



LEGAL UPDATE

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PRE-LIEN NOTICE REQUIREMENT FOR SUBCONTRACTING CREDITORS TRYING TO ACQUIRE A MECHANIC'S LIEN



Colby A. Barks

A pre-lien notice is required when labor or materials are furnished on credit by a subcontractor or material supplier to anyone other than the owner of the property for the purpose of new construction or alterations and repair in order for the subcontractor to later acquire a valid mechanic's lien against the owner's property. See Ind. Code. 34-28-3-1. The pre-lien notice itself needs to indicate to the owner-occupier of the land that work or materials have been provided and there exists future lien rights if the debt is not paid.

The purpose of the pre-lien notice is to put owners on notice of all indebtedness being incurred by the general contractor or primary contract in the course of the construction. By putting the owner on notice of the indebtedness, the owner can anticipate the possibility of a future lien by the subcontractor or material supplier.

This pre-lien notice applies to companies that have provided labor, materials, or equipment to anyone other than the owner of the property (usually the general contractor) on credit for the purpose of original construction or alteration or repair of the owner's lot. For example, if a subcontractor is working for a general contractor on a project and has not been paid, or your labor is otherwise

(continued on page 4)

THE INDIANA INTERITANCE TAX: A TAX NOT TO BE IGNORED



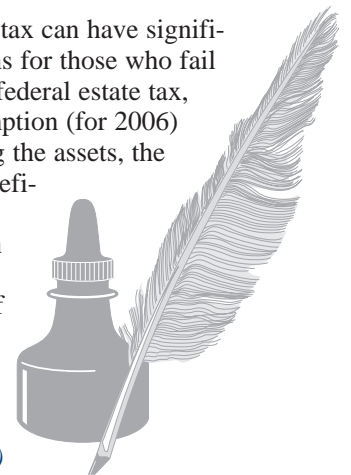
Jason M. Smith

I can still remember like it was yesterday, marching through the front door of a Wal-Mart Supercenter on a Friday afternoon on my way to collect the first paycheck of my lifetime. After hundreds of shopping carts pushed and dozens of TVs and entertainment centers carried, it was time to

reap the rewards. As I frantically opened the envelope and gazed at my paycheck my mind was calculating, "At six dollars an hour for fifteen hours a week for two weeks I should get: A LOT MORE THAN THIS!"

Many of us have similar memories of our first painful introduction to Uncle Sam and his posse, the IRS. It begins us on a lifelong journey of tax understanding and avoidance, as we discover tax brackets, deductions, exemptions and credits. We learn to defer, deduct, and transfer, all with the goal of paying the least amount of federal income tax possible, and for the blessed few of us who accumulate enough wealth to be concerned, we do all the same with even more aggressiveness to avoid the federal estate tax. Clearly, understanding federal tax law is important to many Americans. However, one tax that is often overlooked by many in Indiana is the inheritance tax. Furthermore, it is a tax that many of us in Hoosier country could be affected by and, therefore, should be aware of it.

The Indiana inheritance tax can have significant negative tax ramifications for those who fail to properly plan. Unlike the federal estate tax, which has a \$2,000,000 exemption (for 2006) regardless of who is receiving the assets, the Indiana inheritance tax is beneficiary sensitive. Both inheritance tax rates and exemption amounts are determined by looking at each beneficiary of the decedent's estate. Basically, Indiana tax law separates beneficiaries into



(continued on page 5)

INSIDE

Protecting Assets With Discretionary Trusts ..2

What A Difference A Year Makes! An Update On Indiana's Tax Amnesty Program.....2

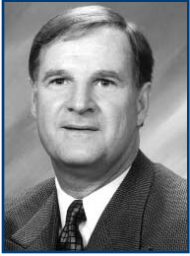
Electronic Discovery Rules Now in Effect3

Beware Spoliating Evidence.....4

Indiana Courts Routinely Refuse To Permit Expansion of Non-Conforming Uses5

Managing Partner's Corner7

PROTECTING ASSETS WITH DISCRETIONARY TRUSTS



Morris A. Sunkel

The Court of Appeals has decided that a properly written trust can protect the assets for the remainderman, while providing discretionary benefits to the income beneficiary. In the case of the *Last Will and Testament of Stonecipher*, 849 N.E.2d 1191 (Ind. App. 2006), Eldo Stonecipher “decedent” created two testamentary trusts in his Last Will and Testament. Each trust designated the decedent’s second wife, Meriam “Graninger” as the income beneficiary to receive all the income of each trust, with one of the trusts allowing Graninger to receive from the principal of the trust “for her reasonable health, support and maintenance, as the Trustee determines . . . according to the standard which she enjoyed before the decedent’s death or according to her actual needs.” The Trustee was also to consider other assets of Graninger’s before invading the principal of the decedent’s trust for Graninger’s support, maintenance and health.

Graninger received \$4,500 to \$5,000 per month from the decedent’s trust in income and principal distributions. About three years after the decedent’s death, Graninger started having health problems and her new husband made demands upon the decedent’s trust to pay for the cost of in-home healthcare, which was in excess of \$10,000 per month. It would seem that the income from the decedent’s trust

was paying approximately \$2,000 per month and Graninger’s new husband wanted an increase of the principal from the trust from \$2,500 per month to \$8,000. The Court acknowledged that the evidence revealed that in the year following the death of the decedent, Graninger’s total income was approximately \$142,000. After the decedent’s death, Graninger made gifts over a 3-year period of \$180,000 to her children. The remaindermen of the decedent’s trust were his grandchildren, which were not the grandchildren of Graninger. It was evident that Graninger had gifted a substantial amount of her assets to her children and intended to rely upon the decedent’s trust for her support.

The bank, which was acting as Trustee, determined that in its discretion from all facts known by them, that the request of Graninger’s new husband for in-home care was excessive and therefore the Trustee continued paying the \$4,500 to \$5,000 per month from the decedent’s trust, but not the \$10,000 or more as requested by Graninger’s new husband.

The Court when reviewing the request of the parties, acknowledged that the Trustee must preserve the trust property and make it productive for both the income and remainder beneficiaries. The Court also stated that when the Trustee is vested with discretion on how distributions are to be made, that unless those discretions are abused, the Court should not interfere.

The Court of Appeals acknowledged that the trust must be administered as the Creator of the trust had

intended and therefore one must look at the plain and unambiguous purpose for the creation of the trusts, which the decedent had designated in his Last Will and Testament. The Court agreed with the Trustee that the decedent had established the trust to provide for not only his second wife, but also for the remaindermen who were his grandchildren. Specifically, the Court found that the Creator of the trust had intended for his wife to be maintained under the same standard for which she was accustomed during the decedent’s lifetime and that would not include excessive payments for in-home care as was being requested by Graninger’s new husband. Graninger did not show that the Trustee abused its discretion in refusing to increase the amount of discretionary distribution of principal to Graninger from the continued payments which she was accustomed prior to her health problems. The Court approved the actions of the Trustee in paying to the income beneficiary the same monthly allowance she had received prior to her health changing.

This type of discretionary trust can be used to protect the trust assets from creditors of the income beneficiary, including excessive nursing home costs which may be incurred when the income beneficiary is required to have excessive uninsured costs for healthcare. This case represents a protection of the assets of the first decedent from the healthcare providers or creditors of the surviving spouse in order to allow the preservation of the assets to ultimate beneficiaries of the trust, i.e., children and grandchildren. ■

WHAT A DIFFERENCE A YEAR MAKES! AN UPDATE ON INDIANA’S TAX AMNESTY PROGRAM



Gerold L. Stout

overdue taxes in exchange for the

This time last year Indiana had just completed its amnesty program. As part of that program, Indiana agreed to waive all penalty and interest owed on

Taxpayer agreeing to pay the full amount of the taxes they owed. In fact, the amnesty program resulted in Indiana collecting millions of dollars in overdue taxes.

Jumping ahead a year, the Indiana legislature has amended the law with regard to the collection and protest of tax liabilities. It is important that taxpayers, both individual and business, understand the changes in the law that

becomes effective January 1, 2007. This article is intended to provide a brief overview of some of these changes.

Collection Process:

Pursuant to IC 6-3-4-8.1, as amended, the Indiana Department of Revenue (“IDOR”) will now have the ability to require withholding agents,

(continued on page 6)

ELECTRONIC DISCOVERY RULES NOW IN EFFECT



Eric P. Mathisen

Some estimate that 85 percent to 95 percent of all newly created information is Electronically Stored Information (“ESI”).

A large organization may have the electronic equivalent of 500 million pages of text and receive 300 million emails per month. On December 1, 2006, changes to the Federal Rules of Civil Procedure went into effect to address the preservation, discovery, production, and protection of this ESI. The changes to the Federal Rules recognize, and attempt to deal with, the ever increasing role that computers and the Internet occupy in our business and personal lives. In short, the new Rules clarify that:

- ESI is discoverable
- Clients must preserve and produce ESI
- Lawyers must understand how to request, protect, review and produce ESI
- The courts have the tools to rectify abusive or obstructive electronic discovery

The new Rules require early attention to issues concerning ESI and electronic discovery. Attorneys for the parties are required, as part of the first planning conference, to discuss issues related to the production and preservation of ESI and a plan for addressing claims of privilege. The joint scheduling order should include any agreements reached between counsel for the parties.

This early focus on ESI will require involvement and input from the client’s IT team at the outset of any litigation. The attorney will need to be familiar with the client’s system and types of information stored in order to properly address proposals to preserve and produce ESI. The client’s IT team will need to stay involved throughout the discovery

process to ensure compliance with the new Rules. ESI that supports a party’s claim or defenses must now be disclosed, without waiting for a discovery request, at the outset of the litigation.

The new Rules underscore a party’s obligation to preserve potentially relevant ESI. The obligation extends to accessible and inaccessible information. In other words, the duty to preserve applies to all potentially relevant information regardless of whether it is accessible or reasonable to produce. The duty to preserve information clearly begins at the start of litigation, but it may also begin before litigation is formally initiated. The obligation to preserve evidence most likely begins when a party reasonably should know that the evidence may be relevant to anticipated litigation. Once the duty is triggered, a “litigation hold” (suspension of normal document destruction procedure) becomes necessary. In-house and outside counsel now have a responsibility to advise, monitor, and ensure that ESI is not destroyed.

In recognition of the challenges posed by preservation of ESI, the new Rules provide some protection to those who act diligently to preserve data but fail. Absent exceptional circumstances, amended Rule 37(f) prohibits a court from imposing sanctions for the failure of a party to provide ESI lost as a result of the “routine, good-faith operation of an electronic information system.” A finding of good faith will hinge on the extent to which the party’s efforts to preserve the lost data were reasonable and timely.

One of the biggest concerns associated with electronic discovery and ESI is the difficulty in reviewing the vast amount of information for privileges. Privileged information may exist on the face of the ESI or it may be hidden in metadata. The new Rules encourage attorneys to contemplate and agree on procedures for handling the review of documents and any inadvertent disclosure of privileged information. As an added safeguard, clients should attempt to segregate and

identify privileged materials from general electronic business documents through internal policies and procedures.

The new Rules now allow a requesting party to specify the form or forms in which that ESI is to be produced. The default form is that in which the information is ordinarily maintained or reasonably useable. A responding party is not obligated to produce the same ESI in more than one form. The responding party may also object to the form requested.

The amended Rules continue to allow a party to produce business records, including ESI, instead of answering an interrogatory if the burden of deriving the answer will be substantially the same for both parties. There is a caveat. A party, choosing to produce ESI in lieu of answering an interrogatory, may obligate itself to provide technical support or even direct access to its electronic information. The Rule requires the producing party to provide “sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.” The Rule concerning subpoenas was also amended to allow the request to copy, test, or sample ESI. A subpoena may specify the form in which information is to be produced.

The adoption of the new Rules is intended to provide more guidance and uniformity to attorneys, clients, and judges in dealing with ESI and electronic discovery. The reality is that businesses and their attorneys will need to carefully maneuver these new Rules and requirements to avoid the potential pitfalls. The key is for businesses to anticipate ESI that may be relevant to a potential lawsuit and to develop a plan with their attorney to protect and preserve the information in the least intrusive manner available. ■

As this area of the law develops, Hoepfner Wagner & Evans LLP will continue to provide you with the guidance you have come to expect.

BEWARE SPOILIATING EVIDENCE



Sean E. Kenyon

Spoliation is the “destruction, mutilation, alteration, or concealment of evidence.” Black’s Law Dictionary 1409 (7th ed. 1999).

Concealing relevant evidence, in any fashion, severely impedes our judicial system’s truth finding function. As the Indiana Court of Appeals recently stated, “there can be no truth, fairness or justice in a civil action where relevant evidence has been destroyed before trial.” *Gribben v. Wal-Mart Stores, Inc.*, 824 N.E.2d 349 (Ind. Ct. App. 2005).

To minimize the temptation and,

theoretically, the frequency of spoliation, the law provides for various sanctions against “spoliators.” Trial judges have discretion to levy a number of litigation-based punishments against plaintiffs or defendants, who fail to produce unaltered evidence when requested to do so. Ind. Trial R. 37(b). Generally, a sanction’s severity depends on the spoliator’s culpability. In cases involving especially heinous and intentional spoliation, default judgment can be entered against the offending party. For example, in *Whitewater Valley Canoe Rental, Inc. v. Board of Franklin County Commissioners*, a canoe rental company was fined the equivalent of roughly \$24,000 (adjusted for inflation) after an irate judge entered default judgment against it.

507 N.E.2d 1001 (Ind. Ct. App. 1987). Early in the litigation, the canoe company claimed that an informal request for the production of relevant documents was overly burdensome. *Id.* 1007. After the judge formally ordered the documents produced, the company claimed that they had been lost or destroyed. *Id.* The judge found that these conflicting responses evidenced intent to conceal the documents and entered judgment against the company. *Id.*

Other punishments available for those who intentionally conceal evidence include ordering spoliators to pay a portion of their opponent’s attorney fees, prohibiting them from presenting certain evidence in support of

(continued on page 7)

Pre-Lien Notice Requirement for Subcontracting Creditors Trying to Acquire a Mechanic’s Lien (continued from page 1)

on credit, you can preserve a claim against an owner of the property for a deficiency if you give the owner a pre-lien notice. Alternatively, if you have provided materials to a subcontractor or general contractor, or anyone other than the owner of the property, for the purposes of the property you can still preserve a future lien against the owner of the property if you provide the owner with a pre-lien notice.

However, like the mechanic’s lien statute itself, the pre-lien notice requirements are technical and have several important components. First pre-liens are required on owner-occupied single or double family dwellings. This section of the mechanic’s lien statute does not apply to commercial construction, rentals, or houses without intended owner-occupiers. However, they would be required by temporary absent landowners if the intended future use is to occupy the home. Temporary absent landowners include those who are currently living in alternative housing until the construction work has been completed - if they intend to occupy the house in the future. A pre-lien notice is not required anytime the subcontractor has a direct contract with the homeowner, since presumably the homeowner is

aware of the contract. *See also, William F. Steck Co. V. Springfield*, 281 N.E.2d 530 (1972).

Also, like the mechanic’s lien section, generally the pre-lien notice has different timelines depending on the type of work being done. In the case of alteration, remodeling or repair work, a pre-lien notice must be made 30 days after the *first* day the labor or materials are supplied. For original construction, the notice must be made within 60 days after the *first* day the materials or labor are furnished.

It is important to note, in the pre-lien context, the deadlines run from the first day materials are furnished. This is the opposite of the time requirement for filing a lien, which runs from the last day of work completed. However, these timelines for both a pre-lien and for filing the mechanic’s lien are two entirely separate and distinct requirements for a valid mechanic’s lien. The timelines for filing a mechanic’s lien are not discussed here.

The pre-lien notice often causes problems for subcontractors and material suppliers. A concern, and the major subject of litigation, is whether a pre-lien notice is required at all. More so for a subcontractor or material supplier, is the fact that a material supplier or

subcontractor may often be in a situation where they have little or no contact with the homeowner. By nature, a subcontractor and material supplier deal with a general contractor and may only know a construction job by its address. While this lack of connection is part of the reason for pre-lien notice requirement, in that the requirement stops homeowners from being confronted with unexpected liens, the lack of connection also hinders unwary subcontractors from being able, on a practical level, to give pre-lien notice. Additionally, especially in the case of material suppliers, a pre-lien notice may be difficult given the sheer number of jobs or number of different general contractors with whom the supplier or subcontractor deals. Overall, subcontractors and material suppliers need procedures for determining if a pre-lien is required and procedures for how to go about giving this notice to homeowners, otherwise the supplier or subcontractor risk jeopardizing their future claim or mechanic’s lien. Even though it may take more initial inquiry regarding the job and owner, a subcontractor and supplier would be well served by providing a pre-lien notice for owner-occupier projects. ■

INDIANA COURTS ROUTINELY REFUSE TO PERMIT EXPANSION OF NON-CONFORMING USES



Thomas L.
Chrzanowski

Two Thousand Six (2006) has been an active year for the Indiana Court of Appeals in interpreting zoning ordinances as they relate to billboards and

signs. One such case is *Cracker Barrel Old Country Store, Inc. v. Town of Plainfield, Indiana on Behalf of the Plainfield Plan Commission*, 848 N.E.2d 285 (Ind. Ct. App. 2006). In 1992, Cracker Barrel opened a restaurant in Hendricks County and received permission from the Hendricks County Planning and Building Department to construct the freestanding sign. Once constructed, the sign stood approximately 150 feet tall and had a surface area of 650 square feet, at a cost of almost \$90,000. Thereafter, annexation occurred, placing Cracker Barrel under Plainfield's jurisdiction. In 1998, Plainfield enacted Ordinance No. 21-97, which instituted a height and surface area limitation on all signs, which Cracker Barrel's sign exceeded. Cracker Barrel's sign, however, qualified as a pre-existing, legally established non-conforming structure, as defined in the Ordinance.

The Ordinance contained a safe harbor clause that provided, "Nothing contained in the Ordinance shall be construed to prevent the maintenance, repainting or posting of legally established Signs. Maintenance shall include the replacement of Sign Surfaces within a Sign Structure provided that the Sign Structure is not removed or changed in any dimension." The Ordinance also stated that, "Should such Building or Structure be moved for any reason for any distance whatsoever, such Building or Structure shall thereafter conform to the provisions of this Ordinance."

In September, 2002, Cracker Barrel had maintenance work performed on the sign by an independent contractor. In the course of performing maintenance, the sign was removed from its pole and lowered to the ground. After completing work on the sign, the independent contractor returned the sign to the top of the pole where it was previously located.

Even though the sign was only temporarily removed from the pole while maintenance was being performed, Plainfield cited Cracker Barrel for a zoning violation and determined that Cracker Barrel lost its legal non-conforming use status. Plainfield demanded that the Cracker Barrel sign be removed and reduced in size to

meet the limitations of its local Ordinance. Cracker Barrel refused to accommodate Plainfield's request and suit was filed. The trial court ruled in Plainfield's favor and the Indiana Court of Appeals upheld the Trial Court's ruling. The Indiana Court of Appeals held that Cracker Barrel lost its status as a legal non-conforming structure when it removed the sign from the pole. The Court stated that, "the extent to which a change in a non-conforming use is permissible depends on the provisions of the zoning regulation, the nature of the uses in question and the facts of the particular case in question." The ultimate purpose of zoning ordinances is to confine certain classes of uses and structures to designated areas. In light of this important purpose, Indiana courts have refused to permit the expansion or changes in nonconforming uses in a variety of factual situations. The Court found that the Plainfield Ordinance made it clear that a structure loses its pre-existing, legally established non-conforming use status if it is moved for any reason and for any distance.

Cracker Barrel violated the safe harbor clause of the Ordinance, not when it performed maintenance on the sign, but when it moved the sign from its pole to perform that maintenance. ■

The Indiana Interitance Tax: A Tax Not To Be Ignored (continued from page 1)

four categories. First, spouses and charitable organizations have a 100 percent exemption and, therefore, owe no tax for any inheritance received. Second, Indiana tax law allows a \$100,000 exemption to Class A beneficiaries, which includes lineal ancestors (parents, grandparents, etc.) and lineal descendants (children, grandchildren, stepchildren, descendants of stepchildren, etc.). Any amount transferred in excess of the exemption amount is taxed at a minimum rate of 1 percent and a maximum rate of 10 percent. Third, Class B beneficiaries, which include siblings, children of siblings, and children's spouses, are entitled to only a \$500 exemption with tax rates ranging from 7 percent to 15 percent. Fourth, Class C beneficiaries encompass transferees not covered by any other category and have a small \$100 exemption with tax rates ranging from 10 percent to 20 percent.

Because the exemption amounts for the Indiana inheritance tax are considerably lower than the federal exemption,

many Hoosiers have a reason to be concerned over their nest egg and, more importantly, a reason to create an estate plan that will lower their tax bill and allow them to give greater gifts to their loved ones. For example, consider a married couple who desire to pass their \$2,000,000 estate on to their two children. Although they will not incur any federal estate tax because they are within the exemption amount, they will incur inheritance tax under Indiana law. Let's assume the husband dies first and his wife receives the full amount. She is entitled to a marital exemption and, thus, no tax is owed. Now, let's further assume that she passes on, leaving \$1,000,000 to each of her two children. Because each child is only entitled to a \$100,000 exemption, both will be taxed on \$900,000 and, accordingly, a total tax of \$90,500 will be owed.

However, a large portion of this tax can be avoided

(continued on page 6)

who the IDOR determines are not withholding, reporting, or remitting the proper amount of tax, to make periodic payments and file informational returns more frequently than the normal reporting period. This could mean that the IDOR may require weekly reporting and remitting by some taxpayers.

Indiana Code 6-8.1-8-2 has been amended to provide that the IDOR must now state within their demand notices the statutory authority for the IDOR to levy against a person's personal property held in a financial institution. Such personal property may include, savings and checking accounts, certificates of deposit or items contained within a safe deposit box.

A new provision has been added to the statute to permit the IDOR to levy on any unclaimed property submitted to the Indiana Attorney General for the benefit of a taxpayer. This new provision can be found at IC 6-8.1-8-15.

Protest of Tax Liability:

There are two (2) significant changes in a taxpayer's right to protest or appeal an adverse tax assessment

rendered against them by the IDOR.

The first change is in the amount of time a taxpayer has to protest a proposed assessment letter from the IDOR. Under the law prior to January 1, 2007, a taxpayer had sixty (60) days from the date that the proposed assessment letter was mailed in which to file a written protest. Indiana Code 6-8.1-5-1(d) has been amended to allow a taxpayer only forty-five (45) days in which to file a written protest. A taxpayer who fails to file a written protest within the forty-five (45) days will be forced to accept the IDOR's proposed assessment and cannot file an appeal to the Indiana Tax Court ("Tax Court").

The second significant change concerns the time period in which a taxpayer must file an appeal with the Tax Court if the taxpayer disagrees with the results of their tax protest before the IDOR. Prior to January 1, 2007, a taxpayer who disagreed with the IDOR's decision regarding their tax protest had one hundred and eighty (180) days in which to appeal the decision to the Tax Court. Effective January 1, 2007, a taxpayer must file their appeal with the Tax Court within

sixty (60) days of the date on which:

1. The IDOR issues a letter of findings, if the taxpayer does not make a timely request for a rehearing; or
2. The IDOR issues a denial of a rehearing of the taxpayer's timely request for a rehearing.

The taxpayer must realize that the Tax Court does not have jurisdiction to hear an appeal if the appeal is not timely filed. In order for an appeal to be timely filed, it must be filed within the time periods specified above.

In Conclusion:

Indiana was successful in collecting a substantial amount of overdue taxes through the amnesty program last year. However, taxpayers must be aware that Indiana has now decided to take a stricter approach to taxpayers who become delinquent in their tax obligations.

As you can see by some of the recent changes in the law, Indiana is tightening up the collection process and shortening the appeals process. What a difference a year makes!■

The Indiana Inheritance Tax: A Tax Not To Be Ignored (continued from page 5)

with proper strategy. Let's assume instead that the husband, upon his death, passed the first \$1,000,000 in life estate to his wife with the remainder of the life estate passing to his children and the second \$1,000,000 to his wife outright. In addition, upon his wife's death, she passes \$500,000 to each child. Assuming the wife was 70 years of age at her husband's death, the value of the wife's life estate would be approximately \$660,000 and the value of the children's remainder interest would be roughly \$340,000 (\$170,000 each). In this situation the assets would essentially end up in the same hands; but the tax owed on both the father and mother's estate would total only \$31,200 for a tax savings of \$59,300. Essentially, splitting the children's gifts between two estates allows for two \$100,000 exemptions per child and lower tax rates overall. Also, by giving a life estate to the wife, she is entitled to the income from the \$1,000,000 during her lifetime and, what's more, the children receive a future right to the \$1,000,000, but are only taxed on \$340,000.

Another important planning technique is to avoid Class B and C beneficiaries if at all possible. Let's assume that in

the previous example the married couple do not have two children but instead have one son and a daughter-in-law (Class B Beneficiary). Upon the death of the surviving parent, \$1,000,000 each is passed to the son and his wife. The tax will be approximately \$153,000, of which, \$107,000 is attributable to the decedent's daughter-in-law because of the small exemption and high tax rates applied to her as a Class B beneficiary. A better plan is to pass the entire amount to the son and let the spouse receive her share through inheritance or gifting from the son. Furthermore, if the gift to the son is split between his mother and father's estate, similar to the previous example, the total tax would be \$52,100 for a tax savings of \$100,900.

Although these are only a few of the methods available to effectively planning your estate and lowering your inheritance tax liability, it is clear that awareness and understanding of the Indiana inheritance tax can be of great benefit. Indiana residents should be alert regarding decisions affecting their inheritance tax liability.■

MANAGING PARTNER'S CORNER



William F. Satterlee, III
Managing Partner

We are pleased to announce that **Colby A. Barkes** and **Jason M. Smith** have joined our firm as associates.

Mr. Barkes is located in our Merrillville office, where his practice focuses in the areas of labor and employment and commercial litigation.

Mr. Smith is located in our Valparaiso office and concentrates his practice in the areas of business, corporate and wealth preservation counseling.

Colby and Jason are featured on the cover. **Welcome aboard!**

Larry G. Evans received the Civility Award from the Indiana State Bar Association's Litigation Section at this year's Annual meeting. The award is presented annually to Indiana attorneys and judges who demonstrate outstanding civility and professionalism in their dealings with judges, attorneys, parties, witnesses and the public. Congratulations Larry!

Michael E. Tolbert was recently elected to the Indiana State Bar Association Board of Governors as a Representative for the 2nd District to serve a two year term.

We bid a fond farewell to **William A. Ferngren** as he leaves Hoepfner Wagner & Evans to begin a solo law practice in Valparaiso. We are sad to see Bill go, but excited for him in his new venture and wish him much success! ■

Beware Spoliating Evidence (continued from page 4)

their own cases, or even levying a felony obstruction of justice charge. *Gribben* at 351. But the most frequently levied sanction is the "adverse inference instruction," also referred to as the "negative inference instruction."

An adverse inference instruction is a judicial admonishment made after the evidence has been presented at trial. In effect, the jurors are told that they may assume that the missing evidence was unfavorable to the party responsible for its concealment. In *Cahoon v. Cummings*, the Indiana Supreme Court affirmed the adverse inference instruction given in a medical malpractice case. 734 N.E.2d 535 (Ind. 2000). The defendant doctor allegedly altered a medical record to make it appear more favorable to his case. *Id.* at 544-46. The trial judge advised the jurors that they could consider the alteration to the medical record evidence that the doctor believed that he had, in fact, caused the harm at issue. *Id.* In other words, the jury was allowed to infer that the defendant personally believed that he was liable for malpractice. The jury ultimately returned an almost \$200,000 verdict against the doctor's estate (the doctor passed away before trial.)

In many cases, an adverse inference instruction can do more damage to the concealer's case than the missing or unaltered evidence itself. While jurors are impressed with concrete evidence that they can experience with their senses, the import of such evidence is

inherently limited, and a good lawyer can ensure that it does as little damage as possible to his client's case. But in the words of one New York court, "an adverse inference instruction often ends litigation - it is too great a hurdle for the spoliator to overcome." *Zubulake v. U.B.S. Warburg, LLC*, 220 F.R.D. 212, 219 (S.D.N.Y. 2003).

While the above-described sanctions have been imposed to address spoliation by a party to a lawsuit, they have not been similarly embraced by Indiana courts where evidence is destroyed or concealed by a stranger to the lawsuit. Indiana courts have held that there is no generally applicable duty for third parties to retain evidence. *Glotzbach v. Froman*, 854 N.E.2d 357 (Ind. 2006). But this does not mean that non-parties may indiscriminately dispose of potentially usable evidence. If special circumstances exist, a third party spoliator can be held liable for damages resulting from its interference with the case. For example, in *Thompson v. Owensby*, an insurance company was held liable for "misplacing" evidence that was relevant to a case involving its insured. 704 N.E.2d 135, 139 (Ind. Ct. App. 1998). The court held that, given the nature of its business, the insurer should have been well aware that the materials were potentially relevant evidence and that such knowledge gave rise to a duty to maintain and produce the materials. *Id.*

Aside from the avoidance of legal

sanctions, the retention of potentially relevant evidence can often benefit the person/company in possession, even if it appears incriminating at first blush. For example, an employee, who is injured on the job by faulty equipment, may have a product liability claim against the equipment's manufacturer and a worker's compensation claim against his employer. If the employer innocently (or not so innocently) decides to dispose of the equipment, because it is no longer useful to him, the employer not only hampers the employee's worker's compensation and product liability claims, but may damage its own ability to recover worker's compensation costs from the manufacturer of the faulty equipment.

So whether a party to a lawsuit or a third party in possession of potentially relevant evidence, there are compelling reasons to avoid spoliation of evidence. For parties to a lawsuit, who alter or destroy evidence, sanctions can be imposed that will be costly or, perhaps, even fatal to the case. For third parties, sanctions can be imposed in limited circumstances. In some cases, spoliation can lead to felony charges. And, indeed, in many cases, it may ultimately be advantageous to retain evidence that may seem troublesome at first. Ultimately, if you possess evidence, which may be relevant to a lawsuit, the best course of action is to seek legal advice as to how best to protect it and avoid costly sanctions. ■

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