT AND PLAN (2000).

23. IND. PRO BONO COMM'N, DISTRICT SEVEN 2000 ANNUAL PRO BONO REPORT AND PLAN 20 (2000).

24. *Id.* LSOI was a not-for-profit organization that provided free legal services for low income people in Central and Southern Indiana. Legal services provided by LSOI included civil matters that are not fee generating, such as: housing, public benefits, health, divorce, Children in Need of Services (CHINS), consumer, education and access to justice. Applications for assistance were accepted in person and by telephone. An attorney reviews each application. The LSOI income criterion for eligibility was based on 125% of federal poverty. Due to its limited staff and numerous applications from financially eligible applicants, LSOI further prioritized requests and determined need for immediate assistance. See *id.* at 8-9. LSOI has now been succeeded by Indiana Legal Services, Inc, which serves clients in much the same way.

poverty in each of the district's counties, which ran as high as fifteen percent.<sup>25</sup>

The committee proposed several actions to address the crux of the problem, lack of pro bono attorneys. It first plans to develop a brochure that both explains its pro bono plan and requests attorneys to indicate their primary area of practice. The committee will solicit from the attorneys which counties they are willing to serve. It will also inquire which attorneys are willing to mentor, train, conduct clinics, speak to other organizations or compile form books as a part of their pro bono efforts. The district's plan declares the involvement and support from local judges and bar associations essential to reaching its goals.

The Thirteenth District Committee concluded that access to justice in its district was hindered by a lack of administration.<sup>26</sup> Specifically, the committee indicated a need for a plan administrator to provide, among other things, "implementation and oversight of the District Plan on a daily basis."<sup>27</sup> It also expressed a need to provide access to legal services "cheaply and swiftly."<sup>28</sup> The committee explains that funds from the Pro Bono Commission are key to solving these problems.

In addition to hiring a plan administrator, financial assistance from IOLTA/Pro Bono will enable the committee to establish a toll-free telephone number "by which every indigent individual anywhere in the District might initially access the pro bono service in the least complicated manner."<sup>29</sup> The committee also plans to initiate a current legal needs study in order to "identify and prioritize pro bono legal services."<sup>30</sup> It will accomplish this by conducting, compiling and interpreting original surveys.<sup>31</sup>

These local efforts have been coordinated by the Indiana Pro Bono Commission. It is a vehicle of the Indiana Bar Foundation, created in accordance with Indiana Professional Conduct Rule 1.15(d)<sup>32</sup> and chaired by Judge L. Mark Bailey of the Indiana Court of Appeals. At the close of 2000, the Commission recommended to the Bar Foundation the distribution of the first \$300,000 in IOLTA funds to begin implementing the local plans.<sup>33</sup>

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25. *Id.* at 21. The percentage of people in poverty in each county were as follows: Vigo, 15.1%; Putnam, 9.3%; Clay, 10.7%; Sullivan, 12.9%; Parke, 12.2%; Vermillion, 11.3%.

26. IND. PRO BONO COMM'N, DISTRICT 13 PRO BONO 2000 ANNUAL REPORT AND PLAN 5 (2000).

27. *Id.*

28. *Id.*

29. *Id.* at 6.

30. *Id.* The existing Legal Needs Study was published in 1992 and has not yet been updated. See LEGAL NEEDS STUDY OF THE POOR IN INDIANA: EXECUTIVE SUMMARY (Legal Services Organization of Indiana, Inc. and United Way/Community Service Council of Central Indiana, Inc., Feb. 1992).

31. *Id.*

32. Ind. Professional Conduct Rule 1.15(d) states: "[A] lawyer or law firm shall create and maintain an interest-bearing trust account for clients' funds which are nominal in amount or to be held for a short period of time (hereinafter sometimes referred to as an "IOLTA account") . . . ."

33. The Commission gave every district \$5000. Additional funds were granted to each

We are still at the beginning of this story, but Indiana is clearly on a path that others find interesting. The Illinois Pro Bono Center ran an article in its publication, *Equal Access*, in which the author described Indiana's pro bono initiative as "new and exciting."<sup>34</sup> The American Bar Association has published articles discussing both the Indiana Pro Bono System and IOLTA in its publication entitled *Dialogue*.<sup>35</sup> The Indiana press has also taken notice.<sup>36</sup> A columnist for the Indianapolis Star noted that pro bono effort has fallen off in some other parts of the country, but observed our pro bono programs have set an example for other states.<sup>37</sup> Observing that our commission's executive director used to hide her face at national meetings, the author noted: "Now she proudly fields calls and collects articles from around the nation about the very subject that used to embarrass her."<sup>38</sup> Under a terrific headline, "Speaking Well of Lawyers," Carpenter observed, "The commission and committees serve as teachers, counselors and matchmakers. They fix up lawyers with people who need lawyers."<sup>39</sup>

This endeavor has also cemented a relationship between the practicing bar and legal services organizations stronger than has ever existed. Undoubtedly, the winners will be low-income Hoosiers who need legal assistance.

### III. REPRESENTING DEFENDANTS IN CAPITAL CASES AND OTHERWISE

The year 2000 featured the most extensive high visibility discussions about the death penalty in a generation. Governor George Ryan's decision in January to impose a moratorium on executions in Illinois<sup>40</sup> set in motion a host of national activity.

Characteristic of this activity was the announcement by a group of leading judges, academics and practitioners of the formation of the National Committee

district based on its percent poverty. These additional grants ranged from \$3059 in District 12 to \$36,708 in District 8. CALENDAR YEAR 2001 IOLTA GRANT BREAKDOWN in *Second Annual Access to Justice Conference: BUILDING A STATE JUSTICE COMMUNITY* (2001).

34. See *Indiana Pro Bono Commission*, EQUAL ACCESS, Aug.-Sept. 2000, at 1, 8.

35. See IOLTA Arrives in Indiana, DIALOGUE, Winter 1998, at 22; David J. Remondini & Greg McConnell, *Creating a Pro Bono Culture: An Update on Indiana's Statewide Pro Bono System*, DIALOGUE, Fall 2000, at 17.

36. See, e.g., *Advice on Filing New IOLTA Form*, IND. LAW., Aug. 2-15, 2000, at 17; Hon. Ezra Friedlander & David J. Remondini, *Recipe for Diversity*, JUD. DIVISION REC., Winter 1999, at 1; Joanne Orr, *The Foundation in the 90's: Pro Bono and IOLTA*, RES GESTAE, Oct. 2000, at 10; David J. Remondini, *IOLTA Arrives in Indiana: Trial Judges to Play Key Role in Pro Bono Plan*, RES GESTAE, Feb. 1998, at 9.

37. Dan Carpenter, *Speaking Well of Lawyer*, INDIANAPOLIS STAR, Sept. 15, 2000, at A17-18.

38. *Id.* at A17.

39. *Id.*

40. Ken Armstrong & Steve Mills, *Ryan Suspends Death Penalty: Illinois First State to Impose Moratorium on Executions*, CHI. TRIB., Jan. 31, 2000, at C1.



to Prevent Wrongful Executions to promote improvements in the administration of the death penalty. The committee included former Florida Chief Justice Gerald Kogan.<sup>41</sup> Justice Kogan was an important recruit for the organizers. Newspaper reports identified him as having voted to uphold a penalty of death more than 200 times and having even opined that revenge might be an appropriate basis for executing "extra-heinous" criminals.<sup>42</sup> He has also voted to continue litigation in "extra-heinous" cases.<sup>43</sup>

President Clinton announced a review of the federal death penalty, apparently prompted by the likelihood of the first federal execution in many years, but noted that there had been "no suggestion, as far as I know, that any of the cases where the convictions occurred were wrongly decided."<sup>44</sup> The

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41. The foundation of the Death Penalty Initiative (formerly known as the National Committee to Prevent Wrongful Executions) of the Constitution Project is the shared belief by its members, both supporters and opponents of the death penalty, that the risk of wrongful convictions and executions is too great. The Committee plans to "develop consensus guidelines on meaningful and specific reforms, and [] carry out a program of public education about them. It will create educational materials, speak out publicly, meet with members of the media and with other opinion-leaders, and support the work of like-minded groups." Questions and Answers about the National Committee to Prevent Wrongful Executions, available at, <http://www.constitutionproject.org/dpi/questions.html> (last visited May 9, 2001).

Justice Kogan testified before the House Judiciary Committee's Crime Subcommittee on June 20, 2000. He urged the adoption of the Innocence Protection Act, H.R. 4167, which proposes reforms of death penalty laws including the establishment of a national standard for competent representation. Innocence Protection Act: Hearing on H.R. 4167 Before the House Comm. on the Judiciary, 106th Cong. (2000) (statement of Hon. Gerald Kogan, former Chief Justice of the Florida Supreme Court).

42. Howard Troxler, *Figuring "I Don't Know" into Life, Death*, ST. PETERSBURG TIMES ONLINE 1-4 (June 28, 2000), at [http://www.sptimes.com/NEWS/062800/TampaBay/Figuring\\_\\_I\\_don\\_t\\_kno.shtml](http://www.sptimes.com/NEWS/062800/TampaBay/Figuring__I_don_t_kno.shtml).

43. When the infamous Theodore Bundy was on his last trip to the Florida Supreme Court just days before he was executed, seven of the nine justices concluded that his final claims were either retreads or long-since barred. *Bundy v. State*, 538 So. 2d 445 (Fla. 1989). Justice Kogan wanted to address them on the merits. *See id.* at 448 (Barkett, J., specially concurring, joined by Kogan, J.).

44. In his press conference last year, President Clinton indicated that with regard to capital cases the issues needing attention are different at the state and federal level. The issue requiring assessment by states is the provision of "the strongest possible effort to guarantee adequate assistance of counsel." At the federal level, he said, the issue "relate[s] to the disturbing racial composition of those who have been convicted." President Clinton announced that he had a review of this issue underway. President William Jefferson Clinton, Press Conference by the President at the White House (June 28, 2000), available at <http://usinfo.state.gov> (last visited May 10, 2001).

The Department of Justice investigated the existence of racial, ethnic and geographic disparities in death penalty cases. The study also described the Department's "internal decision-making process for deciding whether to seek the death penalty in individual cases." U.S. DEP'T OF JUSTICE, *THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988-2000)*, at 1 (2000).

President also suggested that the governors whose states use the death penalty initiate similar reviews,<sup>45</sup> and Governor Frank O'Bannon asked Indiana's Criminal Law Study Commission to undertake an examination of our state's administration of its death penalty law.<sup>46</sup>

Unlike Governor Ryan, Governor O'Bannon did not impose a moratorium on executions.<sup>47</sup> The best reason for withholding such action was the existence, for nearly ten years now, of the Indiana Public Defender Commission<sup>48</sup> and Supreme Court Criminal Rule 24.<sup>49</sup> Indiana was the second state in the country to adopt rules guaranteeing that lawyers who represent those facing the death penalty have the requisite training and experience such litigation requires, receive adequate compensation to attract able practitioners, and have the time necessary to conduct an effective defense.<sup>50</sup>

Indiana has a long history of providing counsel to indigent defendants,<sup>51</sup> and our leadership on providing capable counsel to defendants in capital cases has

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The Clinton Administration declined to impose a moratorium of its own. See Mike Dorning, *Reno Won't Delay U.S. Executions, Report Details Wide Racial Disparities*, CHI. TRIB., Sept. 13, 2000.

45. See Naftali Bendavid, *Clinton Won't Follow Illinois on Executions But President Praises Ryan as 'Courageous'*, CHI. TRIB., Feb. 17, 2000, at 1. Clinton stated, "If I were governor still, I would look very closely at the situation in my state and decide what the facts were." *Id.*

46. Diana Penner, *Governor Calls for Study of State's Death Penalty*, INDIANAPOLIS STAR, Mar. 10, 2000, at A1-2. The Indiana Criminal Law Study Commission is staffed by the Indiana Criminal Justice Institute. The Commission had not yet completed its study of the application of Indiana's death penalty law at the time of Gerald W. Bivins' execution on March 14, 2001. See Dianna Penner, *O'Bannon is Unlikely to Halt Bivins' Execution*, INDIANAPOLIS STAR, Mar. 9, 2001, at C1. Bivins was convicted of murdering a minister at a rest area in 1991 and did not seek further appeal prior to his execution. See *id.*; *Bivins v. State*, 735 N.E.2d 1116 (Ind. 2000) (affirming denial of post-conviction relief); *Bivins v. State*, 642 N.E.2d 928 (Ind. 1994) (affirming convictions and sentence), *cert. denied*, 516 U.S. 1077 (1996). Commission member and Indiana Public Defender Susan Carpenter was quoted as saying, "I certainly would like to see a moratorium while we're still in the evidence-gathering, discussion stage." See Penner, *supra*, at C5. Governor O'Bannon responded, "[t]here's still no reason for a moratorium." *Id.*

47. The governor apparently possesses the authority to do so, under the pardon power of the Indiana Constitution, which says: "The Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses except treason and cases of impeachment, subject to such regulations as may be provided by law." IND. CONST. art. V, § 17 (amended 1984). A "reprieve" is a "temporary postponement of the execution of a criminal sentence." BLACK'S LAW DICTIONARY 1305 (7th ed. 1999).

48. IND. CODE § 33-9-13-1 (effective July 1, 1989; amendment effective May 1, 1993).

49. IND. CRIM. RULE 24 (adopted Nov. 30, 1989, effective Jan. 1, 1990; amended Feb. 4, 2000, effective Jan. 1, 2001).

50. Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and Its Implications for the Nation*, 29 IND. L. REV. 495 (1996).

51. See *Webb v. Baird*, 6 Ind. 13, 18 (1854) (holding a criminal defendant had right to attorney at public expense if unable to afford or hire one on his own).

attracted wide attention. The decisions of all three branches of Indiana government over the last decade created a model for indigent death penalty representation that just in the last year has been the subject of inquiry by legislators, commissions, and judges in Illinois, Michigan, New York, Mississippi, Texas, and a host of other places.

The adoption of Rule 24 has made a substantial change in the landscape of capital litigation. As our court noted in *Ben-Yisrayl v. State*,<sup>52</sup> these protections stand alongside the Sixth Amendment in protecting a capital defendant's rights.<sup>53</sup> We have also pointed out that the defendant is not the only one with an interest at stake: "The State has a strong interest in the proper conduct of every trial and that concern is maximized in death penalty litigation."<sup>54</sup> Where the dictates of the Rule are not followed, the odds of reversal go up.<sup>55</sup>

During the year 2000, the Indiana Supreme Court revised Rule 24 in an effort to build on this valuable foundation. First, we raised the hourly rate payable to counsel by twenty-nine percent.<sup>56</sup> We also adopted provisions designed to enable Indiana's counties to provide capital counsel through salaried attorneys, possibly a more cost-effective method in certain areas.<sup>57</sup> Finally, we permitted counsel to seek advance approval for expert expenses and provided for monthly reimbursement.<sup>58</sup>

But the quieter, and for most people, more pertinent progress that Indiana has made relates not to the dozen capital cases a year, but to the 280,000 felony and misdemeanor cases filed each year. Many of these involve people cannot afford a lawyer, and we know from experience that some of them are innocent. During the last two years, county commissioners, council members and judges in county after county have decided to upgrade the quality of representation they provide. They have done this in part because they believe it represents a respectable moral public policy. They have also done it on the representation, enacted in the Indiana Code, that the State would pay a part of the cost.<sup>59</sup>

This move to improve access to justice has never been on the top ten in the political hit parade, but it is plain that Hoosiers want the justice in their criminal courts to be meted out to those who deserve it and only to those who deserve it. This advancement has cost money, both at the local and the state level, and I thank Governor O'Bannon and a good many legislators who have worked hard

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52. 729 N.E.2d 102 (Ind. 2000).

53. *See id.* at 105-06.

54. *Lowrimore v. State*, 728 N.E.2d 860 (Ind. 2000).

55. *See Prowell v. State*, 741 N.E.2d 704 (Ind. 2001) (holding that capital attorneys not afforded adequate protection from other cases, elected to focus on upcoming non-capital case, post-conviction relief ordered).

56. The amendment increased the hourly rate in capital cases from \$70 to \$90. IND. CRIM. RULE 24(C)(1) (amended Dec. 22, 2000, effective Jan. 1, 2001).

57. IND. CRIM. RULE 24(C)(4) (amended Dec. 22, 2000, effective Jan. 1, 2001).

58. IND. CRIM. RULE 24(C)(2) (amended Dec. 22, 2000, effective Jan. 1, 2001).

59. The State reimburses counties forty percent of the cost of non-capital public defender services. IND. CODE § 33-9-14-4(b) (Supp. 2000).

to follow through on this commitment.

It will keep Indiana out of the headlines that have plagued so many other states and instead mark us a place that works hard at doing justice for all.<sup>60</sup>

#### CONCLUSION

On each of these fronts, the Indiana legal profession has acquitted itself well in reforming the legal system to benefit Indiana's six million people. It is an honor to serve such a legal community as Chief Justice.

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60. The *New York Times* recently reported, "[I]n New York City, there is some basic legal work an indigent defendant cannot expect." Jane Fritsch & David Rohde, *Legal Help Often Fails New York's Poor*, N.Y. TIMES, Apr. 8, 2001, at 1. For example, Juan Carlos Pichardo was convicted of murdering a drug dealer in 1994 and sentenced to twenty years to life. *Id.* at 27. The prosecutor's key witness was the victim's wife, who testified that she saw Pichardo shoot her husband. *Id.* Pichardo's appellate attorney discovered that his trial attorney failed to contact two witnesses whose police statements contradicted the victim's wife's testimony. The trial attorney also failed to uncover a police report in which the victim's wife stated that she had not seen who killed her husband. After finding that the trial attorney displayed a "regrettable ignorance of basic principles of criminal law," the appeals court granted Pichardo a retrial, which resulted in an acquittal. *Id.*