In Answer to Judge O'Bryne

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IN ANSWER TO JUDGE O'BYRNE

BERNARD C. GAVIT*

Judge O'Byrne in his annual address at the last meeting of The Indiana State Bar Association made an extended statement concerning the Indiana Law Journal and advocated an abandonment of the present program in favor of the publication by the Bar Association of a journal devoted exclusively to Bar Association matters. A motion which he made calling for an investigation of the questions he raised and a poll of the membership of the Association on the matter was passed. In the interests of an informed and intelligent decision by the members of the Bar on this matter, I submit the following statement.

I regret the length of this statement, but it seems unavoidable if all of the pertinent facts are stated, especially in relation to the publication of the August issue. I am particularly concerned with the implications of Judge O'Byrne's statements on this score. It is apparent that whether or not Judge O'Byrne intended it some members of the Bar have the impression that the editors of the Law Journal arbitrarily refused to publish the article he refers to. The fact is that it has never been submitted to the editors for publication. The correspondence on this subject which will be set out later, demonstrates that there was no refusal to publish, nor to permit the publication of the article in question; nor was there any insistence that it be edited by student editors. On the other points he raises, practically everything he says is subject to correction and explanation, or fails to suggest additional pertinent factors, with the result that his conclusions are quite insecure.

I

Judge O'Byrne's first discussion is as to the financial aspect of the situation. Among other things he states that $1200 per year is paid to the faculty editor "for such editor." However, the contract between the Bar Association and the Law School which he sets out in full, discloses that this money is paid to the School for editorial services, "the care of extra and back numbers of said Journal, postage and all

* Dean, Indiana University School of Law.
other expenses incidental to said editorial work." It is as a matter of convenience paid directly to the faculty editor, but $450 a year is now allocated as a scholarship to the three principal student editors, and the balance is used to take care of stenographic, office and travel expense, although in a given year there may be some slight margin of compensation to the faculty editor. It is never more than a nominal amount. The faculty editor reports that during the past year he devoted 1000 hours, and the three principal student editors devoted 2500 hours, to the publication of the Journal.

I have not checked Judge O'Byrne's figures as to the expenditures of the Association for the Law Journal nor the percentages against the total income of the Association, because assuming his figures to be correct, it can be demonstrated that the Association does not put into the publication of the Law Journal any substantial amount of money which could be used legitimately for any other purpose.

Beginning with Volume 11, the Board of Managers took affirmative action to reduce the cost of the publication of the Law Journal. From figures furnished by Mr. Batchelor and published in his annual reports, Professor Evens submitted to the Board of Managers a year ago last summer a statement showing that the average net cost of the Journal for Volumes 6-10 inclusive, was $3,151.28 per volume. Those volumes included nine issues a year. Beginning with Volume 11 under an agreement with the Board of Managers, the number of issues was reduced to six a year. The figures for Volume 15 were not available at the time but the statement submitted disclosed that the net average cost for Volumes 11-14 inclusive was $2,330.29 per volume. This, however, included the cost of the index to Volumes 1-12, published in 1937 and two large issues published in Volume 13 under direction of the Board of Managers, devoted to an extended presentation of the Federal Rules of Civil Procedure. Volume 15 was no more expensive than the preceding volumes, with the result that for that five-year period the average net expenditure for the publication of the Law Journal (including the Index) was in the neighborhood of $2,330 per year.

The figures for Volume 16, published during the past year, are as follows:
**Printing and distribution costs .................... $3160.61**  
Editorial, etc. expense ................................. 1200.00  

**Total $4360.61**

**Income:**  
Advertising .............................................. $1194.50  
Re-imbursement for reprints ......................... 79.75  
Sales of copies ........................................... 420.00  

**Total $1694.25**

The net cost is thus, $2666.36, which is larger than the average for the preceding five years. Actually, on a comparable basis it is not, for the reason that because of the increase in membership for the year, an additional 300 copies of each issue were printed and distributed. This item cost $320, so that on a comparative basis the cost for the year is reduced to $2346.36. As will be demonstrated later, the increase in membership brought in a corresponding income for Law Journal subscriptions so that other Bar Association activities were not adversely affected because of this additional item.

Judge O'Byrne's figures do not take into account the assets of the Bar Association in the back number files of the Journal. The files contain approximately 4,500 copies of separate issues. Copies of single issues are sold at prices ranging from $0.75 to $1.50. The last set sold within the last few weeks brought in the sum of $103. The Law Journal files thus constitute an asset of several thousand dollars which if applied against the expenditures reduces the average cost per year at least three or four hundred dollars per year.

It is stated above that the Bar Association has not put any money into the Journal within recent years which could be used legitimately for any other purpose. This is based upon the fact that the By-Laws of Association fix the annual dues at $7 for senior members and $2 for junior members. At the Annual Meeting in 1926, the Association approved a resolution which provided that "membership subscriptions to the Law Journal be $1.50 per member to be deducted from

*These are for Volume 16, and are, therefore, from Sept. 1, 1940 to August 31, 1941. The income figures are from Mr. Batchelor's report and are, therefore, from July 1, 1940 to June 30, 1941. This might make some difference in the final figures, but the difference would be slight.*
the dues of each member.” Since that time the Journal has carried an announcement that the subscription rates are “to Association members $1.50 per year (included in annual dues),” or a similar phrase. At the Fort Wayne meeting Judge O’Byrne, as Chairman of the Membership Committee, reported a net membership of 1,699, and Mr. Wilde at the last meeting reported a net membership of 1,820. Judge O’Byrne’s report indicated a net increase in membership for that year of 246. During the past six years the average membership of the Association has been in the neighborhood of 1,400. At $1.50 a member the income from dues allocated to Law Journal subscriptions would be in excess of $2,000. Last year and at the present time it would exceed that amount, and for the present year would amount to $2,700. It appears to be true that some dues are not collected and that delinquent accounts on dues to some extent may not be collectible. No figures are available on this subject, but even assuming a final loss of 10%-15% it is apparent that the money which the Bar Association has put into the Law Journal has not greatly exceeded the income for this purpose, and that any deficiency has been taken care of by the value of the Law Journal files.

Thus while on the face of Judge O’Byrne’s figures a substantial part of the Association’s income goes into the publication of the Journal, actually it spends little or nothing for this purpose which it could spend legitimately for any other purpose. The Association has itself fixed the dues of junior members so that in the beginning the dues cover little more than the subscription price of the Journal, on the theory that it is wise to encourage the interest of beginning lawyers in Association affairs. They pay little toward the other activities of the Association. Thus one who questions the apparent disproportionate expenses of the Law Journal questions the policy of the Association on the subject of junior and delinquent members and does not prove that the Association is spending more on the publication of the Journal than it should. On the whole it is spending no more than it receives for this purpose.

Judge O’Byrne neglects to mention the fact (which I pointed out to him in a conference in August) that the University makes a substantial cash contribution to the publication of the Journal which if considered, as it should be,
further affects the significance of the figures which he submits. From the beginning the faculty editor of the Law Journal has been relieved of one-third of his teaching load with the result that the Law School budget for purposes of instruction is increased to that extent. Financial aid has been given to the student editors. The University has always supplied all office equipment so that as a matter of fact the University's actual cash contribution to the publication of the Journal is at least $2,500 a year. In addition to this, the University furnishes office and filing space which in Indianapolis would certainly cost the Association not less than $600 per year. In addition, all members of the faculty devote considerable time during the course of the year to the supervision of student notes and other Law Journal matters.

Those facts and figures are stated for the reason that it is commonly asserted or assumed that the entire financial burden of the Law Journal is borne by the Bar Association. That is not true, and never has been true.

Later in his address, Judge O'Byrne compares the cost of the Indiana Law Journal to that of the Illinois Bar Journal, and comes to the conclusion that because the Illinois Bar Journal costs the same amount of money but includes three times the circulation, that our cost is 300 per cent of the cost of the Illinois Bar Journal. One does not know whether the costs have been figured on a comparable basis but in any event anyone familiar with printing costs knows that his comparison is wholly inaccurate for the reason that the principal cost of a publication of this character is the composition cost, and that the additional printing and paper costs for additional copies are very slight. It is a fact also that the Illinois Bar Journal is published in pamphlet form and in a good many respects is not a comparable publication so far as costs of publication are concerned.

In any event the contract for the printing of the Journal has been let on a competitive basis and is a matter which has always been controlled by the Board of Managers.

II.

Judge O'Byrne next deals with the history of the Law Journal, the final conclusion apparently being that while the Bar Association has always wished to publish a trade journal, that the Law School has consistently diverted it
into other fields. The facts do not sustain this conclusion and indeed warrant only the opposite conclusion. Judge O'Byrne calls attention to statements made in Volume I of the Indiana Law Journal published by the Bar Association in 1925. He neglects to point out that this is not Volume I of the present publication. It is a small volume devoted exclusively to Bar Association affairs. However, Volume I of the present Indiana Law Journal was published beginning in January 1926 as the beginning of the present series under the editorial supervision of the Law School. It contains no statement by Mr. Roe, but does contain a statement (presumably by the faculty editor) explaining the new plan for a combined law journal and bar journal. The first issue contains two scholarly articles, some book reviews, comments and student notes and a small amount of Bar Association announcements and materials. The volume contained only six issues, but in these there were published twelve leading articles of a scholarly nature, sixteen book reviews, a considerable number of comments and case notes, and some bar association items. All of the succeeding volumes have followed this general plan, with the addition of issues devoted to the annual meetings.

The records of the July, 1925 meeting of the Bar Association disclose that Mr. Willis E. Roe, as chairman of a committee on the publication of the Law Journal who was also editor of the then existing Law Journal or Bar Journal, reported that the committee had been negotiating with the law faculty and the Trustees of Indiana University "with a view that by cooperating with the legal department of the University in publishing the Law Journal we would be able to offer a better publication than we would be able to do if the State Bar Association would undertake the enterprise alone." He further reported that the negotiations had not been completed and asked that the committee be continued "until such times as some favorable cooperating connection could be made which would give to the State Bar the medium it desires." The report was approved and the committee continued.

At the July, 1926 meeting of the Association (In the meantime Volume I of the present series had been published.) Mr. Roe, as chairman of the Law Journal committee, reported that: "Your committee on Law Journal begs leave to report
that it has held numerous meetings, most of which were in conjunction with the Board of Managers of the Indiana State Bar Association. As a result of these meetings we are pleased to report that satisfactory arrangements have been made with the Indiana University School of Law to supervise and to have charge of the editorial department.” He reported the membership of the Board of Editors and an Advisory Board of Editors and then stated: “The Indiana Law Journal under the most efficient work of the editorial department are already producing a journal which has surpassed the expectations of your committee.” The committee then recommended that membership subscriptions of $1.50 per member be deducted from the dues of each member. A statement was then made as to the necessity of securing additional advertising for the journal and Mr. Roe then stated: “Your committee believes that the Indiana Law Journal is now thoroughly established with a program which is bound to succeed and that it is no longer necessary to have a special committee and your committee therefore recommends that the Law Journal Committee be discharged and that its duties be transferred to the Board of Managers.”

The report of the committee was adopted. Judge O’Byrne has quoted further statements made at this meeting by Mr. Roe and Professor Sayre out of this context in an apparent attempt to sustain his premise that the Law Journal was always intended to be exclusively a Bar Association journal. When read in the light of what was actually done at the meeting the statements quoted are not at all at odds with the proposition that the present Law Journal was established as a cooperative project under the editorial supervision of the law school. The Journal before the convention was one which was essentially one devoted to legal scholarship. It was approved by the Association. For some reason or other the Advisory Board of Editors originally provided for was early discontinued, presumably because this arrangement proved to be unnecessary or unsatisfactory. It was certainly discontinued by the Board of Managers or the Association and not by the Law School.

The only proper conclusion is that in 1925 the Bar Association concluded that it would abandon the bar journal which had been started and publish a journal in cooperation with the Law School which would be a Law Journal or Law
Review and also a means of reporting the annual meetings and other matters of Association and lawyer interest. There has been no substantial change in that program.

Judge O'Byrne points out in the next sub-division of his address that the division of space devoted to law review materials and Bar Association matters remained fairly constant over the years. However, he then insists that during the past year the Bar Association lost space to the Law Review material. I have not checked the accuracy of those figures for the reason that the action taken resulted from a decision of the Board of Managers at the Fort Wayne meeting as to the exclusion of some materials which had been previously published. Thus, for example, it was decided that death and personal items would be eliminated and the register of state officers and Bar Association officers would be published in but one issue rather than in all issues. Judge O'Byrne was present at the meeting when this action was taken and so far as I recall offered no objection. During the year every item in the field of Bar Association news which was submitted was published except two memorials which were refused because of the action in relation to death notices. An effort was made to secure other materials of interest, but without success. That has been true for a number of years, and the experience demonstrates that most members of the bar have not been intensely, or even mildly, interested in that part of the program.

It is true that during the past sixteen years modifications have been made in the plan and contents of the Journal, but it is also true that no change of any consequence has been made without the affirmative action of the Board of Managers. An investigation of the earlier volumes of the Journal will show that many features were started which were abandoned and that others have been added. In no instance has the Law School assumed the responsibility for any such change; it has always been made on approval of the Board of Managers. Judge O'Byrne's conclusion that the Law School has consistently diverted the Journal from its original purpose is wholly without foundation.

I would call attention to the fact that Judge O'Byrne appears to conclude from the contract on the subject and the statement in the Journal to the effect that the management of the Journal remains with the Bar Association, that the
latter intended to publish a trade journal and that the Law School has no real responsibility for its publication. As pointed out above the first conclusion is clearly unwarranted, and neither conclusion is supported by the practical construction placed upon the contract by both parties. The arrangement certainly allocates to the Law School the editorial supervision of the Journal, and that has been the practical construction of the arrangement. Through all the years the Association through its Board of Managers has regulated and controlled, but not edited, the Journal. It has regulated the size of the issues and the expenditures, the inclusion and exclusion of Bar Association matters, and has defined the general policy to be followed. However, it has never undertaken to control the editorial function beyond those limits. Advisory committees and Law Journal committees have been appointed from time to time but have been abandoned.

Judge O'Byrne points out in his address that during the past year the statement on this subject was changed. This was done in the interests of brevity and space. It is impossible to point out wherein the revised statement does not contain all of the substance of the previous longer statement on this subject.

III.

Judge O'Byrne next complains of the editing of the committee reports in the October, 1940 issue. For a number of years it has been the custom to edit the reports of the annual meetings, and only the substance of the committee reports has been printed. No previous complaint by any officer of the Association has been received. Had the Board of Managers made any change in the established policy as to the October, 1940 issue, the committee reports, of course, would have been published in full. The editing of the reports was a good faith effort to comply with the practice on this subject and Judge O'Byrne has not pointed out any specific instance where the judgment of the editor on this score could be questioned. The fact that they were edited proves nothing other than the fact that presumably they needed some editing.

Judge O'Byrne next states that he had difficulty in connection with the report of the mid-winter meeting. The fact of the case is that some question was raised by the
editor as to the publication of some of the collateral proceedings and Judge O'Byrne insisted that they should be published in full. In view of the fact that the editor accepted Judge O'Byrne's judgment on the matter and complied with his wishes in full, it is impossible to establish a fair ground for complaint on that point. The mere fact that there was a difference of opinion on the point ought to be insignificant, particularly if Judge O'Byrne's opinion prevailed, as it did.

Some presidents have taken a more active interest in the Law Journal than others. I am confident that no instance can be found where the expressed wishes of an executive officer of the Association have not been followed.

Judge O'Byrne next calls attention to an incident in connection with the August issue. I am including at the end of this statement as Appendix A, copies of four letters dealing with this subject which give and indicate the exact facts as to this incident. No response has ever been received to the letter dated August 15. It is a fact that Judge O'Byrne was in my office a few days prior to July 28, and made no complaint at that time or at any other time during the year concerning the operation of the Law Journal, except that at the conference in Indianapolis on August 2, he did complain about the editing of the committee reports made at the Ft. Wayne meeting.

I call attention to the fact that his action in connection with the August issue was based almost entirely upon the asserted excessive costs for the year. My statement to him on this subject has never been controverted nor has he since asserted that the editor was responsible for the failure of the June issue to include publicity on the American Bar Association meeting. The delay in the June issue was caused by the illness of an author who had agreed to submit an article for that issue and at the last moment other arrangements had to be made.

Judge O'Byrne has emphasized the clause in the contract which provides that "the President of said Association shall be kept advised of the contents of future issues and material on hand and rejected," and states in substance that he was not so advised. It undoubtedly is true that there was no literal compliance with this provision during the year, but that has been true for several years because previous presidents had regarded the procedure as unnecessary. During
the past year the provision was overlooked. The new editor unfortunately was not furnished with a copy of the contract and had no knowledge of the provision. That is a matter which we regret. I would call attention to the fact, however, that the next clause of the contract provides that the editor and president shall make arrangements on the matter to serve the convenience "of both." As in the case of any other bilateral arrangement, this certainly cast upon Judge O'Byrne a duty as to some affirmative action. It is a moral certainty that had he called attention to this matter at any time during the year, proper arrangements would have been made.

It is also very pertinent that the editor submitted to the Board of Managers at Fort Wayne a detailed proposal covering fifteen pages as to the Journal covering the entire year, of which the following is a summary:

To: Board of Managers, Indiana State Bar Association
From: Frank E. Horack Jr.
Re: Volume XVI of the *Indiana Law Journal*

Some weeks ago I circulated certain proposals for alterations in the editorial policy of the *Indiana Law Journal* for the coming year. On the basis of that report, I am sending to you today a list of ten specific issues which summarize the basic proposals. I think it would be convenient if we had these questions in mind prior to the meeting of the Board next Thursday.

1. Should we experiment with the following division of space in the *Journal* for the coming year, as follows: Two issues containing the proceedings of the Bar Association, two "general" issues, and two "single subject" issues?

2. Should student notes be used to annotate leading articles with an analysis of Indiana decisions?

3. Should the length of student notes be reduced so an increasing number of shorter comments on Indiana recent cases can be included?

4. Should a section entitled "A Review of Government Publications" be included?

5. Should a section entitled "Legal Institutes and Bar Association Activities" be included?

6. Should the obituary section be discontinued?

7. Should the list of judges and officers be excluded from all but the February issue? (Note the original recommendation was the October issue, but in the light of changes which occur at the beginning of the year, I think the recommendation should be amended to read the February issue.)

8. Should the cover of the Journal be changed to black print on cream stock with an outline of the State and the seal of the Indiana Bar Association in red ink?
9. Should laid paper stock be substituted for the present eggshell?

10. Should the type be simplified to reduce composition costs?

In addition to these questions, I will present at the meeting on Thursday a report concerning printing costs and bids submitted by five printing concerns.

Respectfully submitted,
(Signed) Frank E. Horack Jr.

Each item was discussed and passed on by the Board of Managers, and its action regulated the conduct of the editor for the year. Judge O'Byrne was present and made no formal objection. Thus the Board approved a very detailed program for the Journal for the year, and the editor very properly assumed that his function was to carry out that program.

IV.

Judge O'Byrne next compares the Indiana situation with those of other states. I assume it to be a fact that Bar Associations throughout the country deal with this problem in different ways although it is also a fact that some of the best Law Journals in the country, for example the Iowa Law Review, are published jointly by the Bar Association and the state university. A recent survey on this subject by the Association of American Law Schools discloses that fifteen law schools have this arrangement. For reasons which I will undertake to state later, experience in other states is wholly inconclusive for the reason that lawyers in Indiana deserve some publication of this character and the present arrangement appears to be best suited to the needs of the lawyers of this state.

V.

Judge O'Byrne next states several conclusions some of which have been dealt with above and some of which revert to the proposition that the Bar Association should abandon the present arrangement and publish a journal dealing only with Bar Association matters as such. His fifth conclusion on this score, however, and his subsequent rhetorical question asking whether or not the Law Journal should "be restored to the Association which gave it birth" and published purely as a Bar Journal, are at odds with the facts. It has been pointed out above that the original Bar Journal to which he
refers was abandoned in January, 1926, in favor of the present publication, and the new Journal as a matter of fact was the result of a cooperative arrangement between the Association and the Law School, and was expressly approved by the Association. Who made the first proposal on the subject I do not know, but it would appear to be axiomatic that the Bar Association could not be the sole moving force in the cooperative arrangement which resulted. It certainly did not coerce the University into the contract. Mr. Roe’s report states that it resulted from numerous conferences between his committee, the Board of Managers, and representatives of the University.

The inference of his fifth conclusion to the effect that the columns of the Law Journal are not open to the other Law Schools of Indiana is contrary to fact. During the years the Journal has published whatever of merit has been submitted to it regardless of the source. During the last year it is a fact that not a single article submitted for publication was rejected.

The sixth conclusion indicates a serious misunderstanding of the editorial function. In connection with the incident in regard to the August issue I suggested to Judge O’Byrne that the publication of the article which he ordered published would result in a delay in the publication of the August issue for the reason that it would take some time to prepare the manuscript for publication. Every Journal has an established form and all manuscripts submitted are edited to comply with the form used. Citations are always checked for the reason that not infrequently typographical errors are made in copying the manuscript and not infrequently notes are misplaced. I have never known of an author who objected to this valuable assistance in the publication of a manuscript nor have I ever known of an editorial staff which did not consider this procedure a part of its function.

If Judge O’Byrne’s concept of the editorial function is adequate the Law Journal requires only a printer who will set in type everything submitted in the order in which it is submitted, and all editorial staffs are superfluous. However, it is a fact that no publisher operates on that basis, nor has the Law Journal ever been operated on that basis.

So far as the proposition is asserted that the Bar As-
association could save money by the publication of a Bar Journal devoted to Bar Association matters, Judge O'Byrne's conclusion on this score is certainly questionable. If the same amount of materials are published certainly there can be no saving in cost nor in editorial expense. Indeed on the face of it such a project would require the employment by the Bar Association of some expert assistance on the project, and the renting of space, resulting in a rather significant increase in the present costs, for the Bar Association would lose the cash and other contributions the University now makes on this score. Certainly in any event the action in 1926 should be repealed because under the present arrangement members pay $1.50 for a year for a Law Journal and not for a Bar Journal. Many members, and in particular many junior members, have been induced to join the Association because of that fact.

VI.

In conclusion I wish to emphasize the fact that the Law School does not oppose a consideration of the problem as to what shall be done with the Law Journal. The contract between the Law School and the Bar Association expressly provides that it may be terminated by either party and certainly the Bar Association is privileged to abandon the present arrangement whenever it sees fit to do so. As stated in the beginning, the above statement is presented solely in the interests of an informed and intelligent decision on the matter.

Personally I hope that the present type of publication is not abandoned. Long before I was connected with the Law School I was interested in the venture of the Bar Association to furnish to the lawyers of the state a publication in the field of legal scholarship. We receive numerous statements from practicing lawyers as to the practical value of the articles and notes published in the Journal. I am confident that the Journal has constituted a very significant factor in a better administration of law in Indiana. I would dislike very much for the Bar Association to go on record as being concerned solely with its own immediate interests and thus reduce itself to a trade association.

It is true that the Law School could publish its own Journal. If it looked to its own selfish interests it would
probably wish to do so. The objections to this are implicit in what has been said immediately above. Such a publication would reach a very limited number of the lawyers of the state, its influence would be very restricted, and it would result in a considerable additional cost to subscribers. If the lawyers of the state can publish a combined scholarly and bar association journal at a cost of $1.50 per member, as it is clear they can, it is submitted that the best interests of the bar and the public will be served by the continuance of the present program.

APPENDIX

July 28, 1941

Professor Frank E. Horack, Jr.,
Northwestern University School of Law
Evanston, Illinois.

Dear Professor Horack:

At the direction of the President of the Indiana State Bar Association, I have collected a few figures with respect to the financial side of the publication of the Indiana Law Journal beginning with its October 1940 issue. I discover that for the 5 issues from October 1940 to June 1941 both inclusive, the cost to the Association has been just about the same as the cost for the entire 6 issues from October 1939 to August 1940 both inclusive and yet the subscribers have received about 74 fewer pages of material for the money spent by the Association.

Inasmuch as your representation to the Board of Managers of the Association indicated your intention to attempt the publication of a superior Journal for not more than the prior cost, I am instructed by the President to inform you that the August 1941 issue will be radically different from the others you have edited. A single feature article will appear upon the general subject of negotiable instruments in Indiana with particular reference to the feature of fees for legal services. This article has been prepared by the Honorable James M. Ogden, President of the Indiana Law School of Indianapolis and copy for it will be transmitted to Charles J. Barnhill at Bloomington not later than Saturday of this week, August 2nd.

There has been a great deal of criticism of the Indiana Law Journal by reason of its failure to devote space in any appreciable amount to the 1941 meeting of the American Bar Association in Indianapolis. Therefore the publicity for the American Bar meeting in the August issue must be rather extensive and I will contact you later in regard to it.

Finally the radical change in the character of the August number will be explained by a brief note over the signature of the Secretary or the President of the Association. No other material of any type or character will appear in the August issue unless hereafter directed by either the President or the Secretary of the Association. All proof for
the August Journal will be submitted to the Secretary before the printer receives the O.K.

Since the appearance of the June issue just shortly before August 1st has aroused considerable unfavorable comment, the August issue must appear during August.

There does not appear to be occasion for any personal interview in connection with this matter in the judgment of the President and myself but in the event that you wish to appear at a meeting with the President and myself at the Claypool Hotel at Indianapolis on Saturday, August 2nd at 6:30 daylight savings time such an arrangement will be satisfactory. In the absence of further word from you no such meeting will be considered on the calendar, however.

Very truly yours,

(Signed) Thomas C. Batchelor
Secretary

TCB/S

July 31, 1941

Mr. Thomas C. Batchelor
703 Union Title Building
Indianapolis, Indiana

Dear Tom:

Your letter of July 28 addressed to Professor Horack at Northwestern has been sent on to me. Frank advises me that it is impossible for him to get away from his work and engagements in Chicago this week-end, and I am undertaking to straighten out this matter if possible.

I have tried to get in touch with Judge O'Byrne but have been unable to do so, so that it seems necessary to me that I come in and meet with you and O'Byrne as suggested in your letter; that is, at the Claypool Hotel, 6:30, Saturday, August 2. Unless I hear from you to the contrary, I will assume that you will be there. I am sending a copy of this letter to Judge O'Byrne. I assume that you will be able to contact him so that there will be no difficulty about the proposed meeting.

I think it is wise to state in advance of the meeting in a general way my reaction to Judge O'Byrne's action and proposed action on this subject. Subject to correction on this point, I am firmly convinced that it is an usurpation of the power for the President of the State Bar Association to assume the editorship of the Law Journal and is in violation of the agreement between the Association and the University upon this matter. It is also at odds with the program for the Journal for the current year which was agreed upon in detail at the Board of Manager's meeting in Fort Wayne last summer. The fact is that commitments have been made to three authors as to publication of articles in the August issue. One of these was set in type for the February issue and has been held for lack of space. The other two commitments were made because the editor has the impression that Judge O'Byrne wished the materials published. It would seem highly undesirable to repudiate these commitments in favor of an article not yet available and which has never been submitted to the editor. One would hardly doubt that any paper which Mr. Ogden would submit'
would not be worthy of publication, but at least it would seem unwise to insist upon its immediate publication in preference to other commitments without at least the form of editorial supervision.

Mr. Horack has sent me a statement as to the costs of the Journal for the current year, which demonstrates that the proposition cannot be sustained that the costs are excessive or substantially larger than those for last year. The statement made to the effect that subscribers have 75 fewer pages of material for the money spent is certainly inaccurate when all factors are considered.

I do not think that the editorial staff is subject to the criticism given in the third paragraph. Pages of the Journal have been open to any publication which the President, the Secretary, or the committee in charge of the American Bar Association wish to submit on this score. It certainly is not a duty of the editor to prepare copy on this matter.

It is true that the June issue was late in publication, but this arose out of circumstances beyond the control of the editor. Throughout the years, publication dates have been met with some flexibility and it has not infrequently happened that a given publication was late for perfectly valid reasons.

I trust that you and Judge O'Byrne will accept the above statements as being wholly impersonal and made in the course of employment. I recognize that Judge O'Byrne has ideas as to the character of the magazine the Law Journal should be which are at odds with what it has been; and, of course, no one denies that he is entitled to his opinion upon this subject. It seems to me clear, however, that the Board of Managers is on record favoring the present type of publication in practically all of its details, and that we are bound to respect that judgment until it is changed in a proper manner. Our present judgment is that if he persists in the position he has taken, the matter must be submitted to the Board of Managers before we would be justified in submitting to the demands made.

Sincerely yours,

Bernard C. Gavit

BSG:cs
cc: Judge O'Byrne

August 6, 1941

Judge Roscoe C. O'Byrne
Brookville, Indiana

Dear Judge O'Byrne:

After careful consideration of the problem presented by Tom Batchelor's letter of July 28 concerning the publication of the Indiana Law Journal and in the light of the conference which I had with you and Tom in Indianapolis Saturday evening, I have come to the following conclusions:

After going over the publication costs of the Journal for the current year, it appears to be true that when all factors are considered the statements made in the letter of July 28 on this score cannot be sustained. I presented to you and Mr. Batchelor estimates of the costs for the year and factors dealing with the comparative costs for the current year and the past year (which I did not understand either of
you denied) which demonstrated very conclusively that if the plans for the August issue proceeded the total net cost of the Journal for this year would not exceed the cost of previous years on a fair comparative basis. My conclusion is that your action in ordering a serious curtailment of the size of the Journal for the August issue cannot be sustained on the ground of excessive cost and that money is actually available for the publication of an August issue of normal size.

The letter of July 28 offers as an additional ground for the proposed action that there had been criticism of the Journal for failure to include publicity and announcements concerning the American Bar Association meeting. There can be no question but what this basis for the proposed action is wholly without foundation. It was stated at the conference that Professor Horack had solicited contributions on this score and had published everything which had been submitted. Mr. Batchelor agreed that this was true and placed the blame on a general committee in charge of the American Bar Association meeting, which committee had failed to supply him with the necessary information and announcements. The editor of the Journal had definite plans for, and had contacted the secretary as to, announcements on this subject and the State Bar Association meeting for the August issue.

Based upon those two charges, which I am confident cannot be sustained, the letter of July 28 stated in substance that as a result the editor was to cancel his plans for the August issue and was to publish only an article selected by you and such other materials as you might direct to be included. This obviously was intended as, and could only result in, a discharge of the editor and his faculty and student assistants for the August issue. My conclusion is that this is wholly unjustifiable and that the letter of July 28 does not undertake to justify it. Any difficulty in the field of costs could be taken care of by a proper limitation of the size of the Journal or even the abandonment of the publication of an August issue. Nothing stated so far, therefore, would warrant the conclusion that the University could properly be discharged from the editorial supervision of the August issue. I assure you that if it could be demonstrated that an August issue of normal size would result in an excessive cost for the year, there would be no insistence on our part that the excessive cost be incurred. It is very pertinent that the letter was received without any previous communication with me or Mr. Horack on this point. Indeed, no complaint has been received by either of us during the course of the year.

Your action, in my judgment, is in violation of the contract between the School of Law and the Bar Association which imposes editorial supervision of the Journal on the faculty and student editors. We are confronted with the problem of refusing to comply with your demand that the editorship of the August issue be taken from the hands of the editors and turned over to you or refusing to comply to the demand and proceeding with the August issue as originally planned. In deference to your office and in view of the fact that you purport to act in the name of the State Bar Association, I have come to the conclusion that we must submit under protest to this demand.

Mr. Ogden's article was received Monday morning from Mr.
Batchelor's office by the student editor and I am returning it to his office. It seems to me quite clear that if your demand is effective, it is highly inconsistent to ask that the editors of the Journal do any of the editorial work connected with the August issue.

I assume that the August issue will carry the notice suggested in the fourth paragraph of Mr. Batchelor's letter of July 28 and that the notice will state that the issue has been published without any editorial supervision or participation by the Indiana University School of Law. If you think, however, that you are entitled to insist that the student editors assist you with the publication of the August issue, I shall be glad to hear from you on this point; otherwise we will assume that you and Mr. Batchelor will proceed with the August issue. We will advise the authors whose work had been accepted for publication in the August issue of the change.

If you think any of the statements made or conclusions stated are inaccurate or unjustifiable, I shall be very glad to talk to you further on the matter.

It is clear to me that the matter is one upon which the position of the University must be presented in detail to the Board of Managers and I propose to send a copy of all the correspondence on this matter to the members of that Board.

Sincerely yours,

Bernard C. Gavit

BCG:cs

THE INDIANA STATE BAR ASSOCIATION

August 14, 1941.

Dean Bernard C. Gavit,
Indiana University School of Law,
Bloomington, Indiana.

My dear Dean Gavit:

The most careful and considerate analysis of your letter of August 6, 1941, with reference to the Indiana Law Journal has been given and the conclusions reached, which I have already stated to you in person at Bloomington on August 12th, are now reduced to correspondence form in order to properly close the files upon this subject matter.

I consider the paramount duty of every member of the legal profession in Indiana, and particularly every member of the Indiana State Bar Association, to do his utmost to preserve freedom from controversy during the present Association year, in order that we may "put our best foot foremost" in the entertainment of the American Bar Association at Indianapolis September 29th to October 3rd, and to achieve this end, no sacrifice seems too great.

For this reason, and solely for this reason, no further instructions are being given on the part of the Secretary or myself and no further instructions will be given with respect to the August issue of the Journal in addition to those contained, with my approval, the 28th day of July, 1941, in the Secretary's letter directed to Professor Horack, and which letter contains all of the instructions ever given on this particular subject.
The article by Hon. James M. Ogden, a former President of the Indiana State Bar Association, and the President of the Indiana Law School at Indianapolis, transmitted by the Secretary to the Journal Office at Bloomington, with directions to publish in the August issue, and returned by you to the Secretary in accordance with your statement that effect in your letter of August 6th, has been in turn transmitted by the Secretary to Mr. Ogden, with information as to its return and that it would NOT appear, either in whole or in part, in the August issue of the Journal.

You advise in your letter of August 6th that “the editor of the Journal had definite plans for, and had contacted the secretary as to, announcements on this subject (the American Bar Association meeting) and the State Bar Association meeting for the August issue”. You will receive directly from the office of the secretary material on both of these subjects for your consideration and such action as you may desire to take upon these subjects, wholly without any further instruction upon these items.

This final disposition leaves the contents of the August issue of the Journal (except insofar as submitted material for the American Bar and Indiana State Bar Annual Meetings may receive your approval and be included) a matter the sole responsibility for which, and the sole approval of which, rest in your hands.

This final present disposition of the controversy, taken in the interests of preserving harmony, is not intended as indicative of any doubt upon our part as to the correctness of our position upon the merits involved, for we entertain no such doubt.

This letter presents nothing new or different from our discussion in your office Tuesday afternoon, and is being written in accordance with our arrangement, solely in order to place a proper termination upon the correspondence concerning the August issue of the Journal, and in order that at the time that you present to the members of the Board of Managers a copy of all the correspondence on this matter, your letter of August 6th may appear to have had the response which in all courtesy it deserves.

With every assurance to you of my high personal regard and respect, I am

Yours most cordially,
Roscoe C. O’Byrne,
President, The Indiana State Bar Association

CC: T. C. Batchelor

August 15, 1941

Judge Roscoe C. O’Byrne,
Brookville,
Indiana.

Dear Judge O’Byrne:

I acknowledge receipt of your letter of August 14th confirming our conference of August 12th. I assure you again that we are pleased that it has been possible to work out this difficulty without further delay.
We, of course, respect your privilege to raise any question about Bar Association matters you wish and the basis of your final decision.

I had assumed after your last visit here that it was unnecessary to present the matter to the Board of Managers as I had previously suggested, and I in fact abandoned any intention on that score. I had communicated on the matter with Mr. Wilde, Mr. Schultz, and Mr. Dobbins as members of the Board of Managers who were also alumni of the Law School as to their advice on the problem involved. I advised them all that the matter had been settled and unless you think it necessary that some question on the matter be raised with the Board of Managers at its next meeting, it seems wise to me that the incident be considered closed.

I trust that Mr. Ogden understands that the editors of the Journal are not committed to the proposition that his article cannot be published. Our position was simply that it should not be published in preference to previous commitments and without its previous submission to the editors. We shall be very glad to invite him to submit the article for future publication or have you make that suggestion to him.

The copy for the August issue was delivered to the printer yesterday and there may be some difficulty in publishing the August issue now before the end of August, but we will use every effort and influence to that end.

With kindest regards, I am

Sincerely yours,

Bernard C. Gavit.

BCG/mkg
CC: Tom Batchelor