

## **Guidebook for Indiana Coroners 2001 Edition**

# **Addendum on Confidentiality in Death Certificates and Autopsy Reports<sup>1</sup>**

Occasionally, coroners will be confronted with issues surrounding their duties relevant to the recording and reporting of sensitive information which is ordinarily confidential. Specifically, there is little guidance available from Indiana law concerning the confidentiality required about findings of HIV and hepatitis infections in decedents. The general rules governing coroner's records and rules for death investigations are found in Section 103 and Section 104 of the Guidebook.

### ***The Lack of Specific Indiana Law***

Indiana has no statute, administrative rule, appellate case or opinion of the attorney general which specifically addresses any requirement for confidentiality in death certificates or autopsy reports relevant to findings of HIV or hepatitis infections in decedents. There are specific requirements for the mandatory disclosure of public record information, including the contents of coroner's records [See: Section 103 of the Guidebook]. There are also specific requirements for coroners to issue death certificates within 72 hours (even if there is no established cause of death), and the coroner may issue supplemental reports when the cause of death is established [See: Section 104 of the Guidebook]. Generally, coroners are immune from liability for good faith release of the required information in autopsy reports and death certificates. Questions remain as to potential liability in the event of a malicious, negligent, or reckless release of information which is required to be kept confidential, or which is not required to be kept confidential but may cause social, psychological or economic harm to survivors of a decedent. In the absence of a duty not to disclose there can, of course, be no liability.

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## ***Indiana Appellate Cases of Interest***

Very few Indiana cases have ever dealt with specific issues of disclosure of information from autopsy reports or death certificates. Of those, most are actually cases involving interpretations of rules of evidence governing the hearsay status of reports and public records in general. The following are edited versions of three cases of interest.

### ***Althaus v. Evansville Courier Company***

(Indiana Court of Appeals, 1993)

*Althaus v. Evansville Courier Company* [No. 82A01-9212-CV-400], decided June 8, 1993 by the Indiana Court of Appeals, was a civil lawsuit against the coroner of Vanderburgh County. The local newspaper sued the coroner to compel release of a copy of an autopsy report after the death of a police officer. The trial court denied the coroner's motion to dismiss and motion for summary judgment. On appeal, the Indiana Court of Appeals reversed the trial court and held that the documents were "investigatory records" subject to the coroner's discretion to withhold or release.

The following is an edited version of the court's opinion:

On February 24, 1992, an Evansville police officer, James Gibson, Jr., was found dead in his home. Later that day, the Coroner ordered a physician to conduct an autopsy on Gibson's body. About two weeks later during a news conference, the Coroner declared Gibson committed suicide by overdosing on prescription drugs. Gibson's widow, however, disputed the accuracy of the Coroner's declaration during an ensuing press conference. On March 11, 1992, in an effort to aid its investigation of the developing controversy, the Newspaper served a document request upon the Coroner, asking for "[a]ny and all reports or documents, including autopsy reports and results of all toxicology tests, concerning the death of James Gibson, Jr.,...." The next day, the Coroner formally refused the Newspaper's document request. . . .

This case presents a pure question of statutory interpretation and thus, in construing the three statutes involved herein, we are governed by some familiar rules. . . .

The Indiana Access to Public Records Act (the Sunshine Law), codified at IND.CODE 5-14-3-1 *et seq.*, allows any person to inspect and copy the records of any public agency. Subject to certain exceptions, the Sunshine Law provides in part:

It is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and

employees. This chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record.

The Sunshine Law clearly indicates that the public is to have access to the public records of the government officials who represent the citizenry. Because county coroners are elected government officials, IND.CODE 36-2-14- 2, the general rule is that a coroner's official records are subject to public disclosure pursuant to the Sunshine Law.

In 1989, the Indiana Legislature limited the impact of the Sunshine Law as it pertains to coroners. It enacted IND.CODE 36-2-14-18 (the Coroner's Statute), which specifically addressed the subject of which information, exactly, a coroner must disclose and which it has the discretion to withhold. The Coroner's Statute provides:

- (a) Notwithstanding IC 5-14-3-4(b)(1) (the Investigatory Records exception, *infra*), when a coroner investigates a death, the office of the coroner is required to make available for public inspection and copying the following:
  - (1) The name, age, address, sex, and race of the deceased.
  - (2) The address where the dead body was found, or if there is no address the

location where the dead body was found and, if different, the address where the death occurred, or if there is no address the location where the death occurred.

(3) The name of the agency to which the death was reported and the name of the person reporting the death.

(4) The name of any public official or governmental employee present at the

(A) the probable cause of death;

(B) the probable manner of death;

and  
(C) the probable mechanism of death.

(6) The location to which the body was removed, the person determining the location to which the body was removed, and the authority under which the decision to remove the body was made.

(7) The records required to be filed by a coroner under IC 36-2-14-6 and IC 36-2-14-10.

(b) A county coroner or a coroner's deputy who receives an investigatory record from a law enforcement agency shall treat the investigatory record with the same confidentiality as the law enforcement agency.

(c) Notwithstanding any other provision of this section, a coroner shall make available a full copy of an autopsy report upon the written request of the next of kin of the decedent or of an insurance company investigating a claim arising from the death of the individual upon whom the autopsy was performed. The insurance company is prohibited from publicly disclosing any information contained in the report beyond that information that may otherwise be disclosed by a coroner under this section. The prohibition does not apply to information disclosed in communications in conjunction with the investigation, settlement, or payment of the claim. IND.CODE 36-2-14-18.

All the information specifically listed in the Coroner's Statute must be made available for public inspection. The Coroner has no discretion to withhold this information. Furthermore, subsection (c) of the Coroner's Statute requires the Coroner to release a copy of the autopsy report to the next of kin or the appropriate insurance company upon their request.

Perhaps recognizing the intensely personal and sensitive nature of a coroner's work, the General

scene of the death and the name of the person certifying or pronouncing the death.

(5) Information regarding an autopsy (performed or requested) limited to the date, the person who performed the autopsy, where the autopsy was performed, and a conclusion as to:

Assembly did not see fit to require coroners to release all information acquired during the course of their work. Certain kinds of information were excepted. One such exception, the so-called Investigatory Records exception, provides that records compiled in the course of criminal investigations are exempt from the disclosure requirements of the Sunshine Law at the discretion of the law enforcement agency. *See* IND.CODE 5-14-3-2; 5-14-3-4(b)(1). It is this exception that is at issue in this appeal.

The threshold question of whether a coroner's files may be considered to be investigatory records of a law enforcement agency was previously addressed by this court in *Heltzel v. Thomas* (1987), Ind.App., 516 N.E.2d 103, *trans. denied* (1988), Ind., 529 N.E.2d 345. There, after reviewing the various duties a coroner performs, this court concluded, as a matter of law, that a coroner satisfies the definition of a law enforcement official for purposes of the Sunshine Law when, among other things, the coroner acts pursuant to IND.CODE 36-2-14-6 (the Autopsy Statute). *See Id.* at 105-06. Accordingly, in the wake of the *Heltzel* decision, documents compiled pursuant to the conditions listed in the Autopsy Statute are investigatory records falling within the Investigatory Records exception. Under the Investigatory Records exception, it is within the coroner's discretion to release or withhold them. Because there is no dispute that in this case the Coroner acted because Gibson (1) died when apparently in good health, IND.CODE 36-2-14-6(a)(3), (2) died in an apparently suspicious, unusual, or unnatural manner, IND.CODE 36-2-14-6(a)(4) and/or (3) was found dead, IND.CODE 36-2-14-6(a)(5), the documents created as a result are investigatory records subject to the Coroner's discretion to withhold or release them.

We emphasize a coroner has the initial burden of showing a requested document qualifies as an investigatory record. To make this showing, a coroner must satisfy at least one of the conditions listed in the Autopsy Statute. If one of these conditions is satisfied, a coroner meets his burden of proof under IND.CODE 5-14-3-9(f)(1), and the record by definition is an investigatory record. Furthermore, once a coroner

makes this showing, the inquiry ends.

If a coroner can neither satisfy one of the conditions listed in the Autopsy Statute, nor demonstrate the record is otherwise related to a criminal investigation, the record is not an

In this case, as we discussed *supra*, the record supports the Coroner's proper assertion of the Investigatory Records exception. Thus, the Coroner has the discretion to release or withhold any information not otherwise covered by the Coroner's Statute. We note there is sound policy supporting this statutory scheme. Although we foster ideals of unrestricted public access to public records, the General Assembly recognized that in some situations, the public's need for detailed autopsy reports is outweighed by the sensitive content of such reports. Moreover, pursuant to the Coroner's Statute, a coroner is already required to release much of the information contained in autopsy reports. Because the Coroner's Statute ensures that the public will have adequate information, we see no reason, and, more importantly, we have no authority, to judicially alter the legislature's statutory scheme.

The Coroner's Statute sets forth a special rule applicable to coroners and provides that all of the information listed in this section must be made available to the public regardless of the Investigatory Records exception. Additionally, a coroner must release a copy of the autopsy report to the next of kin or the appropriate insurance company.

Regarding other documents not specifically covered by the Coroner's Statute, a coroner may deny the public access to these documents by asserting the Investigatory Records exception. Contrary to both the trial court's conclusions and the Newspaper's assertions,

### ***Doe v. Methodist Hospital*** (Indiana Court of Appeals, 1994)

In *Doe v. Methodist Hospital* [No. 30A01-9312-CV-421], decided September 8, 1994 by the Indiana Court of Appeals, the plaintiff sued Methodist Hospital and specific individuals for invasion of privacy because of disclosure of plaintiff's HIV-positive status. The following is an edited version of that opinion:

On January, 11, 1990, Doe, a letter carrier for the Post Office, suffered what appeared to be a heart attack while at work. He was taken from his workplace by ambulance to Methodist Hospital. While being transported to the hospital, Doe disclosed to the paramedics that he had tested positive for HIV . . . . The paramedics noted Doe's HIV status on their report. The information became a part of Doe's confidential

investigatory record. Accordingly, pursuant to IND.CODE 5-14-3-9(f)(2), a requesting party may gain access to the requested record on the ground that the coroner's denial of access was arbitrary and capricious. . . .

the Coroner is not required to produce evidence linking Gibson's autopsy report to a criminal investigation in order to properly assert the Investigatory Records exception. The *Heltzel* court, as we discussed *supra*, already concluded, as a matter of law, that whenever a coroner acts pursuant to the Autopsy Statute, he has the discretion to release or withhold the documents he compiles, regardless of whether the circumstances listed in the Autopsy Statute are ultimately related to a criminal investigation. In this case, the record supports the conclusion that at least one of the requisite conditions was shown by the Coroner; accordingly, the Coroner may properly deny the Newspaper access to Gibson's autopsy report. If, on the other hand, one of the circumstances listed in the Autopsy Statute had not been satisfied, then the Coroner's denial would have been arbitrary and capricious, thereby enabling the Newspaper's access to Gibson's autopsy report. Thus, we must reverse, as clearly erroneous, the trial court's conclusions that (1) the Coroner must demonstrate Gibson's records are linked to a criminal investigation in order to assert the Investigatory Records exception, and (2) the Newspaper may overcome the Coroner's proper assertion of the Investigatory Records exception by showing the Coroner acted arbitrarily and capriciously. Pursuant to Ind.Appellate Rule 15(N), we direct judgment be entered for the Coroner and against the Newspaper.

medical record at the Hospital.

Co-Defendant Logan Cameron, one of Doe's co-workers, telephoned his wife, Co-Defendant Lizzie Cameron, an employee of the Hospital, to inquire about Doe's condition. Lizzie examined Doe's medical record and advised Logan that Doe was HIV positive. Logan then relayed Doe's HIV status to other employees at the Post Office, including Co-Defendant Cathy Duncan.

Duncan relayed Doe's HIV status to two other co-workers, Ron Oakes and Becky Saunders. Oakes had already known about Doe's HIV infection, having been

Doe brought the present lawsuit for the invasion of privacy against Methodist Hospital, Lizzie Cameron, Logan Cameron, and Cathy Duncan. All defendants moved for summary judgment which was denied with respect to all defendants except Duncan. This appeal relates only to the summary judgment entered against Doe in favor of Duncan. . . .

*[The critical issue was: "Whether Duncan gave "publicity" to the private fact involved sufficient to sustain an action for an invasion of privacy?"]*

Indiana recognizes the tort of invasion of privacy as follows:

The unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern or the wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibility.

*Continental Optical Company v. Reed* (1949), 119 Ind.App. 643, 648, 86 N.E.2d 306, 308 (quoting 138 A.L.R. 22), *trans. denied*.

In *Near East Side Community Organization v. Hair* (1990), Ind.App., 555 N.E.2d 1324, we noted:

The general tort of invasion of privacy has four distinct strands:

1) unreasonable intrusion upon the seclusion of

informed by Doe in confidence. Saunders, however, had not known.

another;

2) appropriation of the other's name or likeness;

3) unreasonable publicity given to the other's private life; and

4) publicity that unreasonably places the other in a false light before the public. 555 N.E.2d at 1334, 1335 (quoting Restatement (Second) of Torts, §§ 652A(2) at 376 (1977)).

Doe has never alleged that Duncan's communication of his HIV status placed him in a false light. Therefore, Doe's complaint can only state a claim under the third strand above, that Duncan gave unreasonable publicity to Doe's private life. *See Hair*, 555 N.E.2d at 1335. Thus, to prevail, Doe must establish that Duncan gave "publicity" to Doe's private life.

The issue of what constitutes "publicity" for the purposes of the tort of invasion of privacy (public disclosure of private facts) is one of first impression in Indiana. . . . In the present case, Duncan disclosed Doe's HIV status to only two co-workers (one of whom had already known). As a matter of law, Doe has failed to establish the "publicity" required to sustain his action for the invasion of privacy against Duncan. Doe has not persuaded us that the trial court's decision to grant summary judgment was erroneous, and we find no error.

*[The plaintiff then appealed to the Indiana Supreme Court.]*

### ***Doe v. Methodist Hospital***

(Indiana Supreme Court, 1994)

In *Doe v. Methodist Hospital* [No. 30S01-9504-CV-420], the Indiana Supreme Court affirmed the Indiana Court of Appeals on December 31, 1997. The Indiana Supreme Court conducted an extensive analysis of the history of tort law and of case law from other jurisdictions. It concluded that the circumstances of this case do not constitute an actionable tort. The following is an edited version of the language of the Indiana Supreme Court:

"In this case, Doe would have us impose upon Hoosiers a legal duty to refrain from publicly disclosing the private affairs of others. We can identify two main interests that such a duty would protect. First, a person has an interest in reputation, in being able to interact effectively with other people. Second, a person has an interest in mental well-being, in avoiding the emotional distress that could result from disclosures. Each of these interests must be balanced against competing public and

private interests. . . . Indiana recognizes a number of the claims described generically as invasions of privacy. The version of these torts involving disclosure of truthful but private facts encounters a considerable obstacle in the truth-in-defense provisions of the Indiana Constitution. The facts and the complaint in this particular case do not persuade us to endorse the sub-tort of disclosure. We affirm the trial court."

### ***Stath v. Williams***

(Indiana Court of Appeals, 1977)

In *Stath v. Williams* [No. 3-575A92], the Indiana Court of Appeals decided a lawsuit brought by insurance beneficiaries against the Lake County Coroner and the coroner's pathologist for an allegedly unauthorized autopsy. The court decided the case on October 3, 1977. The following is an edited version of the opinion of the Indiana Court of Appeals:

The Court of Appeals, Hoffman, J., held that: (1) plaintiffs could not recover from county coroner or members of coroner's staff damages arising out of performance of an autopsy on decedent, in view of fact that performance of autopsy was authorized by statute, and in absence of evidence of bad faith on part of coroner or his staff; . . .

Merlie C. Stath and Stath Office Equipment & Supply, Inc. brought their respective actions against Alexander S. Williams, Coroner; R. A. Lundeberg, Deputy Coroner and Albert Kaltenthaler, a coroner's pathologist, all of Lake County, Indiana, personally and in their official capacities, for the alleged unauthorized autopsy performed June 1, 1967, on the deceased Robert V. Stath. The allegations of the complaints were generally that due to the incompetence of Dr. Kaltenthaler and the abuse of discretion exhibited by Dr. Williams in selecting him, and due to the approval and participation of Dr. Lundeberg, an erroneous and careless autopsy was performed causing the plaintiffs to suffer damages. These were alleged to include the personal anguish of Mrs. Stath together with the expenses incurred by both of the plaintiffs in attempting to obtain accidental death benefits under certain insurance policies on the life of the deceased. . . .

On June 1, 1967, the deceased left his home in apparent good health. During the day he contacted his wife and explained that he had an engagement with a customer in Crown Point, Indiana, and would not return to Rensselaer for dinner.

Thomas Schmal, the customer with whom the deceased had the engagement, testified to the effect that the two had a couple of drinks and a beer over their dinner discussion. He further noted that Mr. Stath appeared to be in normal physical condition and suffering from no discernable ailments when they departed company after the meal.

Later that evening at about 9:30 P.M. an Indiana State Police Officer was dispatched to a one-car automobile accident at the intersection of State Road 2 and Interstate 65. Upon arrival at the scene he found

Based on these facts, the plaintiffs first question the coroner's jurisdiction asserting that the death of Robert Stath was so clearly accidental as to preclude

collided with a bridge abutment a 1966 Cadillac automobile owned by the deceased driver who was identified as Robert V. Stath. An ambulance attendant had moved the body out of the car and a photographer from the coroner's office took several photographs.

Thereafter the body was removed to Methodist Hospital in Gary, Indiana, pursuant to an order by Dr. Williams as coroner, for the purpose of having an autopsy performed to determine the cause of death. Dr. Kaltenthaler as coroner's pathologist performed the post-mortem by doing an external and internal examination of the body, including dissection of various organs. His conclusion was that the cause of death was "cor pulmonale due to extensive emphysema." The subsequent coroner's verdict which included an inquiry by Dr. Lundeberg stated, in pertinent part:

"VERDICT : An inquiry into the death of Robert Stath, 115 Park Avenue, Rensselaer, Indiana, reveals that on June 1, 1967, Mr. Stath was found expired at the scene of a one-car accident which occurred on the above date at approximately 9:30 P.M., on SR 2, at its intersection with I 65 Eagle Creek Township, 5 1/2 mile east of Lowell, Indiana. Investigation disclosed that Mr. Stath was Eastbound on SR 2, when he veered off the highway to the right traveling a total of 313 feet into the grass along the road and striking the bridge abutment of I 65 head on. It is believed that the deceased took ill at the wheel and that accounted for his losing control of his vehicle. The entire front end, roof, and left rear fender of the Stath auto was damaged. At the time of the accident the weather was clear, the lighting dark and the road pavement dry. A Blood Alcohol Analysis taken on the deceased revealed a concentration of .22%. "CAUSE OF DEATH: Natural Cor pulmonale, extensive; bilateral pulmonary emphysema (bulbous type)."

any suspicion of criminal conduct therefore rendering the performance of an autopsy an abuse of discretion. Reliance is placed on *Sandy v. Board, etc.* (1909), 171

Ind. 674, 87 N.E. 131, and *Jameson v. Board of Commissioners of Bartholomew County* (1878), 64 Ind. 524, for the proposition that "the statute with respect to inquests and autopsies has from the earliest times been an arm of the criminal law" and that the mere discovery of the deceased in an automobile which had collided with a bridge abutment is insufficient evidence of crime from which the coroner can retain jurisdiction.

However, an investigation by the coroner under IC 1971, 17-3-17-4(a) (Burns Code Ed.), cannot properly be construed as discretionary or based solely upon a priori suspicion of crime. Rather it is required that when there is notice of the death of a person "from violence or by casualty or by death when in apparent good health, or when found dead, or found in any suspicious, unusual or unnatural manner \* \* \*", the coroner must initiate an investigation. Appellants are mistaken in their assumption that there should be some evidence of crime before the coroner may invoke his jurisdiction. Jurisdiction arises upon disclosure of the factual circumstances contemplated in the statute. It is the investigation itself which determines whether criminal suspicions are justified. Thus, while it is conceivable that a court could find evidence which shows that the coroner's exercise of jurisdiction was erroneous on technical grounds it cannot be said to be an abuse of discretion to order an investigation when, as here, the essential criteria of the statute have been met.

In the case at bar Robert Stath was "found dead" and could be said to have been "found dead when in apparent good health" or possibly "by casualty." Thereafter a representative from the coroner's office made an investigation at the scene and took photographs of the automobile and the body of the deceased. The reporting police officer whose investigation confirmed the conclusion of the coroner stated in his affidavit that there appeared to be "no application of brakes prior to the accident", that "(d)espite the impact of the automobile \* \* \* the body was intact" and that "the decedent's face and body were not bloody." Under such circumstances the coroner was required to assume jurisdiction.

Once having assumed jurisdiction the coroner, in the furtherance of his inquiry, had virtually an unlimited prerogative to order a post-mortem. IC 1971, 17-3-17-4(c) (Burns Code Ed.), states, in pertinent part:

Appellants' reliance on *Scheuer v. Rhodes* (1974), 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90, is misplaced since here there is no showing after presentation of evidence that the coroner's investigation and autopsy were performed in bad faith. The fact that appellants' expert witness thought the coroner relied too

"Whenever any coroner under this act \* \* \* deems it necessary in the discharge of his duties to have an autopsy performed he shall employ a physician possessing the education and training that meet the standards established by the American board of pathology for certification or a physician holding an unlimited license to practice medicine in Indiana acting under the direction of such qualified physician to perform such autopsy, \* \* \*."

This clearly designates that the decision regarding the performance of an autopsy as part of the inquiry is based on the professional expertise and discretion of the coroner. Moreover such a post-mortem is intended to be a scientific investigation concerning the cause of death as determined from the corpse itself and not necessarily from other physical findings made at the scene as part of the overall investigation. In this context the coroner's pathologist was required to follow his function as a physician to perform only the autopsy and accordingly cannot be held liable for failing to investigate other physical evidence. *Hassard v. Lehane* (1912), 150 App.Div. 685, 135 N.Y.S. 711; *Young v. College of Physicians and Surgeons* (1895), 81 Md. 358, 32 A. 177. See also, 31 Ind.L.J. 296.

Appellant argues however that even if the autopsy were technically authorized the coroner and his agents were so haphazard in the performance of it and in their execution of official duties concerning the investigation as to show sufficient elements of bad faith to overcome the immunity statute IC 1971, 17-3-17-15. It is argued in this regard that there was no proper investigation of the accident nor viewing of the photographs of it by the pathologist. Appellees are further said to have ignored the obvious evidence of traumatic injury to the deceased from the collision causing them to arrive at a conclusion of "death by natural cause" through an unnecessary and improper autopsy.

"Bad faith" is not simply bad judgment or negligence, rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity. It is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will. *Vickers v. Mote* (1964), 109 Ga.App. 615, 137 S.E.2d 77. heavily on his pathologist in finding a cause of death does not establish the intentional wrongdoing which is ordinarily the sine qua non of bad faith. Furthermore no evidence was presented concerning the state of mind or intent of the respective appellees with regard to the performance of the investigation. The 37-year-old Mr.

Stath was found dead under circumstances within the confines of the statute. No explanation existed for the one-car automobile collision and the police report implied death before impact. Photographs were taken by the coroner's office and Dr. Lundeberg made reference to the investigation concerning the accident in his verdict. Under these circumstances the performance of an autopsy, contrary to appellants' assertions, shows a good faith effort to determine a medically accurate cause of death and therefore precludes the recovery sought.

As stated in *Jameson v. Board of Commissioners of Bartholomew County*, *supra*, at 540 of 64 Ind.: "These are the public duties of the coroner, which he is bound under the law to discharge, without fear or favor, in the interests of humanity and public justice. Private malice or private gain should never influence or actuate the coroner in the discharge of his high public duties; and the presumption is, and must be until the contrary has been made to appear, that duty alone, and neither malice nor gain, has prompted or instigated the coroner in making his public inquest into the manner and cause of sudden or violent death, who is guilty thereof, and the degree of guilt. The public at large, and the individual citizen, have the right, we think, to rely implicitly on this presumption, in dealing with the coroner in any matter connected with the proper discharge of his official duties. It can not be assumed that a coroner, in making a public inquest under the requirements of law, is influenced therein by improper motives, or actuated thereto by malice or revenge, or by any desire of gain."

Appellants next contend that the trial court erred in refusing to admit into evidence the clothes allegedly taken from the decedent at the time of his death. However, before physical evidence is relevant to the determination of a factual issue the party offering such evidence must lay a proper foundation for its admission. *Storckman v. Keller* (1968), 143 Ind.App. 43, 237 N.E.2d 602. No such foundation was laid in the case at bar. The evidence was not identified as belonging to the deceased nor was it identified as being related to his

demise.

Appellants next contend that the trial court erred in excluding certain portions of the opinion testimony given by their expert witness. However, review of the motion to correct errors, together with the memorandums made a part thereof, disclose a failure to set out the questions, the objections or the offer to prove what evidence would have been given by the witness in answer to the question. The issue is therefore not preserved for review by this court and will not be considered. *Loeser v. Loeser* (1974), Ind.App., 311 N.E.2d 636 (*transfer denied*); *Daben Realty v. Stewart* (1972), 155 Ind.App. 39, 290 N.E.2d 809.

Finally appellants contend that the trial court erred in allowing Dr. Kaltenthaler to testify as to matters on cross-examination beyond the alleged scope of plaintiffs' direct examination. It is argued that plaintiffs' witness, as a defending party in the lawsuit, was called merely to bring the post-mortem examination into evidence so plaintiffs' subsequent expert witness Dr. Petty could make observations on his level of professionalism. However, Dr. Kaltenthaler was examined about the manner in which he performed the autopsy, the reasons for reaching his conclusion as to the cause of death, his consultation with other persons and his investigation of other physical evidence.

Since appellants pursued the circumstances of the autopsy and attempted to present its protocol as a matter which would be subject to subsequent comparison through its own expert, no error can be predicated on the trial court's refusal to limit cross-examination to his recollection of a previous deposition. *Craig, Exrx. v. Citizens Trust Company* (1940), 217 Ind. 434, 26 N.E.2d 1006. The scope, extent, method and manner of cross-examination is under the control and discretion of the trial court. *Kavanagh v. Butorac* (1966), 140 Ind.App. 139, 221 N.E.2d 824 (*transfer denied*). Accordingly no abuse of discretion has been demonstrated.

For the foregoing reasons the judgment of the trial court must be affirmed. . . .

## ***Indiana Administrative Code***

The Indiana Department of Health has promulgated extensive administrative rules and regulations, found generally in Indiana Administrative Code Title 410, governing communicable diseases, the reporting of those diseases, and confidentiality. None of these rules specifically govern the release of information about autopsies or death certificates. Throughout these rules and regulations, however, is the clear intent to maintain confidentiality of reports of HIV and HBV



infections.

For example, 410 IAC 1-2.3-49 (concerning the investigation of communicable diseases) reads in part:

- (e) The results of the investigation shall be documented, in writing, with a copy maintained at the local health department, and a copy forwarded to the department communicable disease section. Local health departments that do not have the necessary security to maintain complete confidentiality of HIV/AIDS patients may defer the storage of all copies to the department.

## ***The Indiana Code***

The Indiana Code provides statutory regulation of public health, including provisions governing communicable diseases, under Title 16. There are numerous statutory references to confidentiality in Title 16, but none of the references are specific to the confidentiality of autopsy information. Generally, the General Assembly seems to have recognized exceptions to what would otherwise be confidential information in the interests of public health reporting. For example, physician-patient privilege is waived for information properly reported to a local or state health officer:

IC 16-41-2-4. Waiver of patient privilege

A patient's privilege with respect to a physician under IC 34-46-3-1 is waived regarding information reported to a local or state health officer under this chapter.

Physicians may order confidential tests of newborn infants for HIV:

IC 16-41-6-4. Testing of newborn infants for HIV

(a) Subject to subsection (e), if:

- (1) the mother of a newborn infant has not had a test performed under IC 16-41-6-2.5;
  - (2) the mother of a newborn infant has refused a test for the newborn infant to detect the human immunodeficiency virus (HIV) or the antibody or antigen to HIV; and
  - (3) a physician believes that testing the newborn infant is medically necessary;
- the physician may order a confidential test for the newborn infant in order to detect the human immunodeficiency virus (HIV) or the antibody or antigen to HIV. The test must be ordered at the earliest feasible time not exceeding forty-eight (48) hours after the birth of the infant.

The Indiana General Assembly has created a number of statutory exceptions to the general requirement that HIV and HBV infections not be disclosed, for example:

IC 35-38-1-10.5. Screening and confirmatory tests for HIV -- Presentence investigation -- Waiver of husband-wife privilege -- Immunity from liability

(a) The court:

- (1) shall order that a person undergo a screening test for the human immunodeficiency virus (HIV) if the person is: (A) convicted of a sex crime listed in section 7.1(e) [IC 35-38-1-7.1(e)] of this chapter and the crime created an epidemiologically demonstrated risk of transmission of the human immunodeficiency virus (HIV) as described in section 7.1(b)(8) [IC 35-38-1-7.1(b)(8)] of this chapter; or (B) convicted of an offense related to controlled substances listed in section 7.1(f) [IC 35-38-1-7.1(f)] of this chapter and the offense involved the conditions described in section 7.1(b)(9)(A) [IC 35-38-1-7.1(b)(9)(A)] of this chapter; and

(2) may order that a person undergo a screening test for the human immunodeficiency virus (HIV) if the court has made a finding of probable cause after a hearing under section 10.7 [IC 35-38-1-10.7] of this chapter.

(b) If the screening test required by this section indicates the presence of antibodies to HIV, the court shall order the person to undergo a confirmatory test.

(c) If the confirmatory test confirms the presence of the HIV antibodies, the court shall report the results to the state department of health and require a probation officer to conduct a presentence investigation to:

(1) obtain the medical record of the convicted person from the state department of health under IC 16-41-8-1(a)(3); and

(2) determine whether the convicted person had received risk counseling that included information on the behavior that facilitates the transmission of HIV.

(d) A person who, in good faith:

(1) makes a report required to be made under this section; or

(2) testifies in a judicial proceeding on matters arising from the report;

is immune from both civil and criminal liability due to the offering of that report or testimony.

(e) The privileged communication between a husband and wife or between a health care provider and the health care provider's patient is not a ground for excluding information required under this section.

(f) A mental health service provider (as defined in IC 34-6-2-80) who discloses information that must be disclosed to comply with this section is immune from civil and criminal liability under Indiana statutes that protect patient privacy and confidentiality.

The General Assembly has also provided general rules for the reporting of communicable diseases, for example:

**IC 16-41-8-1**Sec. 1. (a) Except as provided in subsections (d) and (e), a person may not disclose or be compelled to disclose medical or epidemiological information involving a communicable disease or other disease that is a danger to health (as defined under rules adopted under IC 16-41-2-1). This information may not be released or made public upon subpoena or otherwise, except under the following circumstances:

(1) Release may be made of medical or epidemiologic information for statistical purposes if done in a manner that does not identify an individual.

(2) Release may be made of medical or epidemiologic information with the written consent of all individuals identified in the information released.

(3) Release may be made of medical or epidemiologic information to the extent necessary to enforce public health laws, laws described in IC 31-37-19-4 through IC 31-37-19-6, IC 31-37-19-9 through IC 31-37-19-10, IC 31-37-19-12 through IC 31-37-19-23, IC 35-38-1-7.1, and IC 35-42-1-7, or to protect the health or life of a named party.

(b) Except as provided in subsection (a), a person responsible for recording, reporting, or maintaining information required to be reported under IC 16-41-2 who recklessly, knowingly, or intentionally discloses or fails to protect medical or epidemiologic information classified as confidential under this section commits a Class A misdemeanor.

(c) In addition to subsection (b), a public employee who violates this section is subject to discharge or other disciplinary action under the personnel rules of the agency that employs the employee.

(d) Release shall be made of the medical records concerning an individual to the individual or to a person authorized in writing by the individual to receive the medical records.

(e) An individual may voluntarily disclose information about the individual's communicable disease.

(f) The provisions of this section regarding confidentiality apply to information obtained under IC 16-41-1 through IC 16-41-16.

The Indiana Department of Health has also promulgated extensive rules (found generally at 410 Indiana Administrative Code) for universal precautions in handling bloodborne pathogens which are consistent with the federal rules promulgated by the Occupational Safety and Health Administrations' rules (found at 29 CFR 1910.1030).

## ***Federal Guidelines***

The federal government has created both extensive federal statutory schemes and related systems of federal regulations to govern the confidentiality of health information. The federal statutes and rules are so massive that they are impossible to summarize in this addendum. They also give very little guidance as to problems of confidentiality in autopsy reports and death certificates. These statutes and rules, in addition, apply generally to health care providers, health plans and health care clearinghouses (and not generally to public officials such as coroners). Refer, for example, to “Standards for Privacy of Individually Identifiable Health Information” found at 45 CFR Parts 160 and 164 [65 FR 82462]; these rules and associated commentary go on for over 700 pages. There are also similarly complex and extensive regulations provided by the Center for Disease Control, Veterans’ Administration, Department of Defense, and Bureau of Prisons (among other federal agencies) [See, for example, Revised Guidelines for HIV Counseling, Testing, and Referral, November 9, 2001/ 50(RR19);1-58]. There are, however, no federal statutes or regulations which specifically govern the release of HIV or hepatitis information in autopsy reports or death certificates prepared by Indiana coroners.

## ***Medical Profession Guidelines***

The American Medical Association’s Council on Ethical and Judicial Affairs prepared a report, “Confidentiality of HIV Status on Autopsy Reports,” in 1992 (published at Arch. Pathol. Lab. Med. 1992; 116: 1120-1123). This report, of course, relates to a physician’s (but not a coroner’s) ethical duties and has no legal effect. The report recognizes the high variability of confidentiality laws from state to state, and observes:

In order to ensure that vital statistics and health resources properly reflect actual disease incidence, prevalence, morbidity and mortality, autopsies should include HIV/AIDS where it is relevant to the patient’s cause of death.

The AMA report further states:

Once an HIV or other AIDS-related test is performed, the results of the test should be entered in the autopsy report. . . . The decision to include AIDS-related information in the autopsy report as well as the decision to perform an AIDS-related test, should be based on medical, rather than confidentiality concerns.

The AMA report further states:

In cases where autopsies are done under the auspices of the medical examiners office and state law mandates that the autopsy information be accessible to the public, the physicians should comply with state law. However, in these instances, HIV status should only be recorded when the HIV status of the decedent would be relevant to the patient’s cause-of-death.

The Autopsy Committee of the College of American Pathologists (See: <http://www.med.jhu.edu/pathology/iad/images/jjb/pracguid.htm>) has published “Practice Guidelines for Autopsy Pathology: Autopsy Reporting,” which endorses the AMA guidelines on HIV confidentiality in autopsy reports. They write:

In brief, the council [Council on Ethical and Judicial Affairs of the AMA] recommends that physicians maintain the confidentiality of HIV status on autopsy reports to the greatest extent possible, since this information is part of the medical record. However, pathologists must be aware of their reporting obligations to public health authorities and other parties at risk, as mandated under local law.

## *Conclusion*

Indiana coroners are obligated to report accurately the cause of death on the death certificate, and pathologists are obligated to make a similar determination (consistent with medical ethics) on the autopsy report. Indiana statutory rules governing the contents of these records, access to the records, and sanctions for violating these rules are found in Section 103 and Section 104 of the Guidebook. Coroners have discretion in the release of some information, and Indiana law generally makes coroners immune from liability for good faith disclosure of such information.

Accordingly, there seems little legal consequence from the lawful disclosure (in an autopsy report or death certificate), in good faith, of HIV-positive or hepatitis-positive status of a decedent when those conditions were, in fact, a cause of death. A legal problem might arise, however, in the case of a false or inaccurate report.

There is the potential for legal liability if a coroner maliciously, deliberately, negligently, or recklessly releases an autopsy report or death certificate which falsely reports HIV-positive or hepatitis-positive status of a decedent. In the absence of actual malicious behavior, however, the legal risk seems slight. First, the dead generally have no personal rights and no standing to bring lawsuits. Thus, any plaintiff must be the estate of the decedent claiming a direct economic loss (usually a denial of an insurance claim) or a survivor of the decedent who can claim some injury resulting from the allegedly unlawful breach of confidentiality.

The best course of action for an Indiana coroner in these cases is the obvious one:

- (1) report accurately the information required to be on the death certificate;
- (2) wait for the results of confirmatory laboratory tests before reporting very sensitive

information such as HIV- or hepatitis-positive diagnoses.<sup>2</sup> Such action would, on its face, indicate a good faith effort to comply with the requirements of the law.

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<sup>2</sup> Revised Guidelines for HIV Counseling, Testing, and Referral, November 9, 2001/ 50(RR19);1-58, prepared by the Technical Expert Panel of Center for Disease Control HIV Counseling, Testing, and Referral Guidelines, offers the following (of course, in reference to the testing of live patients):

*Standard Testing Algorithm*

HIV-1 testing consists of initial screening with an EIA to detect antibodies to HIV-1. Specimens with a nonreactive result from the initial EIA are considered HIV-negative unless a new exposure to an infected partner or partner of unknown HIV status has occurred. Specimens with a reactive EIA result are retested in duplicate. If the result of either duplicate test is reactive, the specimen is reported as repeatedly reactive and undergoes confirmatory testing with a more specific supplemental test (e.g., Western blot or, less commonly, an immunofluorescence assay [IFA]). Only specimens that are repeatedly reactive by EIA and positive by IFA or reactive by Western blot are considered HIV-positive and indicative of HIV infection. Specimens that are repeatedly EIA-reactive occasionally provide an indeterminate Western blot result, which might represent either an incomplete antibody response to HIV in specimens from infected persons or nonspecific reactions in specimens from uninfected persons. Although IFA can be used to resolve an indeterminate Western blot sample, this assay is not widely used. Generally a second specimen should be collected  $\geq 1$  month later and retested for persons with indeterminate Western blot results. Although much less commonly available, nucleic acid testing (e.g., viral RNA or proviral DNA amplification method) could also help resolve an initial indeterminate Western blot in certain situations. A small number of tested specimens might provide inconclusive results because of insufficient quantity of specimen for the screening or confirmatory tests. In these situations, a second specimen should be collected and tested for HIV infection. . . .

An HIV test should be considered positive only after screening and confirmatory tests are reactive. . . .