# 43rd Annual Judge Robert H. Staton Indiana Law Update
September 21-22, 2021
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# 43rd ANNUAL

JUDGE ROBERT H. STATON

# INDIANA

## LAW UPDATE™

September 21 - 22, 2021

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# DISCLAIMER

The information and procedures set forth in this practice manual are subject to constant change and therefore should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein. Further, the forms contained within this manual are samples only and were designed for use in a particular situation involving parties which had certain needs which these documents met. All information, procedures and forms contained herein should be very carefully reviewed and should serve only as a guide for use in specific situations.

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# 43RD ANNUAL JUDGE ROBERT H. STATON INDIANA LAW UPDATE™

## Agenda – Day 1

**8:30 A.M. Registration & Coffee**

8:55 A.M. Welcome & Introduction
*- Hon. Melissa S. May, Indiana Court of Appeals - Chair*

9:00 A.M. Ethics
*- Margaret M. Christensen, Charles M. Kidd*

10:00 A.M. Constitutional Law
*- Kenneth J. Falk*

**10:30 A.M. Coffee Break**

10:45 A.M. Probate, Wills, Trusts and Elder Law
*- Todd I. Glass, Robert W. Fechtman*

11:30 A.M. Family Law
*- Hon. Vicki L. Carmichael, James A. Reed*

**12:15 P.M. Lunch Break**

1:30 P.M. Real Estate
*- Mary A. Slade*

2:15 P.M. Internet Law / Social Media
*- Jessica L. Ballard-Barnett, Seth R. Wilson*

**3:00 P.M. Refreshment Break**

3:15 P.M. Criminal Law
*- Mark E. Kamish, Kathie A. Perry*

4:00 P.M. Torts
*- Sarah Graziano*

**4:45 P.M. Adjournment**

# 43RD ANNUAL JUDGE ROBERT H. STATON INDIANA LAW UPDATE™

## Agenda – Day 2

**8:30 A.M. Registration & Coffee**

8:55 A.M. Welcome & Introduction
*- Hon. Melissa S. May, Indiana Court of Appeals – Chair*

9:00 A.M. Evidence – Criminal and Civil
*- Hon. Robert R. Altice, Jr.*

9:45 A.M. Employment Law / Sexual Harassment / Workplace Issues
*- Gregory W. Guevara*

**10:30 A.M. Coffee Break**

10:45 A.M. State and Federal Tax Update
*- Richard L. Bartholomew*

11:35 A.M. Cyber Security
*- Paul J. Unger*

**12:15 P.M. Lunch Break**

1:30 P.M. Business, Contracts and Banking
*- Kiamesha-Sylvia G. Colom*

2:00 P.M. Insurance Law
*- Anna E. Mallon*

**2:45 P.M. Refreshment Break**

3:00 P.M. Appellate Practice Update
*- Maggie L. Smith*

3:30 P.M. Immigration Law Update
*- Jason A. Flora*

4:00 P.M. Bankruptcy Law
*- Thomas P. Yoder*

**4:45 P.M. Adjournment**

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# 43RD ANNUAL JUDGE ROBERT H. STATON INDIANA LAW UPDATE™

# Faculty


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# 43RD ANNUAL JUDGE ROBERT H. STATON INDIANA LAW UPDATE™

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**Hon. Melissa S. May**
Judge, Indiana Court of Appeals, Indianapolis

*Judge May* was appointed to the Indiana Court of Appeals by Governor Frank O'Bannon in April of 1998. She was born in Elkhart, Indiana. She earned a B.S. in criminal justice from Indiana University-South Bend in 1980, a J.D. from Indiana University School of Law-Indianapolis in 1984. She is also a graduate of the Graduate Program for Indiana Judges. Judge May is currently the Presiding Judge of the Fourth District.

Prior to her appointment to the Court, Judge May practiced law for fourteen years in Evansville, Indiana, where she focused on insurance defense and personal injury litigation.

Judge May has been active in local, state, and national bar associations and bar foundations. She served the Indiana Bar Association on the Board of Managers from 1992-1994, as Chair of the Litigation Section from 1998-1999, as Counsel to the President from 2000-2001, as Chair of the Appellate Practice Section from 2007-2008, and as Secretary to the Board of Governors in 2008-2009. She is also a member of the Indianapolis Bar Association and the Evansville Bar Association. In addition, she was a member of the Board of Directors of the Indiana Continuing Legal Education Forum from 1994-1999 and has been a co-chair of ICLEF's Indiana Trial Advocacy College from 2001 to present. She is a fellow of the Indiana Bar Foundation, as well as for the American Bar Association, and she is a Master Fellow of the Indianapolis Bar Association.

From 1999 until December 2004, Judge May was a member of Indiana's Continuing Legal Education Commission, where she chaired the Specialization Committee. She is currently on an Advisory Panel to the Specialization Committee. In 2005, she was named to the Indiana Pro Bono Commission and in July 2008, she was named as Chair of that Commission. While chair, she worked with the fourteen pro bono d istricts to train lawyers and mediators on how to assist homeowners who are facing foreclosure. Judge May also serves on the Civil Instruction Committee, an Indiana Judicial Conference Committee, which has been working to translate all of the civil jury instructions into "plain English." She frequently speaks on legal topics to attorneys, other judges, schools, and other professional and community organizations.

In 2003, Judge May was named to the American Bar Association's Standing Committee on Attorney Specialization. She is now special counsel to that committee. In the spring of 2004, Judge May became adjunct faculty at Indiana University School of Law-Indianapolis, where she teaches a trial advocacy course.

Also in the spring of 2004, she was awarded an Honorary Doctor of Civil Law from the University of Southern Indiana.

**Hon. Robert R. Altice, Jr.**
Judge, Indiana Court of Appeals, Indianapolis

*Judge Altice* was appointed to the Court of Appeals by Governor Mike Pence and began his service on Sept. 2, 2015.

Judge Altice earned his undergraduate degree from Miami University, Oxford, OH. Subsequently, he obtained a master's degree in criminal justice administration from the University of Central Missouri, where he was honored as "Graduate Student of the Year" in his department. He received his law degree from the University of Missouri-Kansas City School of Law.

Judge Altice's legal career began in Jackson County, MO, handling felony cases as a deputy prosecutor before being promoted to Chief Deputy Prosecutor for the Drug Unit. He then practiced with a Kansas City civil law firm, focusing on medical malpractice defense. After moving to Indianapolis, he joined the law firm of Wooden McLaughlin & Sterner, concentrating on insurance defense.

In 1994, Judge Altice returned to prosecution, handling a major felony caseload as a deputy prosecutor for the Marion County Prosecutor's Office. He served as Chief of the Felony Division from 1997 to 2000, prosecuting a number of high-profile felonies while also providing management support to 35 deputy prosecutors. Judge Altice briefly served as the Office's Chief Counsel, working with the Indiana General Assembly to amend laws on domestic battery and possession of firearms by violent felons. As a prosecutor, he tried more than 100 major felony jury trials, including 25 murder cases and countless bench trials.

Judge Altice was elected to the Marion County bench in 2000 and presided over both criminal and civil dockets. As judge of Marion Superior Court, Criminal Division 2 from 2001 to 2012, he presided at 250 major felony jury trials, including 75 murder trials (seven death penalty cases).

While presiding over some of the most serious criminal matters in the state, Judge Altice also served as chair of the Marion Superior Court Criminal Term from 2005 to 2007, as a member of the Executive Committee for the Marion Superior Court from 2007 to 2009, and as Presiding Judge of the Marion Superior Court from 2009 to 2011. As the Presiding Judge, he was responsible for the administration of the Marion Superior Court, with an annual budget of $50 million, and managed a court staff of more than 850 employees. He also hosted a TV show on the government access channel, titled "Off the Bench," in which other civic leaders appeared as guests to discuss public affairs.

Judge Altice moved to the civil division of the Marion Superior Court in 2013, where he officiated at 15 civil jury trials in Superior Court 5. Judge Altice was appointed chair of the Marion Superior Court Civil Term in January 2015.
Throughout his judicial career, Judge Altice has held leadership roles in organizations that improve the administration of justice. He accepted special assignments from the Indiana Supreme Court on the Judicial Performance Task Force, which examined whether judicial evaluations might be useful in Indiana, and the Cameras in the Courtroom project, which allowed cameras in certain courtrooms under limited conditions. During Judge Altice's tenure on the Marion County Community Corrections Advisory Board, the Duval Work Release Center in Marion County was built and opened.

Judge Altice is a member of the Indiana Judges Association, the Indiana State Bar Association, and the Indianapolis Bar Association. He served on the Board of Directors of the Judicial Conference of Indiana, is a member and past president of the Sagamore American Inn of Court, was a member from 2010 to 2015 of the Indiana Judicial Conference Civil Bench Book Committee, and was a member and former chair of the Indiana Judicial Conference Community Relations Committee. In April 2015, Judge Altice was appointed to serve on an ad hoc Indiana Tax Court Advisory Task Force. He currently serves on the Tax Court Advisory Committee. Judge Altice is President of the Board of Directors for the Heartland Pro Bono District.

His community activities include prior service on the Board of Directors of these organizations: Indianapolis Police Athletic League; the Martin Luther King Community Development Corp.; and Coburn Place Safe Haven, a transitional housing facility for domestic abuse victims. Judge Altice also participated on the Super Bowl Legal Subcommittee. He is on the board of the Benjamin Harrison Presidential Site. He has presented on legal and ethical issues for the Indiana Continuing Legal Education Forum, the Indiana Judicial Center, and various Indiana bar associations. In his spare time, he enjoys gardening, golf and reading.

He and his wife, Kris, an attorney who is General Counsel for Shiel Sexton, have two adult children.

**Hon. Vicki L. Carmichael**
Judge, Clark Circuit Court 4, Jeffersonville

On January 1, 2007, *Judge Carmichael* began her service as Judge of Clark Circuit Court No. 4 (formerly Superior Court No. 1). The Clark Circuit Court handles a general jurisdiction caseload and all of the juvenile matters for Clark County, including delinquency and CHINS cases. The Court also has a major felony docket and a civil docket. She implemented a Family Court Project, an Attendance Court Project and began a Family Treatment Drug Court focusing on addressing substance abuse issues of parents. Prior to her election to Superior Court, Judge Carmichael served as Judge of Jeffersonville City Court from January 1, 2000 until December 31, 2006. In that position, she presided over criminal misdemeanors and traffic infractions. She started many new programs for alcohol related offenses, including an Alcohol Court, a Victim Impact Panel, an Alcohol Awareness Program and a Defensive Driving Class. She also started the use of the Ignition Interlock Device for drunk drivers in Clark County.

Before her full-time judge's position, Judge Carmichael maintained a private practice in Jeffersonville, where she focused on family law issues, including divorces, child support matters and child custody cases. She was a family law mediator in Indiana before taking the bench. Judge Carmichael was appointed as the first full-time Public Defender for Clark County in January 1989. She served as the Chief Public Defender and later as an Assistant Public Defender for twelve years. As Chief Public Defender, she had a trial caseload, including a capital murder case, and perfected all of the indigent appeals for the County.

Judge Carmichael also teaches numerous classes at Ivy Tech Community College in the Criminal Justice program at the Sellersburg, Indiana campus. Some of Ms. Carmichael's civic interests and activities include speaking to Government classes in the Clark County Schools, participating in the Clark-Floyd County Pro Bono Project, volunteering with the American Cancer Society, the American Red Cross, Rotary Club and holding the position of past chair of the Leadership Southern Indiana program.

**Robert C. Allega** is a judicial law clerk for Judge Melissa S. May on the Indiana Court of Appeals. He is a graduate of Hanover College (B.A. English, 2010) and the Indiana University Maurer School of Law (J.D. 2013). Prior to his clerkship with Judge May, Allega worked as a deputy attorney general in the Office of the Indiana Attorney General and as a staff attorney for the Indiana Department of Correction.

**Jessica L. Ballard-Barnett**
Judicial Law Clerk, Indiana Court of Appeals, Indianapolis

*Jessica L. Ballard-Barnett* is the Judicial Law Clerk to the Honorable Melissa S. May, Judge on the Indiana Court of Appeals.

Education:

- JD, Robert McKinney School of Law - Indianapolis (2010)
- BS, Psychology, Purdue University (2004)

Legal Experience:

- Judicial Law Clerk, The Honorable Melissa S. May, Judge, Indiana Court of Appeals (2010 – present) Bar Admissions: State of Indiana

Other Experience:

- Adjunct Instructor, Harrison College, Columbus Campus and Online, various courses (July 2012 - Present)
- Presenter/Collaborator, CLE, “Internet Law,” Indiana Law Update (September 2011 - Present)
- Adjunct Professor, University of Indianapolis, Copyright Law, Legal, Ethics, Etiquette (July 2016 - Present)
- Secretary, SENSE Charter School Board (October 2015 - Present)
- Program Chair, CLE, “Appellate Writing” (June 2016)
- Deputy Captain, Operations Team, GenCon (August 2015)
- Presenter, CLE, “Utilizing Electronic Discovery in Modern Lawyering” (April 2014)
- Presenter, CLE, “Emerging Issues in Social Media: Can Lawyers and Judges be Friends?” (November 2013)
- Presenter, CLE, “Modern Lawyering: Utilizing Social Media” (April 2013)
- Presenter, CLE, “Ethics, Internet, and Business Law” (February 2013)
- Columnist, HistoricIndianapolis.com (February 2013 - July 2014)

**Richard L. Bartholomew**
Girardot, Strauch & Co., Lafayette

*Richard L. Bartholomew* graduated from Indiana University with a BS in Business in 1978 and a JD from Indiana University School of Law in 1981. He joined the firm in 1991 and became a shareholder in 1996. His specialty areas include all areas of tax, estate planning, mergers, acquisitions and spin-off tax consulting, succession planning, continuing education presenter to the AICPA Federal Tax Conference, Indiana Continuing Legal Education Seminars, Annual Tax Symposiums in Minnesota, North Carolina, Ohio and North Dakota and Bisk Continuing Education DVD's distributed nationwide.

Richard has been actively involved in various organizations in the Lafayette community including Community Foundation of Greater Lafayette, Lafayette Rotary Club Foundation, Indiana CPA Society Litigation Services, Westminister Village Foundation, Lafayette Rotary Club,and East Tipp Summer Rec.

Richard has many interests outside of the firm including woodworking (he built all of the cabinets in his house as well as various pieces of furniture), snow skiing, fishing, golf, creating Power Point presentations for weddings and birthdays, drawing and playing with his dog, Zoe.

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**Margaret M. Christensen**
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*Meg Christensen* concentrates her practice on three main areas of law: lawyer ethics, appeals and business litigation. Since 2017, she has served as co-chair for Dentons Bingham Greenebaum's Recruiting Committee.

Her focus includes:
- Ethics – Meg has represented lawyers in all stages of the disciplinary process pending before the Indiana Supreme Court. Additionally, she has represented other professionals in front of various state licensing boards, and the IRS Office of Professional Responsibility.
- Appellate – Meg brings a fresh perspective to identifying and analyzing issues on appeal. Meg's experience includes representing clients in the appellate phase of complex business disputes, contract and insurance coverage disputes, and shareholder liability.
- Business Litigation – Meg assists clients in litigation in both state and federal courts in claims involving multi-million dollar contract disputes, shareholder liability, enforcement of employee restrictive covenants, inter-governmental disputes, unfair competition claims, dissolutions, administrative enforcement and licensing. She is experienced in media law issues including defamation defense, reputation management, and social media harms. Meg also represents the media in pursuing access to public records and enforcing open door laws.
- Meg's clients are primarily concerned about the impact their legal disputes will have on their business or personal lives. Recognizing that litigation introduces uncertainty into her client's plans, Meg prides herself in clearly communicating with clients about the practical effect of various strategies. Meg's goal is to help busy clients focus on what they do best while she works to present their strongest arguments in pursuit of the best possible result.
- Between the Indiana State Bar Association (ISBA), the Indiana Continuing Legal Education Forum (ICLEF) and Association of Professional Responsibility Lawyers (APRL), Meg presents on ethics at over a dozen continuing legal education seminars each year. As part of ISBA's Ethics Committee, she considers and issues advisory opinions, recommends rule changes and facilitates lawyer education events. Meg is an active member of the APRL and devotes her time to researching trends in disciplinary enforcement and lawyer ethics.
- In her free time, Meg enjoys cooking, hosting dinner parties, and attending yoga or barre class. She's an avid NPR listener, loves old homes and house rehabs and attending camp with her two children. She has a vested interest in voting advocacy and

once served as a member of the United Nations Election Protection Delegation, monitoring the polls in El Salvador's National Election.

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*Kiamesha-Sylvia Colom* focuses her practice in the areas of real estate transactions (acquisitions, dispositions, development, leasing, sale leaseback transactions and real estate municipality work), real estate lending and commercial finance transactions and related business transactions.

Kiamesha helps developers, corporate real estate departments, municipalities, tenants and landlords achieve their real estate goals related to development projects, drafting and negotiating of lease documents, negotiating transfer documents and ultimately getting the deal done.

Kiamesha has closed numerous SBA, USDA and conventional commercial loans for commercial lenders and borrowers related to real estate, equipment, machinery and C&I lending.

Kiamesha's extensive base of knowledge covers an array of commercial loan types, including government guaranteed lending, asset based line of credits, term loans, real estate transactions and construction loans. Additionally, she has assisted banks with recovery of yearly financial documents, past due funds, liquidation and government guaranteed purchasing processes.

Kiamesha also assists minority, women, veteran and disabled owned businesses with attaining state and city certifications.

**Kenneth J. Falk**
American Civil Liberties Union of Indiana, Indianapolis

Since 1996, Kenneth Falk has been the legal director of the ACLU of Indiana. A 1977 graduate of Columbia Law School in New York City, Mr. Falk was employed by Legal Services Organization of Indiana (now Indiana Legal Services) from 1977 to 1996. At the time he left Legal Services he was the Litigation Director of the organization. Since 2000, Mr. Falk has also served as an Adjunct Professor of Law at the Robert H. McKinney School of Law in Indianapolis.

In his work with the ACLU, Mr. Falk has litigated and argued numerous cases in Indiana and federal appellate courts, including the United States Supreme Court.

In 1996 Mr. Falk was named a Sagamore of the Wabash and in 2004 he was awarded the David M. Hamacher Public Service Award by the Indiana State Bar Association. In 2006 he was named a “Distinguished Barrister” by the Indiana Lawyer. In 2016 he received the David W. Peck Senior Medal for Eminence in the Law from Wabash College. Also, in 2016 he was named a Fellow of the American College of Trial Lawyers.

**Robert W. Fechtman**
Fechtman Law Office, Indianapolis

Robert Fechtman is a life-long resident of Indiana. He graduated from Northwestern University with a degree in music and a major in economics, and he received his JD from Rutgers School of Law. He also attended the University of San Diego's Institute on International and Comparative Law at Magdalen College, Oxford University. In 6th and 7th grade, Mr. Fechtman went away to school to sing with the American Boychoir in Princeton, New Jersey.

Mr. Fechtman focuses his practice on the problems of older and disabled persons, particularly special needs trusts, estate planning and trusts, health law, Medicaid planning, guardianships and decedents' estates. He is a frequent writer and speaker on a variety of estate planning, disability and elder law topics. He has been certified as an elder law attorney by the National Elder Law Foundation.

Mr. Fechtman is a member of the National Academy of Elder Law Attorneys, and he is a two-time Past President of the Indiana Chapter of the National Academy of Elder Law Attorneys. He is a member and a Past President of the Special Needs Alliance, which is a national, non-profit, invitation-only network of lawyers dedicated to disability and public benefits law. He is also a member of the Elder Law Section and the Probate, Real Property and Trusts Section of the Indiana State Bar Association, and a member of the Indianapolis Bar Association. Mr. Fechtman is a sustaining member of the Indiana Trial Lawyers Association. He is currently serving on the Boards of Directors of the National Elder Law Foundation, which is the accrediting organization for elder law attorneys, and of the Indianapolis Bar Association Estate Planning and Administration Section Executive Council, and the current President of the Board of The Indianapolis Children's Choir.

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*Jason Flora* has over a decade of professional experience advocating for the rights of people just like you. He graduated from Butler University in 1998 with a degree in International Management and Spanish. He then graduated from the Indiana University Robert H. McKinney School of Law and was admitted to practice in the Indiana State Bar in 2009. He opened his practice on the west side of Indianapolis in 2009 and now operates both the west side and south side offices. Jason has a strong background in immigration and criminal defense and is ready to serve you. Jason is a proud resident of Indianapolis and resides there with his wife and three children.

FINE & HATFIELD

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# Todd I. Glass

Mr. Glass joined Fine & Hatfield in 1995 after practicing seven years in Muncie, Indiana. Since joining the firm, Mr. Glass has represented individuals and businesses with significant focus on estate planning and administration, trust planning and administration, guardianships, agribusiness and business planning coupled with succession strategies. His practice now concentrates in complex trust planning and wealth transfer techniques.

He represents businesses of all sizes, especially closely-held family owned businesses in a variety of markets and industries. He is active in the Warrick County community and has an active municipal law practice representing local government officials and boards as County Attorney for Warrick County, Indiana.

Mr. Glass has been certified as an Indiana Trust and Estate Lawyer since 2007 as a specialist in the areas of estate and trust planning and administration by the Indiana Trust and Estate Specialty Board, which he has served as Co-President since 2019. He has served as an adjunct faculty member at the University of Evansville where he taught Probate Law in the Department of Legal Studies, and he regularly speaks at continuing legal education programs.

*Contact Info:*
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**Education Summary**:
Wabash College, B.A. 1984
University of Dayton, J.D. 1988

**Bar Admissions:**
Indiana, U.S. District Court, Northern and Southern Districts Indiana, 1988
U.S. Court of Appeals, Seventh Circuit 1990

**Professional Associations and Honors:**
Indiana Trust and Estate Specialty Board (2017-2019, Co-Chair 2019-2021)
Evansville Bar Association, (Board Member 2005-2011, President 2011-2012)
Evansville Bar Association, Probate, Elder Law and Guardianship Section (Chair 2002-2003)
Indiana Bar Association (Member, Young Lawyers Council)
Indiana Probate, Trust and Real Property Section (Council Member, 2005-2012)
Evansville Estate and Financial Planning Council

**Community Involvement:**
Castle High School Band Boosters, Inc., Board member (2014-2021) and President (2016 and 2020)
Newburgh Museum Foundation Corp., Board Member and Past President (2013-2019)
Warrick County Community Foundation, Board Member (2012-2018)
Warrick County Community that Cares Coalition, Board member and Past President (2013-2014)
Indiana Supreme Court Disciplinary Commission, EBA Grievance Committee (Chair 2012-2020)
Warrick County Bicentennial Steering Committee (Chair 2013)
Reitz Home Preservation Society, Inc., Past Board member and President (2007-2011)

**Sarah Graziano**
Hensley Legal Group, PC, Indianapolis

*Sarah Graziano* was born and raised in Milwaukee, Wisconsin, but has called Indiana her home since graduating from Valparaiso University School of Law, with honors, in 1999. Sarah began her career focusing on litigation for a well respected defense firm in Indianapolis, but she quickly realized that her true focus was to help people who have disputes with corporations, insurance companies and the like. Since 2002, Sarah has focused her practice on helping individuals who have been injured at the hands of others. In addition, she has helped individuals with employment matters, including discrimination, wrongful termination, contractual disputes, and other issues involving the employment relationship.

Sarah has been extremely fortunate to have a large number of civil jury trials in her nearly eleven years of practice.

Sarah is an active member in good standing with the Indiana Bar Association and also holds membership with the Indiana Trial Lawyers Association. As part of her membership with the Indiana Trial Lawyers Association (ITLA) she has had the privilege to speak at seminars hosted by ITLA both on employment matters and issues involving claims for injuries.

**Greg Guevara, Partner**
gguevara@boselaw.com / (317) 684-5257

Greg Guevara is a partner in the Labor and Employment Group at Bose McKinney & Evans. As a highly responsive business advisor and employment litigator, Greg helps his clients by understanding their objectives and offering practical legal advice tailored to their unique situations and desired outcomes. He provides aggressive and ethical advocacy to a broad range of clients, including privately held businesses, non-profit organizations, and national companies, as well as executives, physicians, and other professionals.

Greg concentrates his practice on labor and employment law and litigation, including:

- Non-competition, non-solicitation and confidentiality agreements
- Emergency injunctions
- Defense of discrimination/EEO claims
- Wage/hour compliance and litigation
- Disability/reasonable accommodation
- FMLA/leaves of absence
- Sexual harassment and workplace investigations
- Severance and executive employment agreements
- Personnel policies/employee handbooks
- Reductions-in-force
- Union avoidance, unfair labor practices, and collective bargaining

Greg practices in the federal and state courts in Indiana and Ohio, federal and state agencies (EEOC, NLRB, ICRC, IOSHA, etc.), and other jurisdictions as needed.

He began his law career with Bose McKinney & Evans then practiced with the Columbus, Ohio office of Jones Day. Before returning to BME in August 2006, he spent seven years working as an executive for Reliant (formerly GCM), an international Christian mission organization based in Orlando, Florida. His experience in private practice, board governance and non-profit management gives him the ability to provide practical guidance and sound management advice to businesses dealing with a full range of employment-related issues.

**Education**
University of Michigan Law School (J.D., cum laude, 1992)
University of Michigan (B.A., high honors/high distinction, 1989)
Member, Phi Beta Kappa

**Honors / Awards**
*Best Lawyers*® 2021 Indianapolis Employment Law – Management Lawyer of the Year
*Best Lawyers*® 2020 Indianapolis Litigation – Labor and Employment Lawyer of the Year
*The Best Lawyers in America*® 2011-2021
*Chambers USA* 2010-2020 (Labor and Employment-Indiana)
*Indiana Super Lawyers*® 2013-2020 (Employment Litigation: Defense; Employment Law)

**Mark E. Kamish**
Baldwin Perry & Kamish, PC, Indianapolis

For two decades *Mark Kamish* has concentrated his efforts exclusively on defending people accused of committing crime (a partial listing includes two capital murder cases in which the death penalty was sought, other charges of murder, felony murder, manslaughter, attempted murder, reckless homicide, child molesting, rape, criminal deviate conduct, sexual misconduct with a minor, possession and dissemination of child pornography, child exploitation, sexual battery, neglect of a dependent, gun charges, drug offenses, arson, armed robbery, criminal confinement, burglary, forgery, fraud, theft, auto theft, battery, domestic battery, stalking, escape, promoting prostitution, felony driving while intoxicated and felony driving while intoxicated causing death).

In doing so, Mark has tried 60 jury trials, including 47 felony jury trials to verdict. At the appellate level, he has successfully argued before the Indiana Supreme Court. Mark is a graduate of the National Criminal Defense College (NCDC) in Macon, Georgia and has received hundreds of hours of trial advocacy training. In 2009, Mark became only the fourth lawyer ever in the state of Indiana to be a Board Certified Criminal Law Specialist by the National Board of Trial Advocacy, joining his partner Andy Baldwin, who became the third. Additionally, Mark has been a frequent faculty member for the Indiana Public Defender Council (IPDC) Trial Practice Institute (a 4-day “boot camp” for lawyers wanting to improve their trial skills). He is also a member of the National College for DUI Defense (NCDD).

Mark received his undergraduate degree in Engineering from the United States Military Academy at West Point in 1983. Following Ranger School and a tour of duty with the 82nd Airborne Division, Mark graduated from the Field Artillery Officer Advanced Course and the Defense Language Institute (German), Presidio of Monterey, California. He commanded a nuclear weapons unit in Germany from 1988 to 1990. Following military service, Mark served for 10 years in a variety of managerial and engineering positions with Fortune 1000 companies. After 3½ years at Newell in Rockford, Illinois, Mark accepted an operations manager position at Harman-Motive, a division of Harman International, located in Martinsville, Indiana. He also served as a supplier engineer at that company.

After graduating from the Indiana University School of Law - Indianapolis’ evening

program, Mark was a full-time public defender at the Marion County Public Defender Agency from 2000 to 2004, a part-time major felony PD from 2005 to 2006 and a conflict D felony PD from 2006 to 2009. In the past 10 years, Mark has continued to accept pauper counsel appointments in Hamilton, Hendricks and Monroe counties.

In 2018, Mark was appointed Criminal-Rule-24-qualified co-counsel on a death penalty case remanded from the 7th Circuit Court of Appeals after his client had been on death row for 22 years. He helped negotiate a 110-year sentence in that case by way of a plea agreement (the lowest recorded sentence in Indiana history for a person convicted of triple homicide). In 2019, Mark was lead counsel for another death row inmate whose sentence was remanded after 15 years by the 7th Circuit. That client is now also off death row and serving a sentence of life without possibility of parole.

**Charles M. Kidd**
Indiana Supreme Court Disciplinary Commission, Indianapolis

*Chuck Kidd* is Deputy Executive Director, of the Indiana Supreme Court Disciplinary Commission. Admitted to bar, 1988, Indiana, Northern and Southern Federal Districts of Indiana. Education: Butler University, B.S. 1979; Indiana University School of Law--Indianapolis, J.D. 1987. Member: American Bar Association, Indiana State Bar Association and Indianapolis Bar Association (Distinguished Fellow); Roster of the National Organization of Bar Counsel. Former Master member, Sagamore American Inn of Court. Former Indiana Deputy Attorney General (1988-1991). Author of numerous continuing legal education works including the Survey of Recent Developments in Professional Responsibility in volumes 26 through 28 and 30 through 36 of the Indiana Law Review. AV Rated by Martindale-Hubbell.

**Anna Mallon**
Paganelli Law Group LLC, Indianapolis

*Anna Mallon* concentrates her practice in the areas of insurance bad faith, insurance coverage, third–party defense of insureds, and personal injury defense. Anna regularly practices in state and federal courts handling trials, summary judgment hearings, mediations and arbitrations. Prior to attending law school, Anna taught high school government.

When not practicing law, Anna enjoys traveling, ballet, and cheering on the Fighting Irish of Notre Dame and the Chicago Cubs. Anna is married and has two children.

**Tyler Moorhead, Associate**
tmoorhead@boselaw.com / (317) 684-5130

Tyler Moorhead is an associate in the Labor and Employment, and Litigation Groups of Bose McKinney & Evans LLP. Tyler assists clients with a wide array of labor and employment matters including employment litigation, discrimination and wrongful termination defense, wage claims, non-compete, confidentiality, and non-solicitation agreements, and compliance with FMLA, ADA, FLSA, and other employment-related state and federal statutes.

Tyler also has experience representing clients in a wide variety of litigation matters including complex commercial litigation, contract disputes, fraud, breach of fiduciary duty, and toxic tort environmental litigation.

**Education**
Indiana University Robert H. McKinney School of Law – Indianapolis (J.D., summa cum laude, 2017)
Indiana University Kelley School of Business (B.S. in business, magna cum laude, 2014)

**Honors / Awards**
Dean's Tutorial Society Fellow; Norman Lefstein Award of Excellence for Pro Bono Service; Professional Responsibility Association, President; Eli Lilly Law Alumni Award, McKinney School of Law; Resident Excellence Award, McKinney School of Law; Founders Scholar, Indiana University; Indiana Excellence Award, Indiana University

**Appointments / Memberships**
Member: Indiana State Bar Association; Indianapolis Bar Association; Indianapolis Zoo Council

**Kathie A. Perry**
Baldwin Perry & Kamish, PC, Indianapolis

*Kathie Perry:* My entire career has been spent exclusively defending the accused, except for a 9 month period in 2014 when I briefly ventured into other areas of law. It was a miserable 9 months, but it helped me realize a very basic fact about myself: I am a criminal defense attorney. Period. Joining The Criminal Defense Team of Baldwin Perry & Kamish, PC with our exciting style of aggressive, creative and strategic defense and dedication to the criminally accused was a perfect fit. For those who are dedicated to criminal defense, like all of the lawyers in our firm, dealing with the hectic pace and constant pressures of representing clients accused of committing a variety of crimes is simply a way of life. I realized very quickly upon joining the firm that my history as a criminal defense attorney mirrored the experiences of all of our firm's lawyers.

1 of only 6 Board Certified Criminal Law Specialists in Indiana

AREAS OF PRACTICE

- 100% criminally related law, primarily all phases related to criminal defense, including pre-arrest advocacy, trial, appellate and post-conviction relief work.

CRIMINAL DEFENSE EXPERIENCE

- Monroe County Public Defender Agency, 1999-2001, Certified Legal Intern
- Marion County Public Defender Agency, 2001-2014, Deputy Public Defender
- Baldwin Perry & Kamish, P.C., 2015 – present, Partner

EDUCATION

- Maurer School of Law - Indiana University- (Juris Doctorate, 2001) Bloomington, Indiana

Merit Scholarship Award Winner

**James A. Reed**
Cross Glazier Reed Burroughs, PC, Indianapolis

*Jim Reed* has concentrated his practice in the legal aspect of relationship transitions of all types since graduating from law school. He has been involved in divorce cases with some of the largest marital estates in Indiana. He represents many professionals (medical, legal, accounting, financial), business owners and executives, community leaders, high-profile individuals in entertainment, sports and politics, and the spouses/partners of these individuals. Because of his experience and the personal nature of the practice, Jim has helped individuals and families find solutions to complex relationship and legal transitions. His practice includes counseling cohabitating partners in implementing plans for estate transitions, health care decision making, joint ownership and survivorship, as well as representing partners in the conclusion of relationships, custody and support of their children, and the division of property and assets. Jim approaches the representation of his clients with years of diverse experience and from a broad perspective.

**Mary A. Slade**
PGP Title, Carmel

Mary Slade has over 25 years of Indiana real estate transaction and litigation experience. Mary began her career in real estate as an assistant regional counsel for a national title underwriter where she handled transaction underwriting, claims, and auditing in six states including Indiana. As regional counsel for another national title underwriter, her responsibilities included underwriting and claims for 16 states and the District of Columbia. Mary's private practice concentrated on real estate litigation and commercial transactions. Prior to being a Deputy Prosecuting Attorney for the Prosecuting Attorney of Marion County, Mary graduated from Butler University with a Bachelor of Arts in International Studies and received her Juris Doctorate from Indiana University School of Law – Indianapolis. She has served as the 2018-2021 Chair of the Real Property Committee of the Probate, Trust, & Real Property Section of the Indiana State Bar Association ("PTRP") and previously served as the 2017-2018 PTRP Chair. Her volunteer work includes co-editor of the Indiana Land Title Association's Real Estate Handbook and the PTRP's newsletter. After her in-house counsel work with a national underwriter underwriting simple to complex Indiana commercial, multi-site, and residential transactions, she currently serves as Vice President , National Underwriting Counsel for PGP Title and Premier Land Title Insurance Company; divisions of Pulte Group.

# Maggie L. Smith

## Member

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**Industries**

Mobility & Transportation

Logistics

**Practice Areas**

Appellate

Business & Commercial Litigation

**Bar Memberships**

Indiana

Maggie is recognized as one of the top appellate attorneys in the country. In addition to being named by *Super Lawyers*® as one the top 25 Women Attorneys in the state of Indiana, Maggie has been selected as one of *The Best Lawyers in America*® in the field of appellate practice every year since 2009, and this year she has been named the 2021 "Lawyer of the Year" by Best Lawyers for appellate practice.

She also has been identified as an *Indiana Super Lawyers*® appellate attorney, listed as a *Chambers USA*® *Top Tier* Appellate Litigator, and recently was celebrated for fifteen years as a Martindale Hubbell AV Preeminent Rated Lawyer with the "Highest Possible Peer Review Rating in Legal Ability & Ethical Standards."

Maggie has been involved in hundreds of appeals, and has represented businesses, individuals, and groups in all types of appellate proceeding at every level of the state and federal appellate courts. She also has significant experience representing *amicus curiae* parties before Indiana's appellate courts.

Her clients say that her appellate "writing skills are great" and she also has "fantastic" oral advocacy skills arguing before appellate courts—a combination that makes Maggie "the complete package."

In addition to representing parties on appeal, Maggie has been actively involved in drafting the Indiana Appellate Rules, is a leader in the state and national appellate practice communities, and is a regular presenter and author on appellate topics.

Prior to entering private practice, she served as a judicial law clerk with the Indiana Supreme Court and was an Adjunct Professor of Law at Indiana University, teaching legal writing and reasoning and appellate advocacy.

The Indiana Supreme Court appointed Maggie to an eight-year term on its Committee on Rules of Practice and Procedure in 2009, and in this capacity, she

was engaged in the continuous study of all the Indiana Rules of Procedure (Trial Rules, Evidence Rules, Jury Rules, Appellate Rules, Professional Conduct Rules, etc.). Maggie was actively involved in the e-fling projects, Administrative Rule 9(G) overhaul, and the appellate rules.

## Other Info About Maggie

### Experience

*Member* — Frost Brown Todd

Successfully defended the constitutionality of the original Indiana wine shipping statute on appeal in the federal courts.

Successfully represented Dolby Laboratories on appeal in patent challenge to Dolby Surround Sound systems.

Successfully prosecuted appeal resulting in long-dormant cause of action for Title by Acquiescence being recognized.

*Adjunct Professor* — The Master's Study
Instructed tutelage program students in dual-college credit course on "Rhetoric: The Art of Persuasive Argument."

*Adjunct Professor* — Indiana University School of Law
Instructed first-year law students in legal reasoning, legal writing, and oral advocacy.

*Law Clerk* — Honorable Justice Brent E. Dickson, Indiana Supreme Court
Assisted Indiana Supreme Court Justice in drafting opinions.

*Instructor* — Indiana University: Law Program for Gifted Students
Taught basic legal concepts to gifted and talented high school students.

### Education

Indiana University Maurer School of Law, visiting student, 1995-1996

University of Arizona, James E. Rogers College of Law, J.D., 1994, *magna cum laude*

University of Arizona, B.A., 1991, *cum laude*

**Paul J. Unger**
Affinity Consulting Group, LLC, Columbus, OH

*Paul J. Unger* is a nationally recognized speaker, author and thought-leader in the legal technology industry. He is an attorney and founding principal of Affinity Consulting Group, a nationwide consulting company providing legal technology consulting, continuing legal education, and training.

He is the author of dozens legal technology manuals and publications, including recent published books, *Tame the Digital Chaos – A Lawyer's Guide to Distraction, Time, Task & Email Management* (2017) and *PowerPoint in an Hour for Lawyers* (2014). He served as Chair of the ABA Legal Technology Resource Center (2012-13, 2013-14)( www.lawtechnology.org/), Chair of ABA TECHSHOW (2011)(www.techshow.com), and served as Planning Chair for the 2016 ACLEA Mid-Year Conference in Savannah, GA. He is a member of the American Bar Association, Columbus Bar Association, Ohio State Bar Association, Ohio Association for Justice, and New York State Bar Association, and specializes in document and case management, paperless office strategies, trial presentation and litigation technology, and legal-specific software training and professional development for law firms and legal departments throughout the United States, Canada and Australia. Mr. Unger has provided trial presentation consultation for over 400 cases. In his spare time, he likes to run and restore historic homes.

**Seth R. Wilson**
Adler Attorneys, Noblesville

*Seth R. Wilson* practices with Adler Attorneys in Noblesville. Previously he practiced with Hume Smith Geddes Green & Simmons. Seth is admitted to practice in the State of Indiana, as well as both the Northern District and Southern District Federal Courts in Indiana.

Seth graduated from Regent University School of Law in Virginia Beach, Virginia in 2006 where he served as Editor-in-Chief of Regent Law Review. Seth is a 2003 graduate of Taylor University, located in Upland, Indiana, majoring in Mass Communications/Journalism, with a minor in Pre-law.

Follow Seth on Twitter or connect with Seth on Linkedin.

Practice Areas
•Premises Liability
•Products Liability
•Automobile Liability
•Worker's Compensation
•Environmental
•Commercial Litigation
•Data Security/privacy
•E-Discovery
•Mass Tort Litigation
•Estate Planning and Probate
•Legal Technology Services
•Law Firm Administration/Management

**Thomas P. Yoder**
Attorney at Law, Fort Wayne

**Thomas P. Yoder** is a retired partner from the law firm of Barrett McNagny LLP in Fort Wayne, Indiana, and concentrated his practice for 42 years in business bankruptcy, creditors' rights and general insolvency matters. He now concentrates his practice, when he feels like working, in the area of commercial and business mediations and is an Indiana mediator. He is a *cum laude* graduate of Hanover College (B.A. History, 1974) and the Indiana University School of Law at Bloomington (J.D. 1977). He is a Past President of the Indiana State Bar Association (1999-2000), a former member of the Board of Directors of the American Bankruptcy Institute (1994-2000), a former director of the Allen County Bar Association (2005-2008), and is a Fellow of the American College of Bankruptcy (2003). He has also written and lectured extensively on bankruptcy and insolvency-related topics and is a co-author of *Bankruptcy- A Survival Guide for Lenders* (First ed. 1997; Second ed. 2008), published by the American Bankruptcy Institute and winner of the ABI's Outstanding Publications Award (1997). Until retiring, he had been listed in the last twenty-plus (20+) editions of "*The Best Lawyers in America*" and in every edition of "*The Indiana Super Lawyers*", as well as in certain separate specialty listings published by both. In 2000, he was awarded the Sagamore of the Wabash distinction by the Governor of Indiana, the State's most prestigious recognition of citizenship.

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# Section One

# Ethics

**Margaret M. Christensen**
Dentons Bingham Greenebaum LLP
Indianapolis, Indiana

**Charles M. Kidd**
Indiana Supreme Court Disciplinary Commission
Indianapolis, Indiana

## Section One

# The Top Ten:
# A Summary of Recent Professional Liability Cases
# 2021 UPDATE

Chuck Kidd,
Kevin McGoff &
Margaret Christensen

# INTRODUCTION

The heart of this work revolves around the ways in which lawyers earn discipline from the Indiana Supreme Court. We also cite cases wherein lawyers face civil liability and may be exposed to disciplinary action.

One important disclaimer: This work identifies our categorization of the top ten ways in which lawyers get themselves sanctioned. That does not mean these are the *only ways* lawyers get themselves sanctioned. There are, of course, other ways in which lawyers face both disciplinary action and civil liability. In fact, lawyers often find new ethical problems, either intentionally or unintentionally, that cause legal problems for them personally.

Finally, the ten categories we have identified are discussed in *reverse* order. The most fertile sources of disciplinary problems appear last in this listing. In truth, all but the last two or three statistically occur with about the same frequency. Cases involving communications and diligence occur in surprisingly greater numbers than any other type of disciplinary action. In fact, these issues also surface in conjunction with the other types of lawyer conduct discussed herein.

# Number 10

# DUTIES OWED TO OPPOSING OR THIRD PARTIES

In ***Matter of Blickman*, 164 N.E.3d 708 (Ind. 2021)**, Respondent, outside counsel to a private high school engaged in conduct prejudicial to administration of justice. Respondent represented the school with respect to a report that a teacher at the school had engaged in inappropriate conduct with a student and had received sexually graphic images from the student. In connection with this representation, Respondent attempted to prevent the student and her family from cooperating with law enforcement and the Department of Child Services. This improper demand for silence in connection with the school's settlement payment was "contrary to public policy and sought to subvert justice." *Id.* at 714. The Court reasoned: "After all, had the efforts to silence those involved been successful, the result would have been to shield [the teacher] from answering for his crimes and to turn loose a child predator to teach and coach at another unsuspecting school." *Id.*

Respondent was also charged with violations of Rule 1.1 (incompetence) and 1.2(d) (counseling or assisting a criminal act) because he failed to immediately advise the school to report the suspected child abuse as required by statute. The Court rejected these claims on the basis that it was reasonable for Respondent to require a few hours to research his client's obligations and Respondent did not encourage or participate in his client's scheme to avoid reporting.

Finally, Respondent was charged with a violation of Rule 8.4(b) (criminal conduct reflecting adversely on the lawyer's honest, trustworthiness, or fitness in other respects). This charge was based on Respondent's own failure to directly report the suspected child abuse and his possession of the sexually explicit images of the minor student in connection with his representation. The Court rejected these claims, reasoning that the law with respect to attorney reporting of child abuse is unsettled, and "guessing incorrectly about an unsettled legal matter, upon which reasonable minds can differ and indeed have differed, does not reflect adversely on Respondent's honesty, trustworthiness, or fitness as a lawyer." *Id.* at 718. Likewise, Respondent's possession

of the images was for the purpose of preserving evidence, not for any purpose that would reflect on his fitness as a lawyer. *Id.* at 718-19.

***Matter of Steele*, 19S-DI-427 (Ind. Aug. 6, 2021)**, presents the question of whether an an attorney's demand that disciplinary grievances filed by an opposing party in a civil matter be withdrawn as a condition of settlement be "prejudicial to the administration of justice" within the meaning of Rule 8.4(d) when those grievances were meritless? The Court held that "a coercive threat to file a grievance with the Commission, or (as here) a quid pro quo demand that a grievance be withdrawn, violates Rule 8.4(d)." Respondent was suspended for 30 days, in part because during the disciplinary proceedings, his conduct was abusive to the Commission, the Commission's staff, and the hearing officer.

In ***Matter of McClarnon*, 165 N.E.3d 989 (Ind. 2021)**, Respondent represented a child's "Paternal Grandmother" following the father's death. Respondent initiated a guardianship action by filing a petition for guardianship, naming and serving "Mother" as an interested party. On December 2, 2019, Respondent filed on Paternal Grandmother's behalf a petition for emergency custody in the guardianship action. Mother's counsel objected, and the guardianship court issued an order on December 4 denying the petition for emergency custody.

Meanwhile, on December 3, 2019, Respondent also filed a "Verified Petition for Emergency Ex Parte Custody of Minor Child" in a separate, pre-existing paternity case involving the same child. This petition did not contain a certificate of service or comply with the notice requirements of Trial Rule 65(B). A hearing on this petition was held on December 5 in the paternity case, and neither Mother nor her counsel were present. The paternity court granted this emergency petition on December 6. Mother's counsel subsequently obtained a change of judge in the paternity case and filed a motion to correct error, which was heard by the successor judge in early 2020. Following that hearing successor counsel appeared for Paternal Grandmother and Respondent's appearance was ordered withdrawn.

Respondents conduct violated Rule 3.5(b) (engaging in an improper ex parte communication with a judge); Rule 8.4(d) (engaging in conduct prejudicial to the administration of justice); and Rule 8.4(f) (assisting a judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law). Respondent received a public reprimand.

In ***Matter of Martin*, 166 N.E.3d 345 (Ind. 2021)**, Respondent represented "Husband" in ongoing post-dissolution litigation involving Husband's marriage to "First Wife." In August 2018, a domestic dispute between Husband and "Second Wife" led to criminal charges against Second Wife and Husband's petition for marital dissolution from Second Wife. Respondent also represented Husband in this dissolution action. Respondent deposed Second Wife in the post-dissolution proceedings without notifying Second Wife's counsel in her own dissolution and criminal matters involving Husband. Respondent also provided a copy of the deposition to the prosecutor handling the

Second Wife's criminal matter. Respondent violated Rule 4.2 by speaking to a represented party about the subject matter of the case in which she is represented. Respondent received a public reprimand.

In ***Matter of Hudson*, 105 N.E.3d 1089 (Ind. 2018)**, Respondent, a deputy prosecuting attorney in Porter County, was prosecuting "Defendant" who was charged with four counts of child molesting based solely on statements made by the Defendant's stepchildren to the police, there was no physical evidence. Nearly a week before trial, Respondent interviewed one of the stepchildren. In the interview, the child admitted he had lied regarding Count II at the request of his biological father. Although Respondent believed the Defendant's stepchild had lied about the Count II allegations, Respondent did not drop the charge at any point. During trial, Respondent avoided asking about Count II during direct examination. Ultimately, the truth was revealed at trial, and the trial court addressed Respondent's failure to disclose the stepchild's recantation.

The Disciplinary Commission brought several charges against the Respondent, and although Respondent conceded to a violation of Rule 3.8(a), she sought review of the hearing's officer conclusions that she violated Rule 3.8(d) and 8.4(d). The Court held that because the Respondent did not give any indication that Count II was being abandoned, she had violated Rule 3.8(a). Additionally, the Court held that Rule 3.8(d) required Respondent to disclose the stepchild's recantation to the defense as it was information that tends to negate the guilt of the accused. The Court also held that the Respondent had violated Rule 8.4(d) because her conduct was prejudicial to the administration of justice. As a result of the Respondent's conduct, the Court imposed an eighteen month suspension without automatic reinstatement.

In ***Matter of Anonymous*, 43 N.E.3d 568 (Ind. 2015)**, Respondent violated Indiana Professional Conduct Rule 3.5(b) by communicating *ex parte* with a judge without authorization. Respondent represented the maternal grandparents of a child. The grandparents were concerned about the child's welfare; the putative father's paternity had yet to be established, and the mother was allegedly unemployed and addicted to drugs, threatening to take the child from the grandparents' home.

Respondent prepared an "Emergency Petition" to appoint the grandparents as the child's temporary guardians. An associate attorney of Respondent's presented the Petition to the judge, who signed it. Respondent did not provide advance notice to the putative father and mother before the presentation. By failing to certify efforts to provide notice, the Respondent also was not in compliance with Trial Rule 65(b).

While noting that there will be situations where an emergency justifies a lack of notice, Respondent's actions "did not justify dispensing with the mandatory procedures designed to protect the rights of other parties with legal interests in the proceedings." As a result, Respondent received a private reprimand.

In ***Matter of Drendall*, 53 N.E.3d 404 (Ind. 2015)**, Respondent violated Indiana Professional Conduct Rules 3.5(b), 8.4(d), and 8.4(f). Respondent represented the

maternal grandparents in a custodial action of their five-year-old grandson because the child's mother had just died. The child's father did not live in Indiana, was in arrears on child support, and had very little contact with his child. The grandparents were from Kenya and wanted to take their grandson there after the funeral. Respondent filed a motion in probate court seeking leave for the grandparents to intervene and for the court to award custody to the grandparents. Respondent did not serve the motion on the father.

A hearing was held two days later, but Respondent did not provide the father with notice of the hearing and did not ask the court to delay the hearing so that the father could be heard. Further, Respondent did not allege an emergency as Trial Rule 65(B) requires. After the court awarded custody to the grandparents, they took the grandson to Kenya. The father filed a motion to correct error and the grandparents had to bring the child back to the US. At the subsequent hearing, the court awarded custody to the father. Respondent consented to discipline and was subject to public reprimand.

Although one of the more important cases decided on the issue of the lawyer's duties to an opponent, ***Smith v. Johnston*, 711 N.E.2d 1259 (Ind. 1999)**, is no longer a recent case, its concepts are important to continue to review. *Smith* involved the appeal of a default judgment in a medical malpractice case. The plaintiff's lawyer fought her case through the medical review panel and got a decision in her client's favor. She then made a demand on the defendant's lawyers. Although a negative response to the demand was eventually made, the plaintiff's lawyer filed suit in Marion Superior Court and served the defendant physician only (as permitted under the Trial Rules). The physician did not respond or notify his lawyers. About six weeks after the complaint was filed, the plaintiff's lawyer applied for a default judgment. In her affidavit in support of the default, the lawyer indicated that she had received no pleading from the physician, "nor has any attorney contacted the undersigned regarding entering their appearance on behalf of Defendant in this case since the filing of this cause." The default was granted and the plaintiff took a judgment for $750,000. When served with the judgment, the defendants' lawyers appeared and filed a motion to set aside the default under Trial Rule 60(B)(1) [excusable neglect] and (3) [fraud or misrepresentation by an opponent.] The Supreme Court rejected the excusable neglect argument, but set aside the default on the basis of Rule 60(B)(3) because of the misconduct on the part of the plaintiff's lawyer. The Court held,

> [W]e conclude that the overriding considerations of confidence in our judicial system and the interest of resolving disputes on their merits preclude an attorney from inviting a default judgment without notice to an opposing attorney where the opposing party has advised the attorney in writing of the representation in the matter. Accordingly, we hold that a default judgment obtained without communication to the defaulted party's attorney must be set aside where it is clear that the party obtaining the default knew of the attorney's representation of the defaulted party in that matter.

The Court also spoke directly to lawyers about their ethical duties. The plaintiff's lawyer in this case argued that, if the Court adopted the defendant's arguments, it would become harder for a lawyer to take a default judgment against a health care provider. In response, the Court shot back,

> We hope so. A default judgment against a health care provider or any other party is an extreme remedy and is available only where that party fails to defend or prosecute a suit. It is not a trap to be set by counsel to catch unsuspecting litigants. . . [W]e reject the gaming view of the legal system. . .

The point is clear: the lawyer's duties to the client are pre-eminent, but there are duties owed to others as well. In *Smith*, the lawyer failed in her duties to the opposing party, his counsel and the judicial system. In its simplest form, the message is: fair play matters.

Number 9

# CRIMINAL CONDUCT

Obviously, lawyers are like any other segment of the population when it comes to criminal misconduct. Lawyers have been convicted of crimes ranging from alcohol problems (*Matter of Spencer*, 863 N.E.2d 1299 (Ind. 2007) to murder (*Matter of Angleton*, 638 N.E.2d 1257 (Ind. 1994). Some examples of the types of criminal conduct for which lawyers have been disciplined follow.

In ***Matter of Cooper*, 161 N.E.3d 362 (Ind. 2021)**, the Respondent—an elected prosecutor—plead guilty to confinement, domestic battery, identity deception, and official misconduct arising from an incident in which he brutally beat his girlfriend and used her phone to send text messages purporting to be from her. He exacerbated the conduct by making misrepresentations to justify his actions. Respondent was found liable for violating Rules 8.4(b) and (c) and suspended for four years, without automatic reinstatement.

***Matter of Hill*, 144 N.E.3d 184 (Ind. 2020)**, involved the elected Attorney General of the State of Indiana being charged with violated of Rules 8.4(b) and (d) as a result of allegations that he groped women at a political event. The Court found that his conduct constituted criminal battery and that as an "officer charged with administration of the law," like a prosecutor, his misconduct was prejudicial to the administration of justice. The Court found that Respondent's conduct did not exhibit offensive personality in violation of the Oath of Attorneys. Respondent was suspended for 30-days, with automatic reinstatement.

***Matter of Lennox*, 144 N.E.3d 181 (Ind. 2020)**, resulted in the disbarment of the Respondent. Respondent converted client funds, which resulted in attorney being charged with several felonies. Respondent failed to cooperate with the Disciplinary Commission's investigation and also neglected three client matters and failed to communicate with clients.

In ***Matter of Brewer*, 110 N.E.3d 1141 (Ind. 2018)**, Respondent faced 13 counts of

attorney misconduct that were brought against her by the Disciplinary Commission. Counts 1 through 11 involved Respondent neglecting eleven different cases of clients who had hired her for criminal and family law matters. Respondent failed to attend hearings and timely file briefs, failed to return a client's file after being terminated, failed to keep clients informed about their status of their case, etc. She later admitted to using cocaine during these representations.

Count 12 involved an incident where Respondent was served with a bench warrant. While serving the warrant, law enforcement found Respondent incoherent and impaired. They found cocaine, marijuana, and drug paraphernalia and charged Respondent with a Level 6 felony and two misdemeanors. Count 13 resulted from Respondent not participating in the disciplinary process.

In addition to violations of Rules 1.3, 1.4(a)(3), 1.16(d), 8.1(b), and 8.4(b), the Court found that Respondent violated Rule 1.16(a)(2) when she failed to withdraw from representation when her ability to represent the client became impaired. The Court was unable to find any mitigating circumstances as she neglected multiple client cases and failed to cooperate in several disciplinary proceedings. Finding reasonable grounds for a lengthy suspension, the Court suspended Respondent for three years without automatic reinstatement.

In ***Matter of Smith*, 97 N.E.3d 621 (Ind. 2018)**, Respondent violated Indiana Professional Conduct Rule 8.4(b) when he committed a criminal act that reflected adversely on his honesty, trustworthiness, or fitness as a lawyer. During a phone conversation between the Respondent and his wife, the Respondent threatened to murder his wife with an axe. He then drove to his wife's house, with the axe in the front seat, and was trying to enter her home when the police arrived. The Court points out the "profoundly troubling" facts of this case and states that there was a "heightened possibility that Respondent might have carried out his threat" if his wife had not left the house and called the police before he arrived.

After this incident, the Commission filed a "Disciplinary Complaint" against the Respondent. However, he never appeared, responded, or participated in the disciplinary proceedings. The Court took the nonparticipation into account in their opinion by concluding that it reflected "exceedingly poorly" on the Respondent's "commitment to his responsibilities as an attorney and his fitness to practice." Ultimately, the Court concluded that "the serious nature of Respondent's misconduct, his resulting felony conviction, his noncooperation with the disciplinary process, and his failure to participate in these proceedings, collectively persuade a majority of this Court to conclude that disbarment is the appropriate sanction in this case."

In ***Matter of Johnson III*, 74 N.E.3d 550 (Ind. 2017)**, Respondent, who was the chief public defender in Adams County and married, had an affair with "Jane Doe" ("J.D.") who had a conviction for operating while intoxicated. Shortly after Respondent's wife left him, Respondent began harassing Jane Doe by phone and Facebook, including a phone call where Respondent was crying and shooting a gun during the phone call. Eventually, a protective order was issued, but was thereafter violated. The Court held

that a suspension for a period of not less than one year, without automatic reinstatement, was warranted for Respondent's pattern of harassment of Jane Doe. The Court declined to determine whether Respondent's criminal stalking, harassment, and invasion of privacy conduct violated Rule 8.4(b) because the hearing officer did not make specific findings on these allegations.

In ***Matter of Schenk*, 83 N.E.3d 695 (Ind. 2017)**, Respondent was convicted of operating a vehicle while intoxicated ("OWI") with an alcohol concentration equivalent of .15 or more in 2011. A few years later, in 2016, Respondent pled guilty to a charge of possession of marijuana. Neither of these convictions were reported to the Commission by Respondent, which violated Admission and Discipline Rule 23(11.1)(a)(2) (2016). Respondent was later arrested and charged with multiple OWI-related offenses, of which prosecution was deferred pending completion of the Allen County Alcohol Deterrent Program. Respondent violated Indiana Professional Conduct Rule 8.4(b) and Admission and Discipline Rule 23(11.1)(a)(2) (2016). The Court suspended Respondent for 180 days with 30 days actively served and the remainder stayed subject to Respondent completing at least 24 months of probation with JLAP monitoring.

In ***Matter of Chamberlain,* 87 N.E.3d 447 (Ind. 2017)**, Respondent was suspended from practicing law for three years, without automatic reinstatement when he committed counterfeiting. "Respondent endorsed a check payable to a third party, siphoned off $10,000 for himself, and provided the payee with a cashier's check for the remainder" without the knowledge or permission of the payee. Respondent violated Indiana Professional Conduct Rules 8.4(b) and 8.4(c) and was required to pay restitution to the victim before petitioning for reinstatement.

In ***Matter of Robertson*, 78 N.E.3d 1090 (Ind. 2016)**, Respondent drove to the Shelby County Courthouse for a small claims hearing while intoxicated. Once Respondent arrived, he "made repeated physical sexual advances on the court's receptionist." As a result of his behavior, the judge and a security officer were called. Respondent was given a breath test, which showed an alcohol concentration equivalent of .15. Following these results, the judge held a contempt hearing. At the hearing, the Respondent could not stand out without leaning on something. After finding Respondent in direct contempt, the judge ordered Respondent to stay in jail until his alcohol concentration equivalent was at zero.

The small claims hearing Respondent was attending was continued to another day and the incident delayed the court's schedule by at least an hour. The Respondent was charged with multiple crimes and pled guilty to operating while intoxicated as a Class A misdemeanor. Respondent violated Professional Conduct Rules 8.4(b) and 8.4(d), as well as Admission and Discipline Rule 22 for his offensive advances and remarks toward the court's receptionist. Respondent was suspended for one year, with 90 days actively served, and the remainder of the suspension stayed subject to the completion of at least two years of probation under the Court's terms.

In ***Matter of Keaton*, 29 N.E.3d 103 (Ind. 2015)**, Respondent was a married

attorney who began an intimate relationship with his daughter's college roommate ("JD"). The Respondent and JD maintained a long-distance relationship for three years. JD permanently ended the relationship in March 2008.

During the ensuing months, Respondent left numerous threatening, vulgar, manipulative, and abusive voicemails for JD. At least 90 of the voicemails were saved by JD. Additionally, Respondent sent at least 7,199 emails to JD, mostly consisting of expletives and threats. On numerous occasions, Respondent threatened to harm JD and himself if she did not reply to his voicemails or emails. In order to solicit a response from JD, Respondent hosted and maintained a sexually explicit website containing intimate images of JD that were obtained during their relationship. Respondent would routinely travel from Fort Wayne to Bloomington to stalk and confront JD at her law school. In 2009, the associate dean for students at JD's law school contacted Respondent in an attempt to stop the stalking and harassment. In his response, Respondent claimed that he was not violating any laws or ethical rules and was thus "blameless in this matter," and that JD was "happily engaged in" the communications.

Thereafter, JD sought help from the Indiana University Police Department ("IUPD"). In August 2009, a detective from IUPD phoned Respondent and advised Respondent to stop contacting JD. Respondent's response to the detective was similar to his response to the associate dean. Following the phone call, Respondent sent a series of threatening emails to JD, warning her against seeking a protective order. In April 2010, JD received an *ex parte* protective order against Respondent in response to the stalking and threats.

In May 2010, Respondent was arrested and criminally charged in Monroe County with felony stalking. The criminal case was dismissed by the State in April 2011 based on personal privacy concerns raised by JD. After the dismissal, Respondent continually attempted to contact JD in 2011 both by phone and by email. JD did not reply.

In February 2012, the Commission notified Respondent that it was investigating his conduct involving JD. Ten days later, Respondent, *pro se*, filed a civil complaint in state court against JD alleging malicious prosecution and abuse of process. In May 2012, Respondent, *pro se*, filed a second complaint in federal court against JD, and others, alleging unlawful arrest.

Throughout the disciplinary proceedings, Respondent made contradictory and false statements to the Commission alleging that JD had been less than truthful with the various law enforcement officers and attorneys with whom she had communicated with. Among other things, the Commission found that Respondent violated Indiana Professional Conduct Rule 8.4(b)-(c) for engaging in conduct involving dishonesty, fraud, deceit or misrepresentations and for committing criminal acts (stalking, harassment and intimidation) that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer. In a stern opinion, the Court concluded that Respondent should be disbarred because:

> In short, Respondent's repugnant pattern of behavior and utter lack of remorse with respect to the events involving JD, his deceitful responses and lack of candor toward the Commission…his inability or unwillingness to appreciate the wrongfulness of his misconduct, and his propensity to shift blame to others and see himself as the victim, all lead us unhesitatingly to conclude that disbarment is warranted and that Respondent's privilege to practice law should be permanently revoked.

In ***Matter of Philpot*, 31 N.E.3d 468 (Ind. 2015)**, Respondent was convicted of two counts of mail fraud and one count of theft from a federally-funded program - all felonies. The convictions resulted from his use of federal funds to pay himself impressible bonuses in connection with work that he performed in his capacity as the elected Clerk of Lake County, Indiana. Respondent had no prior criminal record and repaid with interest the monies in question. The parties agreed that Respondent violated Indiana Professional Conduct Rule 8.4(b), by committing criminal acts that reflect adversely on his honesty, trustworthiness or fitness as a lawyer. The Court suspended Respondent from the practice of law for four years for his misconduct.

In ***Matter of Hollander*, 27 N.E.3d 278 (Ind. 2015)**, Respondent was employed as a public defender. Respondent came across a police report of a woman who had been arrested for engaging in prostitution. The report contained the woman's personal phone number. The Respondent recognized the phone number from an online escort service and proceeded to send text messages to the phone number. Respondent told the woman that a former client had given him her information and that he could help with the woman's situation; stating he would "work with" her regarding her attorney fees.

At the time the messages were sent, the phone was in the possession of the Indiana Metropolitan Police Department ("IMPD"). An IMPD police officer, pretending to be the woman, responded to the several text messages and calls from Respondent and set up a meeting with him in a hotel room. Respondent went to the hotel around where he attempted to hug and kiss an undercover officer, made statements conveying he wanted sex in return for his legal services, and began to undress. Respondent was subsequently arrested for patronizing a prostitute.

Respondent violated Rules 1.2(d), 1.5(a), 1.7(a), 1.8(j), 7.3(a), and 8.4(a)-(d). The violations stemmed from Respondent's improper attempt to charge and engage in sex for legal services, making dishonest or false representations, committing a criminal act that reflects adversely on the lawyer's honesty, and engaging in conduct prejudicial to the administration of justice. The Court suspended Respondent from practicing law for one year, without automatic reinstatement.

# Number 8

# CONFLICTS OF INTEREST

This is one of the areas of ethics that concerns practicing lawyers the most, but appears to be one of the least well understood by the bar. In essence, the conflict of interest rules govern different aspects of the lawyer's duty of loyalty to the client. Some rules act to protect the client from conflicts with other clients, other rules act to protect the client from their own lawyer and still others act to protect *former* clients from some of the dangers of conflicting interests after the representation is over.

Cases are legion which explore all the contours of this area of ethics. Certainly any written work exploring this subject would be a respectable tome. In the final analysis, these cases revolve around the question: "to whom does the lawyer's loyalty run?" If the answer isn't unequivocally, "the client," then a conflict of interest almost undoubtedly exists. One case illustrates the extent to which conflict questions can be simultaneously complex and very apparent. In ***Matter of Watson*, 733 N.E.2d 934 (Ind. 2000)**, Respondent wrote a will for an 85-year-old man who was the largest single shareholder in an Indiana telephone company. The Respondent's mother was the second largest shareholder in the company.

Subsequently, Respondent prepared for the testator a codicil which granted an option to the company, upon the testator's death, to purchase these shares at a price reflecting the stated book value. After the testator died, the board of directors elected to exercise the option to purchase the estate's shares at the listed book value. About two years later, Respondent, his mother, and the company's remaining shareholders sold all of the company's stock, realizing an amount per share in excess of two times that paid to the testator's estate for the shares. The Supreme Court found that the Respondent knew or should have known that the option for the company to buy the shares at book value was setting a price which could be substantially less than fair market value. Respondent was found to have violated Rule 1.8(c) because he drafted the codicils when it was reasonably foreseeable that the instruments had the potential for providing a substantial gift to him and his mother. As a result, Respondent was suspended from the practice of law for sixty days.

***Matter of Thoms*, 166 N.E.3d 344 (Ind. 2021)**, involves a lawyer who sent his Client a series of sexually explicit text messages evincing Respondent's desire to engage in sexual acts with Client. Respondent and Client were not involved in a personal relationship prior to the representation. Respondent's conduct violated the following Rules:

- 1.7(a)(2): Representing a client when the representation may be materially limited by the attorney's own self-interest.
- 1.16(a)(1): Failure to withdraw from representation when the representation will result in violation of the Rules of Professional Conduct or other law.
- 8.4(a): Attempting to violate the Rules of Professional Conduct; specifically, by attempting to engage in an improper sexual relationship with a client.

Respondent was suspended for 30 days, with automatic reinstatement.

***Matter of Burton*, No. 139 N.E.3d 211 (Ind. 2020)**, involved a chief deputy prosecutor who committed attorney misconduct by abusing his prosecutorial authority as part of a campaign of retaliation against a detective. Specifically, Respondent improperly leveraged his prosecutorial authority to exact a personal vendetta against a police detective who was seeking to determine whether attorney had attempted to trade consideration of leniency in a female defendant's criminal matters over the years in exchange for sexual contact; attorney acted not to further the public interest, but rather to protect his own self-interest, in violation of Rule 8.4(d) & (e). Further, Respondent gave the defendant legal advice despite his role at the prosecutor's office, in violation of Rule 1.7(a)(2). Respondent was suspended for 90 days, with automatic reinstatement.

In ***Matter of Daley*, 116 N.E.3d 457 (Ind. 2019)**, Respondent was appointed as a public defender to represent one of two co-defendants (in the Order, the Court refers to the two co-defendants as JB and KW) in a burglary case. Respondent's client was JB and he told the Respondent about the codefendant's involvement and stated that he wanted to testify against his codefendant as the prosecution's witness. The Respondent never read the probable cause affidavit, which listed KW as the codefendant, and made no effort to find the identity of the codefendant.

Two months later, KW was arrested and he and Respondent entered into an agreement where Respondent would privately represent KW in the case. Respondent also accepted $1,450 as a partial retainer from KW. Respondent told his paralegal to file an appearance and other documents for KW's case. However, the Respondent did not supervise the paralegal to ensure that this was done, and as a result, neither the appearance nor the other documents were filed.

When Respondent initially met with KW, he never mentioned the codefendant. KW's probable cause affidavit, which Respondent did read, only identified JB by his nickname. After KW's pretrial conference, Respondent learned that he was representing both codefendants. Respondent immediately requested to withdraw from both cases, returned the $1,450 retainer to KW, and apologized.

The Court found Respondent in violation of Rules 1.1, 1.7(a), and 5.3(b) and imposed a

public reprimand for his misconduct.

In ***Matter of Henderson*, 78 N.E.3d 1092 (Ind. 2017)**, Respondent was the elected prosecutor in Floyd County and was tasked with prosecuting a former police officer charged with murdering his wife and two minor children. The officer was convicted twice, but when he appealed, both convictions were reversed. In a third trial, the officer was acquitted. The Respondent was the prosecutor in the officer's second trial and attempted to continue representing the State as they began preparations for the officer's third trial until he was removed from the case as a result of a conflict of interest.

Within days of the jury returning a guilty verdict in the officer's second trial, Respondent entered into an agreement with a literary agent, with the intent to write and publish a book about the Camm case. After the Court issued a decision reversing Camm's convictions and remanding for a third trial, Respondent wrote to the literary agent, expressing his belief that "this is now a bigger story" and asking the literary agent to seek a "pushed back time frame" for publication and "to push for something more out of the contract." Respondent violated Professional Conduct Rules 1.7(a)(2), 1.8(d), and 8.4(d) and received a public reprimand.

In ***Matter of Kirsh*, 83 N.E.3d 699 (Ind. 2017)**, Respondent was retained to represent clients who were seeking to adopt children. The "Birth Mother" decided to select another set of adoptive parents after the Respondent provided her with profiles of other candidates seeking to adopt. Respondent acted without consulting with his clients and attempted to have the clients sign a release form, which would bar clients from seeking an action against Respondent with the Disciplinary Commission. Respondent violated Indiana Professional Conduct Rules 1.7(a), 1.8(b), 8.4(d) and was disciplined with a public reprimand.

In ***Matter of Hanley II*, 19 N.E.3d 756 (Ind. 2014)**, Respondent hired an attorney ("Associate") to work in his law office pursuant to an employment agreement in 2006. Respondent's law practice focuses primarily on Social Security disability law. The employment agreement included a non-compete provision that prohibited Associate from practicing Social Security disability law for two years in the event his employment with Respondent was terminated. In 2013, Respondent fired the Associate. Thereafter, Respondent sent letters to Associate's clients stating he no longer worked at the firm and that Respondent would be taking over their representation. Additionally, in those letters, Respondent included Appointment of Representative forms for the clients to complete in order for Respondent to replace Associate as the clients' representative before the Social Security Administration.

Associate continued to practice Social Security disability law after leaving the firm, and at least two of Associate's existing clients chose to keep Associate as their lawyer. Respondent did not attempt to enforce the non-compete provision and provided Associate with files for Associate's clients after disciplinary grievances were filed against him. The parties agreed that Respondent violated Indiana Professional Conduct Rule 1.4(b), for failure to explain a matter to the extent reasonably necessary to permit a

client to make informed decisions regarding the representation, and 5.6(a) for making an employment agreement that restricts the rights of a lawyer to practice after termination of the relationship. The Court imposed a public reprimand for Respondent's misconduct.

# Number 7 ATTORNEY FEES

Like conflicts of interest, lawyers often mistakenly believe that claims about unreasonable fees are a prime source of disciplinary cases. In truth, the Disciplinary Commission's annual reports traditionally show that allegations involving the lawyer's fee only account for three to five percent of the total grievances received. As a general rule, unreasonable fee cases are about just that - unreasonable fees. However, the Supreme Court has had the opportunity to interpret the reasonableness requirement under many different circumstances.

This summary is updated annually and some of the older decisions are replaced by more recent case law. However, on the topic of attorney fees, there are cases the court decided some years ago that set forth the current state of the law. These summaries continue to be published for that reason.

In ***Matter of Rios*****, 139 N.E.3d 704 (Ind. 2020),** "Client" hired Respondent to assist him with an immigration matter. Client paid Respondent $1,420 – more specifically, a $1,000 retainer for legal work and a $420 anticipated filing fee. After Respondent had done a minimal amount of work and before anything was filed, Client terminated Respondent and asked for a refund of the filing fee and any unearned attorney fees. Respondent wrote Client a check for $920 (the $420 filing fee and $500 in unearned legal fees), but the check bounced. After Respondent refused to write Client another check, Client sued Respondent in small claims court and obtained a default judgment in January 2017 for $920 plus $101 in court costs and post-judgment interest at the rate of 8% per annum. In May 2019, Respondent provided Client a $1,000 cashier's check in partial satisfaction of the amount she owes to Client. Respondent violated Rule 1.16(d) by failing to timely refund advance payment of fees and expenses that were not earned or incurred and was publicly reprimanded.

In ***Matter of Saar*****, 106 N.E.3d 1037 (Ind. 2018)**, "Client" entered into a representation agreement with "Law Firm." The agreement indicated Law Firm would receive a 35% contingent attorney fee if the case was resolved without trial, 45% plus expenses if the case was resolved with trial and a $175 per hour of work performed on the case if the case was discharged by Client prior to an eventual settlement recover. Respondent was an associate with Law Firm, however, while Client's case was ongoing, Respondent left

Law Firm and began work with a new law firm. Client chose to have Respondent continue to represent him under the same fee terms. When the case was settled, Respondent kept 35% as her fee and negotiated a $2,000 settlement with Law Firm for the time spent on the case. This resulted in the Client being charged 46% of the settlement amount. Rule 1.5(a) prohibits the collection of an unreasonable fee, but the Respondent returned the excess amount to Client upon facing disciplinary charges. The Court issued a public reprimand for Respondent's misconduct.

In ***Matter of Emmons*, 68 N.E.3d 1068 (Ind. 2017)**, Respondent was appointed guardian of an 88-year old incapacitated woman where his duties included being a signatory on her bank accounts. Respondent wrote three checks to himself from the PTSB account, totaling $20,000, indicating that they were for legal fees. The Court ordered Respondent to file accounting records and appear before the court, which Respondent failed to do. The Court held that first, Respondent was under an indefinite suspension due to his noncooperation with the Commission's investigation, and second, a suspension of not less than three years was warranted for Respondent's misconduct regarding converting guardianship funds.

In ***Matter of Peters*, 23 N.E.3d 660 (Ind. 2014)**, Respondent represented a client on a contingency basis in a civil action brought against the client's landlord. A trial resulted in judgment for the client for over $46,000. A dispute between the client and Respondent arose after the judgment because Respondent had failed to provide the contingent fee agreement in writing. The parties agreed that Respondent's lack of a written contingency agreement was an oversight and did not stem from a dishonest or selfish motive.

Additionally, the parties agreed that Respondent violated Rule 1.5(c), which requires contingent fee agreements to be in writing and signed by the client. The Court issued a public reprimand for Respondent's misconduct.

In ***Matter of Corcella*, 994 N.E.2d 1127 (Ind. 2013)**, Respondent filed suit in federal court on behalf of a client against several defendants. Summary judgment was eventually entered in favor of the defendants in 2011. The parties' fee agreement called for a billing rate of $175 an hour. However, Respondent billed the client for more than 60 hours of work at $200 an hour, which was her usual hourly billing rate at the time. After the client filed a grievance, Respondent refunded the $1,580 overcharge to the client. In July 2009, Respondent and her client changed the fee agreement to provide for a contingent fee. In December 2009, they again changed the fee agreement to provide for a blended hourly and contingent fee. One or both of the changes resulted in a fee agreement that was more advantageous to Respondent than the previous agreement. Respondent did not advise the client in writing of the desirability of seeking the advice of independent counsel before agreeing to the changes. Respondent was publicly reprimanded for her actions.

In ***Matter of Snulligan*, 987 N.E.2d 1065 (Ind. 2013)**, Respondent was hired to represent a client charged with Dealing Cocaine, a class A felony, and Possession of

Cocaine, a class C felony. The Respondent quoted a flat fee of $12,000 for the case, and the parties agreed that $6,000 should be paid in advance. A month later, the family sent Respondent a letter terminating her services, requesting an itemization of services already performed, and requesting a refund of the unused fees paid in advance. Respondent did not keep ongoing records of the work she did on the case, and she sent a response to the family purporting a billing rate of $175 per hour for 37.8 hours. The hearing officer found Respondent's attempt to reconstruct time records unreliable, and found she did little actual work to move the case forward. Respondent was ordered to refund $5,000. For this misconduct, Respondent was suspended from the practice of law for not less than thirty days, without automatic reinstatement.

In ***Matter of Canada*, 986 N.E.2d 254 (Ind. 2013)**, Respondent represented a client who was accused of Conspiracy to Commit Dealing in Methamphetamine, a Class A felony. The client made it clear to Respondent that he wanted to resolve the case through a plea agreement.

Respondent entered into a flat fee agreement with the client for $10,000, to be paid from the cash bond posted by the client's father. The agreement stated that, barring a failure to perform the agreed legal services, the fee was non-refundable because of the possibility of preclusion of other representation and to guarantee priority of access. The hearing officer found the fee was reasonable on its face for someone of Respondent's skill and experience.

After Respondent procured a plea offer, the client stated he was going to hire a different lawyer to see if he could get a better deal. Respondent estimated he had spent about twenty hours working on the client's case. Client was eventually sentenced similarly to the offer Respondent procured, and the $10,000 bond was released to Respondent for his fee. The court examined whether Respondent improperly collected and failed to refund an unearned portion of the flat fee.

The Court discussed the fact that the client was free to discharge Respondent at any time and retain a different attorney. The Court examined whether any portion of the $10,000 fee was unearned in this instance. Herein, the client retained the Respondent to negotiate a plea agreement. Respondent spent time on the case and negotiated an agreement with the prosecutor, to which the client initially agreed. The Court determined the Commission did not prove by clear and convincing evidence that the Respondent did not fully earn his flat fee, and entered judgment for Respondent.

In ***Matter of O'Farrell*, 942 N.E.2d 799 (Ind. 2011)**, the law office Respondent works in uses an "Hourly Fee Contract" or a "Flat Fee Contract" in most cases when it represents a party in a family law matter. Both types of contract contain a provision for a nonrefundable "engagement fee." The law office charged a "client 1" a $3,000 engagement fee for the cases, plus $131 for filing fees, which the client 1 paid. On November 28, 2006, Respondent filed motions to withdraw as the client's attorney in the divorce case and in the PO Case. Both cases eventually were dismissed. The law office refused to refund any part of the $3,000 the client had paid, saying that the fee was

earned upon receipt pursuant to the Flat Fee Contract.

Another client agreed to pay an "engagement fee" of $1,500 and signed the law office's Hourly Fee Contract. Due to the client's unwillingness to pay any additional fees for further services rendered, Respondent and the law office ended their representation of the client and withdrew as her attorney. The law office refused to refund any part of the fee paid by the client, saying that all fees were earned upon receipt and nonrefundable. The Court concluded that in charging nonrefundable flat fees, Respondent violated Indiana Professional Conduct Rule 1.5(a) by making agreements for and charging unreasonable fees. For Respondent's professional misconduct, the Court imposed a public reprimand.

An important case was decided in ***Matter of Stephens,* 851 N.E.2d 1256 (Ind. 2006)**. Therein, Respondent entered into a medical malpractice employment agreement with a client, which provided that the client agree to pay Respondent as much of the first $100,000 obtained from the health care providers as is necessary to equal one-third of the total recovery. The client then agreed to pay a non-refundable retainer of $10,000 in addition to the contingency fee. The client paid Respondent $10,000, but about 18 months later, the client demanded the return of her file and accused Respondent of breaching their contract. The client sought a refund of the $10,000, but Respondent declined to refund the money because it was "non-refundable." After the commencement of disciplinary proceedings, Respondent refunded the full $10,000 to the client.

Indiana's medical malpractice statutes limit a plaintiff's attorney's fees to fifteen percent (15%) of any recovery from the Patient Compensation Fund. While the medical malpractice statutes do not restrict the amount of attorney fees taken from the first $100,000 recovered, the Court stated that the Indiana Rules of Professional Conduct do set standards for attorney fees and held that Respondent's agreement violated Rule 1.5(a), which requires that a lawyer's fee be reasonable. Regardless of the source of the fee, an attorney's compensation must still meet the reasonableness requirements of Rule 1.5(a) and the 15% limitation of I.C. 34-18-18-1.

The Court also held that the nonrefundable retainer provision of Respondent's agreement violated Rule 1.5(a), saying "[b]y locking a client to a lawyer with a non-refundable retainer, the lawyer chills the client's right to terminate the representation." Finally, the Respondent's second fee agreement, which gave Respondent a pecuniary interest adverse to the client, was obtained without a separate written consent from the client, which violated Rule 1.8(a). The Court held that a public reprimand was appropriate.

The Indiana Trial Lawyers Association intervened following this decision and asked that the Court reconsider its conclusion that the Respondent had improperly attempted to circumvent the limitations on attorney fees recoverable under the malpractice act. The Supreme Court issued a subsequent opinion, ***Matter of Stephens*, 867 N.E. 2d 148 (Ind. 2007)**. The Court acknowledged that each case is unique and must be evaluated on its own merit. Those plaintiffs lawyers engaged in medical malpractice cases are

given guidance as to what is a reasonable total fee in those cases.

The Court recognized that the legislature only limited attorney fees from those monies recovered from the fund. The reasonableness of the total fee is for the Supreme Court to determine, using the Rules of Professional Conduct. It recognized attorney fees of up to 35% are commonly considered reasonable in tort litigation and at times, higher percentages are not out of line. Additionally, parties are free to enter into contracts of their own making.

The Court recognized that limiting plaintiff's attorneys to fees of 15% of the fund recovery plus no more than the customary percentage from the provider, would result in fees that may be too low for lawyers to consider taking medical malpractice cases. The consumers of legal services could be negatively affected.

The sliding scale fee agreement concept, where a lawyer might receive 100% of the non-fund recovery is acceptable. The key is to be certain the lawyer's fee agreement results in a total fee within the typically acceptable range in tort litigation. If you practice in this area of the law, you should read the second *Stephens'* opinion.

In another case relating to attorney's fees, the lawyer required certain clients to pre-pay a portion of his fees before he performed any services. ***Matter of Kendall*, 804 N.E.2d 1152 (Ind. 2004)**. These arrangements were set forth in contracts and specified that the advanced fee payments were "non-refundable." Notwithstanding this provision, it was Kendall's practice to refund any unearned portion of the fees. In the interim, the advance fees were deposited into Kendall's operating account. Subsequently, Kendall's firm was placed into bankruptcy, and he was unable to refund the unearned portions of the fees. Two issues were addressed in the case: (1) were the fees required to be segregated until earned?; and (2) were the fees reasonable? The Supreme Court took the opportunity to clarify the difference between advance fee payments and flat fees. The Court defined a "flat fee" as a "fixed fee that an attorney charges for all legal services in a particular matter, or for a particular discrete component of legal services." Furthermore, the Court described an advance fee as "a partial initial payment to be applied to fees for future legal services."

The Court then determined that Indiana Professional Conduct Rule 1.15(a) generally requires the segregation of advance payments of attorney fees until actually earned. However, the segregation and accounting requirements are not applicable to flat fees, as discussed in *Matter of Stanton*, 504 N.E.2d 1 (Ind. 1987). In determining whether the fee was reasonable, the Court relied on ***Matter of Thonert*, 682 N.E.2d 522 (Ind. 1997)**. In *Thonert*, the Court noted that nonrefundable retainers are not per se unreasonable, but that one should be justified by value received by the client or detriment incurred by the attorney. When such justification exists, the Court emphasized that it should be included in the fee agreement. Thus, the Court held that an assertion that an advance payment is nonrefundable violates the requirement in Rule 1.5(a) that a fee be reasonable. In the case of a flat fee, the agreement should reflect the fact that such a flat fee is nonrefundable except for failure to perform the agreed legal services.

In August of 2003, the Supreme Court held, as a matter of first impression, an attorney's recovery of a contingency fee on settlement funds that were not to be received until the future, without discounting future settlement payments to present value, amounted to collection of an unreasonable fee. ***Matter of Hailey*, 792 N.E.2d 851 (Ind. 2003)**. The Court reasoned that the fee agreement must be based on the value to the client, unless some other method is clearly spelled out. Here, the agreement called for 40% of the settlement, so the attorney was entitled to 40% of the present value. The Court noted that there is nothing wrong with a lawyer receiving the full amount of his fee in current dollars and the client receiving payment in future dollars, so long as the relationship between the present value of the two is in proportion to the percentage of the lawyer's fee agreed to in the fee agreement. The attorney in this case received a public reprimand for this and other fee-related violations.

The amount and computation of the lawyer's fee is a subject about which lawyers give considerable thought. These cases show, however, that communicating the fee and the method by which it is calculated is equally important for the client to understand. Lawyers who do not commonly give detailed explanations of the fee deals with their clients would be well advised to do so.

The Indiana Supreme Court's most significant pronouncement in this area came in the case of ***Galanis v. Lyons & Truitt*, 15 N.E.2d 858 (Ind. 1999)**, not a recent case, but certainly an important decision. Although somewhat dated, it is still worth reading. In *Galanis*, the lawyer entered into an attorney client relationship with the plaintiff to represent her in a personal injury case. The lawyer undertook the matter on a contingency fee basis. After doing some work on the case, the lawyer was discharged and the plaintiff hired a second lawyer who brought the case to a conclusion. Ultimately, a declaratory judgment action was filed and the case eventually made its way to the Supreme Court. Among other issues, the Court addressed the method of determining the reasonableness of the lawyer's fees and the use of the equitable doctrine of *quantum meruit*:

> The trial court in this case held that the reasonable value of Lyons' work should be determined commensurate with the hourly rate of a community attorney charging for similar services. Judge Staton, dissenting in the Court of Appeals in this case, read this as requiring a fee equal [to] 'the hourly rate of a community attorney…' [citation omitted]. The parties apparently make the same assumption. Lyons challenges this method of calculating the reasonable value of the firm's work. If a fee agreement provides for an hourly rate in the event of a pre-contingency termination, it is presumptively enforceable, subject to the ordinary requirement of reasonableness. See Indiana Professional Conduct Rule 1.5. We agree with Lyons that, in the absence of such an agreement, the value of a discharged lawyer's work on a case is not always equal to a standard rate multiplied by the numbers of hours of work on the case. Where the lawyers have agreed to work on contingent fees and there is no

> contractual provision governing payment in the event of discharge, compensating the predecessor lawyer on a standard hourly fee could produce either too little or too much, depending on how the total hourly efforts of all lawyers compare to the contingent fee.

One of the most important features of this analysis is the duty of courts that are faced with fights like this to make not only a quantitative evaluation of the lawyer's time, but a qualitative evaluation of the lawyer's efficiency and productivity for the client.

The Indiana Supreme Court reiterated the *Galanis* standard in its opinion in ***Cohen & Malad LLP v. John P. Daly, Jr. and Golitko Legal Group PC*, 27 N.E.3d 1084 (Ind. 2015).** Therein the Court quoted from *Galanis*, stating, "a lawyer retained under a contingent fee contract is discharged prior to the contingency is entitled to recover the value of services rendered if there is a subsequent settlement or award[,]" and in that case, "the fee is to be measured by the proportion of the total fee equal to the contribution of the discharged lawyer's efforts to the ultimate result[.]"

# Number 6

# MALPRACTICE

Most lawyer malpractice cases do not end in disciplinary action. That fact does not make them significantly more popular for the defendant lawyer, however. Some cases are worthy of note.

In ***Matter of Welke*, 2019 WL 4264738 (Ind. Sept. 10, 2019)**, Respondent violated Rules 1.1, 1.3, 1.4(a)(2), 1.4(b), 5.3(b), and 8.1(a). In 2010, "Client" was charged with murder. Client was not proficient in English and was represented by an experienced public defender, who was utilizing an interpreter in their meetings. Client claimed he acted in self-defense, however, the public defender did not believe that a self-defense argument would stand up in court, but thought that it would be a mitigating factor. The public defender and the deputy prosecutor were in the process of working out a plea agreement, where Client would plead to voluntary manslaughter.

Before the plea deal was worked out, Respondent's nonlawyer assistant began to meet with Client's family in an effort to convince them to hire himself and Respondent to defend Client's murder charge by telling them that Client would likely be successful in his self-defense argument and saying that the public defender would "sellout" the Client. The family agreed and they paid Respondent a $6000 retainer. $1000 of that retainer was to be used to hire an interpreter.

Respondent had never worked on a murder case, and had very little experience with major felonies. Respondent and his nonlawyer assistant could not communicate with client, did not hire an interpreter, did not meet with Client in jail, and delegated nearly all of the casework to the nonlawyer assistant. The nonlawyer assistant brought an "interpreter" to only one meeting with Client. The interpreter was "an untrained and unpaid woman who needed community service credit for her own criminal conviction" and was tasked with interpreting the nonlawyer's opinions that Client had a strong likelihood of success on a self-defense theory.

Respondent looked at post-mortem pictures of the victim for the first time right before the trial was set to begin and realized that a theory of self-defense or voluntary manslaughter would not be possible. The State offered Client a plea to voluntary manslaughter, with a

fixed sentence of 40 years, during the final pretrial conference. The Respondent did not consult Client, tried to accept the State's offer, and was only stopped from accepting the plea because Client complained.

As expected from these facts, when Client's murder trial began, Respondent was not prepared and did not arrange for an interpreter. As the trial progressed, the State offered a new deal; Client would plea to murder and serve a fixed term of 45 years. During a recess, Respondent had one of Client's friends interpret this new offer. Respondent advised Client to accept because of how weak their case was and Client followed Respondent's advice.

When the Commission conducted its investigation, Respondent lied to the Commission. Respondent told them that Client was fluent in English and that he had been to see Client in jail multiple times.

In the Court's discussion, they spent a significant amount of time discussing their disapproval of how Respondent and nonlawyer assistant exploited "inaccurate stereotypes about public defenders and the particular vulnerability of defendants and their family members to unrealistic expectations." They went on to say, "In the end, switching from the public defender to Respondent earned Client a lighter wallet, comprehensively shoddier legal representation, weakened bargaining power, the inability to meaningfully participate in his own defense, and ultimately a higher-level conviction and several more years in prison than he otherwise would have received." Respondent was suspended from the practice of law for a period of not less than three years, without automatic reinstatement.

In ***Matter of Crosley*, 99 N.E.3d 643 (Ind. 2018)**, Respondent failed to supervise an attorney who was performing work in Indiana but was not licensed in Indiana. The attorney worked for a Texas firm with which Respondent had an "of counsel" relationship; the agreement between Respondent and the firm was that a Texas firm attorney would complete the work and Respondent would sign off on documents and present them in court to expunge criminal records. The Texas law firm's attorney who completed the work and filed with the court was not admitted with temporary admission to the Indiana bar, yet she still represented herself as attorney on these Indiana expungement cases.

When Respondent learned of the Texas attorney's representations to the court, the Respondent apologized for the error. All of the expungement clients received the services they had paid for and the Court held that the appropriate discipline would be a 30-day suspension.

In ***Matter of Straw*, 68 N.E.3d 1070 (Ind. 2017)**, Respondent advanced a series of frivolous claims and arguments in four lawsuits, three of which were filed on his own behalf. The first suit was a defamation suit where opposing counsel sought information from Respondent and in response, Respondent sued opposing counsel in federal court, alleging racketeering activity and seeking $15,000,000 in damages and injunctive relief.

The second suit was in federal court against the ABA and 50 law schools, alleging violations of the Americans with Disabilities Act ("ADA"), which was dismissed for lack of standing. Respondent lost the third suit, an employment discrimination claim, because he let the statute of limitations lapse without filing. The fourth case was a post-dissolution proceeding where Respondent filed suit alleging defendants had violated the ADA by discriminating against the former husband, which was dismissed. The Court held that a suspension for a period of 180 days, without automatic reinstatement, was warranted for Respondent's misconduct.

In ***Matter of Bernacchi*, 83 N.E.3d 700 (Ind. 2017)**, Respondent hired an independent paralegal and instructed his client to pay a "non-refundable" retainer fee to the paralegal. The client was directed to ask the paralegal about any questions regarding the case. During the first court hearing for the case, Respondent incorrectly asserted that he represented the opposing party. At the second hearing, Respondent failed to advocate for his client's wishes to obtain child support and instead argued against the opposing party having to pay child support. The client was not present at any of these hearings and was later informed by the Respondent of his actions.

Client requested the Respondent to correct this in court, but Respondent refused. Client asked for a refund, but it was not granted to her until two years later when she already lost her house due to insufficient funds. During this time, Respondent harassed client into dropping her grievance against him with the Commission. As a result, Respondent violated Indiana Professional Conduct Rules 1.1, 1.5(a), 5.3, 5.4(a), 8.4(d), and Guideline for the Use of Non-Lawyer Assistants 9.1. He was suspended from practicing law for one year, without automatic reinstatement.

In ***Matter of Ellison*, 87 N.E.3d 460 (Ind. 2017)**, Respondent entered into an agreement with a client to represent client in an expungement appeal. However, Respondent failed to timely file an appellant's brief and neglected to truthfully tell client that he did not file the brief. Client's appeal was dismissed and Respondent failed to notify the client of the dismissal or have the appeal reinstated. Therefore, Respondent violated Rules 1.1, 1.3, 1.4(a)(3), 1.4(b), 3.3(a)(1), 8.1(a), and 8.4(c).

The Court imposed a 90-day suspension, without automatic reinstatement. In the Court's discussion of the appropriate sanction, they stated that the Respondent had no prior discipline and if he had only neglected one appeal, the sanction may have been minor (a 30-day suspension, as opposed to 90 days). However, the Court highlights the Respondent's continued dishonesty throughout the expungement matter. Respondent lied to his client, the Court of Appeals, and the Commission. The Court states that this dishonesty "elevates this into a much more serious offense." In their explanation of why they imposed a longer sentence, the Court also points out that the Respondent did not accept responsibility for his wrongdoing, did not participate in proceedings before the hearing officer, and he filed a one-page sanction brief in which he did not mention any of his dishonest acts.

Number 5

# ADVERTISING AND IMPROPER REFERRALS

This is another area of the law of ethics that is confusing and generally not well understood by lawyers. In a nutshell, truthful lawyer advertising is protected speech under the First Amendment of the U.S. Constitution. The states are free to regulate lawyer advertising if the speech is "false, fraudulent, misleading, deceptive, self-laudatory or unfair." This term is found in Rule 7.1(b) of Indiana's Rules of Professional Conduct. It is further defined in subsections (c) and (d) of the Rule to include prohibitions on the use of statistics, opinions about the quality of the legal services and testimonials that contain any representation the lawyer could not personally make in a public advertisement. Rules 7.2 through 7.4 further regulate lawyer solicitations regarding letterhead, in-person solicitation and advertising of "specialty" practices.

The biggest trend in the enforcement of limitations on lawyer referral services is discipline of lawyers who assist non-lawyers in providing legal services to clients. Although traditional advertising violations are often not charged in these cases, any lawyer approached to assist a corporation in providing consumer legal services should consider whether the corporation solicits clients in a manner that the lawyer could not. If a lawyer is offered a client pipeline that is "too good to be true," the lawyer should carefully vet the proposal to ensure that it would not be viewed by the Court as loaning out his or her bar card.

***Matter of Homan*, 149 N.E.3d 1184 (Ind. 2020)**, involved a Respondent who associated as "of counsel" with a Texas law firm that offered expungement services. The law firm forbade Respondent from negotiating his own fees, communicating with clients, or event attending hearings. Respondent had not control of the firm's completion of work for the clients. Some clients cases were delayed causing prejudice to their immigration status. This relationship was found to violate myriad rules of professional conduct related to diligence and client communication as well as assisting in the unauthorized practice of law and allowing non-lawyer sot usurp the lawyer's

professional judgment. Unrelated to these issues, Respondent also lost his license due to a DUI and continued to drive while his license was suspended. This conduct resulted in a violation of Rule 8.4(b). Respondent was suspended for 90 days, by agreement.

In ***Matter of Wray*****, 91 N.E.3d 578 (Ind. 2018)**, Respondent used a referral system with non-lawyers to solicit clients for claims against a mobile and modular home manufacturer. During his solicitation of the homeowners, Respondent and his agents would have clients sign agreements regarding Respondent's representation without discussing the merits of their claims. These agreements inaccurately reflected how litigation costs would be advanced and Respondent misled homeowners to settle their existing claims in anticipation of new potential claims. Respondent also did not properly manage trusts and ledgers for the clients. The Court held that Respondent's relationship with the non-lawyers who were soliciting clients for him constituted an agent relationship and that the signed agreements and statements to clients were misleading and deceptive. The Court found that Respondent violated Rules requiring reasonable consultation and communication with clients; prohibiting unreasonable fees; requiring lawyers to maintain trust account records; requiring reasonable efforts to supervise nonlawyers employees; prohibiting the sharing of fees with nonlawyers; prohibiting direct solicitation and payment in exchange for a referral; and prohibiting dishonesty. The Court suspended Respondent from practicing for nine months without automatic reinstatement.

In ***Matter of Wall*****, 73 N.E.3d 170 (Ind. 2017)**, Respondent worked with a Florida corporation ("CAS") that offered legal services to consumers outside of Indiana. The typical transaction involved an intake and representation agreement with a CAS paralegal, followed by a nonrefundable fee. Respondent was paid $75 per agreement signed where his sole role was to convince the client to undergo mortgage modification. For the most part, CAS provided the bulk of legal services and Respondent was minimally involved. The Court held that a 30-day suspension from practice of law, with automatic reinstatement, was appropriate sanction where he assisted in charging and collecting an unreasonable fee in violation of Rules 1.5(a) and 8.4(a); engaged in improper fee splitting in violation of Rule 1.5(e); and assisted in the unauthorized practice of law in violation of 5.5(a).

In ***Matter of Fratini*****, 74 N.E.3d 1210 (Ind. 2017)**, Respondent was affiliated with a California corporation that advertised various debt-relief services nationwide via a website and direct mail solicitation. The debtors were screened by nonlawyers who asked clients to sign nonrefundable retainer agreements. The retainer agreements contained a $399.00 fee, a legal fee equal to 18% of the total debt at issue, and monthly payments toward escrow and legal fees over a four-year span. The Respondent's only role was to review and sign the retainer agreements after they had been signed by the debtor and the USLSG nonlawyer. The Court approved a Conditional Agreement which stipulated that Respondent violated: Rules 1.4(a)(1) and (5), Rule 5.3 and Guideline 9.3 by failing to reasonably supervise nonlawyers, Rule 5.5(a) by assisting in the unauthorized practice of law, and Rule 8.4(a) by knowingly assisting another to violate the Rules (charging and collecting an unreasonable fee and

using an improper trade name). The Court suspended Respondent from the practice of law for a period of not less than six months, without automatic reinstatement.

In ***Matter of Westerfield*, 64 N.E.3d 218 (Ind. 2016)**, Respondent, who was licensed to practice law in Indiana but not in Florida, was hired by a non-lawyer marketing representative to quiet title actions for homeowners. Thereafter, Respondent accepted flat fees for representation, but did not complete any quiet title actions or fully refund her clients. In May of 2015, the Indiana Commission filed a four-count complaint against Respondent for improperly soliciting clients, failing to refund unearned fees, and engaging in the unauthorized practice of law in another state (Florida). The Court also found that Respondent had a "lengthy disciplinary history" and was "disingenuous and evasive" about her relationship with the marketing representative. The Court held that an eighteen-month suspension, without automatic reinstatement, was an appropriate sanction for Respondent's misconduct.

In ***Matter of Anonymous*, 6 N.E.3d 903 (Ind. 2014)**, Respondent entered into agreement with American Association of Motorcycle Lawyers ("AAML") to have them advertise for him on their website. AAML's direct phone line was connected to Respondent's so that when potential clients called the AAML they would reach Respondent. Lawyers that the AAML advertised on behalf of were referred to as "Law Tigers" on the AAML website. The AAML website contained examples of previous results obtained by "Law Tigers." A tab led to "Client Testimonials" from persons who claim to have utilized "Law Tigers" in seeking advice and/or representation regarding a motorcycle-related legal matter. None of the settlements, verdicts, or testimonials related to Respondent, but that was not disclosed on the website. The Court found these advertisements to be misleading and issued a private reprimand. The lessons to take from the Law Tigers case are: 1) recitation of actual results is considered a violation of Rule 7.1 because it can be considered misleading; and 2) lawyers are liable for advertisements that are associated with them, and should be vigilant of communications made by referral networks or other entities marketing in multiple states.

Number 4

# CLIENT CONFIDENCES AND PRIVILEGE

***Matter of Meisenhelder*, 153 N.E.3d 221 (Ind. 2020)**, involved a Respondent who represented two clients in unrelated matters. Respondent filed a pleading in the first client's case that revealed confidential information about the second client's case. Respondent's motive is not revealed by the facts recited in the order approving the agreed discipline, but he agreed that he violated Rule 1.6(a) by revealing information relating to representation of a client without the client's informed consent and Rule 1.9(c)(2) by revealing information relating to the representation of a former client except as rules permit or require.

In ***Matter of Smith*, 991 N.E.2d 106 (Ind. 2013)**, Respondent engaged in attorney misconduct by, among other things, revealing confidential information relating to his representation of a former client by publishing the information in a book for personal gain. Respondent revealed that he and his former client engaged in a sexual relationship, and he also communicated that partial motivation for writing the book was to recoup legal fees he felt the former client owed him. In addition to violations of Rule 1.9 for revealing information related to the representation of a former client, Respondent was found to have violated Rule 1.7 (conflict of interest); 7.1 (false statements about his services); 8.4(c) (engaging in dishonest or fraudulent conduct); and 8.4(e) (stating or implying the ability to influence a government official). The Court disbarred Respondent.

In ***Matter of Anonymous*, 932 N.E.2d 671 (Ind. 2010)**, Respondent represented an organization that employed "AB." AB asked Respondent for a referral to a family law attorney after an altercation with her husband. AB and her husband soon reconciled. In 2008, Respondent was socializing with two friends, one of whom was also a friend of AB. Unaware of AB's reconciliation with her husband, Respondent told her two friends about AB's filing for divorce and about the altercation. Respondent encouraged AB's friend to contact AB because the friend expressed concern for her. When AB's friend called AB and told her what Respondent had told him, AB became upset about the revelation of the information and filed a grievance against Respondent. The Court concluded Respondent violated Rule 1.9(c)(2) by improperly revealing information relating to the representation of a former client. For Respondent's professional misconduct, the Court imposed a private reprimand.

# Number 3

# CONDUCT INVOLVING DISHONESTY

Unfortunately, cases involving dishonest attorneys are all too common.

In ***Matter of Lee*, 169 N.E.3d 407 (Ind. 2021)**, Respondent represented a client in criminal cases pending in Dearborn County, Indiana and in Ohio. Respondent repeatedly continued the Indiana matter because he believed that a motion to suppress evidence in the Ohio case would be successful and beneficial in the Indiana case. However, Respondent never filed the suppression motion and misled his client about the status of the case. Respondent entered into a conditional agreement for a 180-day suspension, with automatic reinstatement as a result of his violations of Rule 1.3 (failure to act with reasonable promptness and diligence) and 8.4(c) (engaging in conduct involving dishonesty fraud, deceit, or misrepresentation). The suspension was later converted to suspension *without* automatic reinstatement because Respondent failed to comply with the obligations of a suspended attorney under Admission and Discipline Rule 23(26) and with the terms of our disciplinary order.

**In the Matter of Gupta, 140 N.E.3d 287 (Ind. 2020),** resulted in the disbarment of Respondent who committed a wide-ranging, severe, and long-lasting pattern of misconduct including criminal tax evasion client neglect, and serious issues commingling client funds with his own. “Many of Respondent’s actions were intended to unjustly enrich himself and affiliated consultants at the expense of his clients and the public fisc. Several of Respondent’s clients have suffered significant prejudice as a result of Respondent’s neglect of their cases and financial mismanagement. Respondent continued to accept clients long after it had become apparent that he could not capably represent them, and he ceased practicing only when forced to do so by an emergency interim suspension.” *Id.* at 291. Respondent was suspended for three years by agreement, but the Court noted that had he not entered into a conditional agreement to discipline, disbarment may have been a more appropriate sanction.

In ***Matter of Fraley*, 138 N.E.3d 262 (Ind. 2020)**,the Respondent repeatedly commingled her own funds with client funds and converted client funds for her own use. Then upon investigation of her trust account mismanagement and theft, Respondent repeatedly lied to the Commission and the Court and falsified evidence to hide her misconduct. Respondent

was disbarred. The Court reasoned: “Respondent’s total lack of insight during these proceedings into the wrongfulness of failing to account for client funds and using those funds to pay personal expenses, and her utterly inexplicable decisions during the progression of this case to double and even triple down on her demonstrably false statements, persuade us that her fitness to practice law is not capable of being restored.”

***Matter of Hudspeth*, 95 N.E.3d 515 (Ind. 2018)** includes four complaints against the Respondent and his honesty. First, Respondent did not communicate with a client about a bankruptcy case, did not respond to discovery requests, and lied in a letter to the client that the case had been dismissed due to lack of evidence after Respondent did not attend the dismissal hearing. The client then filed a grievance with the Court. Furthermore, the Court found the Respondent created the dismissal letter during the disciplinary process and did not send it to the client. Next, the Respondent did not respond to the Commission’s inquiry into the grievance. Then, the Respondent lied to a client, telling her the case was pending when it had already been dismissed. Finally, the Respondent used websites to inaccurately represent his experience, the size of his practice, and his specialties within the law. The Court found the Respondent’s willful dishonesty harmful to his clients and the public and suspended Respondent for 18 months, without automatic reinstatement.

In ***Matter of Mulvany*, 83 N.E.3d 72 (Ind. 2017)**, Respondent represented clients in federal court seeking judicial review of Social Security claims where he applied for attorney fees that did not accurately reflect his “actual time,” which was a statutory requirement. Respondent was found to have a tendency to round up to the nearest hour on each of his tasks. Upon review of the inappropriate timekeeping practices, the parties agreed that the Respondent was in violation of knowingly making a false statement of fact to a tribunal and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. The Court held that a public reprimand was warranted for the Respondent’s misconduct.

In ***Matter of Jun*, 78 N.E.3d 1100 (Ind. 2017)**, Respondent was hired by a United States citizen to assist his wife, a citizen and resident of South Korea, in immigrating to the United States to live permanently. Respondent proposed that the client’s wife enter the United States on a non-immigrant visa or visa waiver, and then seek a permanent residency status. Respondent knew that to obtain the non-immigrant visa or visa waiver, his client’s wife would have to state falsely on her application that she intended to leave at the expiration of her non-immigrant visa period, fail to reveal her marital status to a United States citizen, or make other false or misleading statements. When the client’s wife arrived in the United States, she was denied entry based on false statements to customs officials and forced to take the next return flight to South Korea. The Court found that Respondent counseled or assisted his client to engage in conduct he knew to be criminal or fraudulent in violation of Rule 1.2(d) and imposed a public reprimand.

In ***Matter of Yudkin*, 61 N.E.3d 1169 (Ind. 2016)**, Respondent, knowingly made several misrepresentations regarding the timeliness of a motion to correct error (“MTCE”) during trial. In May of 2013, the trial court ruled in favor of the Respondent, but the appellate

court found that Respondent's statements were misleading. In response, Respondent filed a frivolous federal lawsuit against the opposing party, alleging defamation. Upon review, the Commission found that Respondent had "selectively quoted the language of Trial Rule 59(C) in a manner that suggested" the opposing party's MTCE would have been untimely regardless of the misrepresentation. The Court suspended Respondent for 90 days, without automatic reinstatement.

In ***Matter of Epstein*, 87 N.E.3d 470 (Ind. 2017)**, the Respondent represented a defendant that recorded their phone conversations. The phone conversations demonstrated that Respondent improperly bragged about his personal relationships with the judges, which implied that he could influence the judges' decisions; used derogatory terms when discussing another client's race; and told the defendant that he could flee to avoid or delay criminal prosecution. Respondent violated Rules 1.2(d), 8.4(e), and 8.4(g). Thus, Respondent was suspended from the practice of law for 90 days, without automatic reinstatement.

In ***Matter of Cooper*, 78 N.E.3d 1098 (Ind. 2017)**, the Respondent was one of the deputy prosecutors on a capital murder case. The Respondent handled the case at both the trial and sentencing phases. The presiding judge recused himself from the proceedings and a special judge was appointed. The Respondent released a public statement in which he indicated that he was suspicious of the transfer of the case to the special judge and then offered purported support for that suspicion which was false, misleading, and inflammatory in nature. The Supreme Court concluded that the statements concerning the special judge's qualifications and integrity were made with reckless disregard as to its truth or falsity. The Court found that the Respondent violated Indiana Rule of Professional Conduct Rule 8.2(a) (making a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge). The Court issued a public reprimand.

In ***Matter of Powell*, No. 76 N.E.3d 130 (Ind. 2017)**, Respondent committed attorney misconduct by falsifying evidence and knowingly making false statements to the Court in his efforts to be reinstated to the practice of law. Respondent was previously suspended for actions undertaken during his representation of a client, T.G. The client received a settlement in a personal injury action and was in an abusive relationship and involved with drugs. Her then lawyer, not the Respondent, acted as settlor of a special needs trust in the benefit of T.G. in order to avoid the rapid depletion of the proceeds of her settlement. The lawyer acted without the consent of T.G. T.G. then consulted with the Respondent about how to get access to her trust funds and the Respondent became the successor trustee. He then quickly disbursed $30,000 from the trust account to T.G. and $15,000 to himself after expending only minimal effort. The Court determined that the fee was unreasonable, and suspended him for four months. Simultaneously, T.G. dissipated her assets on drugs and other expenditures.

The Respondent then sought reinstatement and was denied because the Court found that he had practiced law during his suspension, forged signatures, and filed a false affidavit with the Court. He then filed another petition for reinstatement three days later,

which was again denied. In July of 2014, the Respondent tracked T.G. down to Iowa in order to make "restitution." He convinced her to forge a notarized document purporting to give her $15,000 in restitution but only actually gave her $1,500. He presented this document to the Commission during his reinstatement hearing, but T.G. testified that she never received anything greater than $1,500. The Court determined that the "Respondent's elaborate scheme to convince the Commission and this Court that he made full restitution to T.G. when in fact he had not –are but the culmination of a years-long endeavor to game the system." The Court ultimately disbarred the Respondent.

In ***Matter of Fox*, 78 N.E.3d 1096 (Ind. 2017)**, Respondent moved for leave to correct a one-page Table of Contents and a four-page Table of Authorities. The Court granted the motion and specifically ordered Respondent not to make any substantive changes. However, when Respondent filed a corrected brief it contained a thirty-six page Table of Contents and fifty-nine additional sources. The Court held that a public reprimand was warranted for Respondent's misconduct.

In ***Matter of Ogden*, 10 N.E.3d 499 (Ind. 2014)**, Respondent made several allegations about a judge in order to have him removed from a case involving the administration of an estate. He alleged that the judge committed malfeasance in the initial stages of the administration of the Estate by allowing it to be opened as an unsupervised estate, by appointing a personal representative with a conflict of interest, and by not requiring the posting of a bond. He also alleged that the judge allowed the personal representative to engage in misconduct over the course of the administration. The Court found that the Commission met its burden of proof in proving that Respondent had violated Rule 8.2(a), which provides that "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . . ." The judge had not actually presided over the administration of the estate during the time that the personal representative was involved. The Court found that Respondent could have easily acquired this information prior to making the allegations, which represented to them that Respondent made the statement without any reasonable basis for believing it to be true, and suspended him from the practice of law for 30 days.

In ***Matter of Alexander*, 10 N.E.3d 1241 (Ind. 2014)**, Respondent, in one case, hired a former attorney who had resigned from the bar and allowed him to perform law-related tasks such as legal research, client interviews, and assisting Respondent at counsel table during trial.

In a second matter, Respondent was involved in a case where a driver had left a steakhouse intoxicated and was then involved in an accident that injured Respondent's clients.

Respondent's clients argued that the driver was visibly intoxicated and the steakhouse served him anyway. A waitress at the steakhouse was willing to testify that this was true, but eventually contacted Respondent to let him know that she had changed her mind and that she had lied initially when she spoke with him. As part of the discovery

process, the restaurant served interrogatories to Respondent's clients. The Respondent did not include the waitress's name in the appropriate part of the response to interrogatories, although he disclosed the name in another part of the discovery. Respondent was found to be in violation of Indiana Trial Rule 26(E)(2)(b) which provides that, "A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which . . . he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment." Respondent was suspended from the practice of law for 60 days.

In ***Matter of Usher*, IV, 987 N.E.2d 1080 (Ind. 2013)**, Respondent was a partner at a law firm, and pursued a consistently unrequited relationship with a summer intern. Their previous friendship declined because of his insistent pursuit of a romantic relationship. Respondent received a movie clip featuring the intern in a state of undress. After Respondent communicated his possession of the clip to the intern, she ended their friendship.

Respondent then began efforts to humiliate the intern and to interfere with her employment. Respondent sent the clip to attorneys at the firm where she had accepted a job offer in an effort to adversely affect her employment. Respondent sent Intern an email accusing her of lying and misleading him, and Respondent drafted a fictitious email thread with the subject line "Firm slogan becomes 'Bose means Snuff Porn Film Business' w/addition of [Jane Doe] "Bose means Snuff Porn Film Business" w/ addition of [Jane Doe]", and suggested the Intern was a danger to female professionals.

Respondent recruited a paralegal to disseminate the email with directions on how to avoid having the e-mail linked back to them. Respondent was out of town when the email was sent. Thereafter, the intern served him with a protective order with the email attached.

Respondent's firm demanded he resign, and he complied. The hearing officer found the email was a "vindictive attempt to embarrass and harm [Intern] both personally and professionally." The Court found that Respondent violated Professional Conduct Rule 3.3(a)(1) by knowingly submitting false responses to RFAs in defense of Intern's civil action against him. Respondent admitted to originally misrepresenting his involvement with the email.

The Court concluded that Respondent violated Indiana Professional Conduct Rules 3.3(a)(1), 8.1(a), 8.1(b), 8.4(a), 8.4(c), and 8.4(d), by, among other things, engaging in a pervasive pattern of conduct involving dishonesty and misrepresentation that was prejudicial to the administration of justice. For Respondent's misconduct, the Court suspended Respondent for three years, without automatic reinstatement.

# Number 2 TRUST ACCOUNTS

Misconduct involving the funds of clients and third parties is one of the most serious acts of misconduct a lawyer can commit. As a result, the sanctions for misconduct in these cases are equally serious. What follows are highlights of recent cases provided for a flavor of the kind of sanctions the Supreme Court metes out for violations in this area.

***Matter of Williams*, 148 N.E.3d 317 (Ind. 2020)**, involved ongoing trust account mismanagement as well as failure to communicate with clients or make meaningful efforts to make progress on their cases. Respondent also failure to refund unearned fees, despite promises to do so. Respondent entered into a conditional agreement admitting liability for violations including lack of competence and diligence, commingling his property with the client's property, making a false statement to the Commission, and mismanagement of his trust account. Respondent was suspended for 180-days, *without* automatic reinstatement.

In ***Matter of Gabriel*, 120 N.E.3d 189 (Ind. 2019)**, Respondent was appointed as guardian of her incapacitated father's person and estate by the guardianship court. The Respondent spent considerable sums of her own money taking care of her incapacitated father, which significantly depleted her personal assets. After the sale of her father's residence, the guardianship received approximately $40,000. The Respondent started taking withdraws and making payments to herself from the estate without obtaining the requisite court approval and in violation of a restraining order that had been issued by the guardianship court. The Respondent also failed to file an accounting with the court and subsequently failed to comply with a court order to do so.

The Commission and the Respondent agreed that the Respondent violated Rule 3.4(c) based on her failure to comply with the court order, but the Commission also alleged violation of Rule 8.4(b). The Court, however, found that the Respondent's actions did not violate Rule 8.4(b) because the Respondent's conduct did not rise to the level of criminal exploitation. The Court suspended Respondent for 90 days, with automatic restatement.

In ***Matter of Schuyler*, 97 N.E.3d 618 (Ind. 2018)**, Respondent stole at least $550,000

from the estates of six clients. One of the estates filed a grievance against the Respondent and the Commission found that Respondent did not comply with orders for accounting and distribution of assets. Respondent did not appear at multiple hearings and a warrant was issued for his arrest. He was eventually charged with fifteen felony counts and pled guilty, leaving him to spend 8 years incarcerated and to pay restitution. The Court disbarred Respondent.

In ***Matter of Mercho*, 78 N.E.3d 1101 (Ind. 2017)**, Respondent misappropriated funds from his attorney trust account over a period of several years, making dozens of disbursements of client funds for purely personal purposes. At least two of these instances involved disbursement of funds Respondent was holding in trust for another attorney and that attorney's client. During the Commission's investigation, Respondent made numerous false statements, and submitted a client ledger containing false entries, in an attempt to extricate himself from the disciplinary process. The Court held that a suspension for a period of 180 days, with 90 days actively served and the remainder stayed subject to completion of at least one year of probation was warranted for Respondent's misconduct.

In ***Matter of James*, 70 N.E.3d 346 (Ind. 2017)**, Respondent significantly overdrew his trust account, mismanaged his trust account, converted client funds, made unauthorized withdrawals, and failed to cooperate with the Disciplinary Commission. During this case, Respondent was already under suspension in two other cases for failure to cooperate with the Commission. The Court disbarred Respondent.

In ***Matter of Ulrich*, 78 N.E.3d 1097 (Ind. 2017)**, Respondent represented his client in a personal injury lawsuit where the settlement was $100,000. The settlement was deposited into Respondent's trust account where he held the client's funds while Respondent sued the client's insurer. The client was only able to obtain its settlement claim after bringing suit under new legal representation. During this time, Respondent failed to keep individual client ledgers, withdrawal fees earned, and unauthorized withdrawals. The Court held that a suspension for a period of six months, all stayed subject to completion of at least two years of probation, was warranted for Respondent's misconduct.

In ***Matter of Safrin*, 24 N.E.3d 417 (Ind. 2015)**, Respondent maintained two attorney/client trust accounts ("Trust Accounts"), neither of which were registered as an Interest on Lawyers Trust Account ("IOLTA"). Respondent did not notify the banks that the Trust Accounts were subject to overdraft reporting to the Commission. On his Attorney Annual Registration Statements from 2008 through 2011, Respondent falsely stated that he was exempt from maintaining an IOLTA. Over several years, Respondent shared signatory authority for the Trust Accounts with another lawyer, who stole money from the Trust Accounts. This resulted in overdrafts, which were not reported to the Commission because the accounts were not registered as IOLTA accounts. Additionally, Respondent falsely claimed to the Commission that his fee arrangements never contained a nonrefundable fee provision. The parties agree that Respondent violated Rules 1.5(a), 1.15(g), 8.1(a)-(b) and 8.4(c). The violations stemmed from Respondent

falsely certifying he was exempt from holding an IOLTA trust account, making an agreement for an unreasonable fee, providing false statements to the Commission, and engaging in dishonesty and deceit. The Court suspended Respondent from practicing law for six months, without automatic restatement.

In ***Matter of Thomas*****, 30 N.E.3d 704 (Ind. 2015)**, Respondent initially employed various experienced persons to manage his law office and attorney trust account. However, at some point between 2002 and 2004, Respondent's wife took over management of Respondent's trust account. The wife had no prior experience with trust accounts or fiduciary accounting. Beginning in 2004 or 2005, Respondent gave control of his trust account to his wife and did not adequately supervise her. In 2006, Respondent became aware that his trust account was in poor shape and needed to be "untangled." Despite knowing his wife's accounting was incorrect, during the next several years Respondent failed to take appropriate measures to supervise his wife or reconcile his trust account issues. Throughout 2009 and 2010, Respondent's wife signed Respondent's name to the drawer's line on trust account checks and opened trust account bank statements received in the mail prior to giving them to Respondent. Monies from Respondent's trust account and operating account would routinely intermix. In 2009, Respondent filed for bankruptcy but failed to list his attorney trust account in his Statement of Financial Affairs. The Court concluded that Respondent violated Rules 1.1, 1.15(a), 3.3(a)(1), 5.3(a)-(c), 8.4(a)-(b), for failing to diligently supervise his wife, commingling client and attorney funds, and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Respondent was suspended from the practice of law for eight months.

# Number 1

# NEGLECT AND LACK OF COMMUNICATION

By far and away, year after year, this is the most common complaint grievants make about their lawyers...or former lawyers. Almost invariably, the reported decisions involving this form of misconduct are multiple count matters which result in the lawyer's suspension or disbarment. For illustration, what follows is a partial list of recent disciplinary actions involving these elements which resulted in public discipline.

**Matter of Adams, No. 139 N.E.3d 209 (Ind. 2020)**, involved five counts of client neglect, communications of false status reports to multiple clients, and significant delay in refunding unearned fees to clients. Respondent further incorrectly certified that his business account was an IOLTA. Respondent was charged with the following rule violations:

- 1.3: Failing to act with reasonable diligence and promptness.
- 1.4(a)(3): Failing to keep a client reasonably informed about the status of a matter.
- 1.4(a)(4): Failing to comply promptly with a client's reasonable requests for information.
- 1.15(g): Failing to certify that all client funds which are nominal in amount or to be held for a short period of time are held in an IOLTA account.
- 1.16(d): Failing to refund unearned fees after termination of representation. The parties further agree that Respondent's failure to properly certify his IOLTA account with the Clerk also violated Admission and Discipline Rule 2(f).

Respondent was suspended for 180 days, with 60 days actively served and the remainder stayed subject to completion of at least two years of probation with JLAP monitoring. The Court noted Respondent's engagement with JLAP and efforts to overcome his practice management issues in mitigation of his misconduct.

In ***Matter of Ricks*, 124 N.E.3d (Ind. 2019)**, Respondent committed attorney misconduct by neglecting clients' cases on four separate occasions and by failing to cooperate with the disciplinary process. In Client 1's case, Respondent accepted a retainer payment to assist the client with an expungement petition. Respondent failed to advance the client's case for nearly three years and did not return client's initial retainer payment.

In Client 2's case, Respondent again collected a retainer payment to assist the client with a post-conviction relief action. Over the course of three years, Respondent grew less responsive to inquiries from Client 2 and ultimately failed to appear for a hearing where the court entered judgment against the client.

In Client 3's case, Respondent again accepted a retainer payment to assist the client with a post-conviction relief action and ultimately failed to advance the case. The court removed Respondent as counsel for failing to appear at a hearing. In Client 4's case, Respondent charged and collected an advance payment to assist the client with a sentence modification but quickly grew unresponsive and ultimately failed to advance the case. Respondent had been suspended twice before for almost identical transgressions, and the Court ultimately found the Respondent in violation of Professional Conduct Rules 1.3, 1.4, 1.16, 8.1, and 8.4. As a result, the Court suspended Respondent from the practice of law for two years, without automatic reinstatement.

In ***Matter of Elliott*, 137 N.E.3d 254 (Ind. 2020)**, Respondent represented "Wife" in a dissolution matter, and another attorney represented "Husband." The negotiated resolution reached by the parties contemplated that Husband would be awarded portions of Wife's four retirement accounts. Under the terms of the decree, Respondent was to prepare qualified domestic relations orders ("QDROs") for two of those accounts within 90 days, and opposing counsel was to prepare QDROs for the other two accounts within 90 days. (Neither Respondent nor opposing counsel did so). Respondent violated Indiana Professional Conduct Rule 3.2 by failing to make reasonable efforts to expedite litigation consistent with the interests of his client and received a public reprimand. ***See also Matter of Lytle*, 135 N.E.3d 156 (Ind. 2019)** (same underlying facts, but Lytle was also found to have violated Rule 1.4(a) & (b) for failing to respond to her client's requests for information and keep him adequately informed.

In ***Matter of Coleman*, 67 N.E.3d 629 (Ind. 2017)**, Respondent falsely represented that he was associated with a law firm while soliciting employment with a client. During the representation, the client had difficulty communicating with Respondent, and Respondent failed to keep client informed about events in the case, made decisions about the case without consulting the client, and failed to appear at a pretrial conference. Despite the client's prior instructions that he did not want to enter a plea agreement, Respondent negotiated a plea agreement without consulting the client. The client then fired Respondent and hired new counsel. Respondent did not withdraw his representation or forward a copy of the client's file to new counsel until after a show cause proceeding was initiated against him. The Court found Respondent's conduct to be "wide-ranging, pervasive, retaliatory, and deceptive." Respondent also struck his wife in the presence of four children. The Court suspended Respondent for two years, without automatic reinstatement.

In ***Matter of Staples*, 66 N.E.3d 939 (Ind. 2017)**, Respondent appeared as successor counsel for a criminal defendant. Respondent did not appear for a pretrial conference and did not timely respond to inquiries from court staff regarding his absence. When the client was unable to appear at a hearing due to his hospitalization, Respondent did not

file a motion to continue although ordered to do so, and failed to appear during the show cause proceedings that ensued. Respondent was found in contempt, and failed to appear for a sanctions hearing. Respondent was ordered to appear with the client at a hearing; the client appeared, but Respondent did not. The trial court again found Respondent in contempt. The Court imposed a public reprimand for Respondent's misconduct.

In ***Matter of Jackson*, 24 N.E.3d 419 (Ind. 2015)**, Respondent signed an agreement with Consumer Attorney Services ("CAS"), a Florida firm, to be "of counsel" and to provide services to CAS's Indiana loan modification and foreclosure defense clients. CAS paid Respondent $50 (later raised to $75) for every Indiana loan modification client and $200 for each foreclosure client assigned to him. Non-lawyer employees of CAS performed all intake work for clients assigned to Respondent and drafted pleadings to review and file.

An Indiana resident hired CAS and was assigned to Respondent. The client was not informed that Respondent's role in his representation would be limited, nor was he informed about how fees would be shared between CAS and Respondent. The fee agreement called for an initial nonrefundable retainer followed by monthly payments for the duration of the representation. Other than making an initial brief phone call to the client and signing the fee agreement on behalf of CAS, Respondent had no involvement in attempting to obtain a loan modification from the client's lender. The client was eventually served a complaint for foreclosure. Following the foreclosure notice, a non-lawyer at CAS sent the client a "retainer modification agreement," which increased the client's monthly payments for continued representation. The lender of the home mortgage sought summary judgment, and Respondent filed a response on the client's behalf that was initially drafted by a non-lawyer at CAS. Throughout the proceedings, Respondent did not keep the client informed about the status of the litigation, did not consult with the client about the availability of a court-ordered settlement conference, and did not raise any substantive defenses. The client eventually terminated his relationship with CAS. CAS did not notify Respondent of the termination, and Respondent did not withdraw his appearance from the foreclosure action. The client eventually obtained a loan modification by directly negotiation with his lender. The client sought a refund of unearned fees held by CAS but was unsuccessful.

The parties agreed that Respondent violated the following Rules of Professional Conduct: 1.4(a)(1)-(3),(5), 1.4(b), 1.5(e), 5.3(b), 5.4(c), 5.5(a), 8.4(a), (c)-(d). Among other things, Respondent failed to reasonably communicate and keep his client informed about the status of a matter, failed to obtain a client's required approval of a fee division, knowingly assisted another to violate the Rules of Professional Conduct, and engaged in deceitful misrepresentations. The Court suspended Respondent from practicing law for 120 days, with automatic reinstatement.

This has been an exposition of ten of the most common sources of disciplinary action and personal liability for lawyers. Although the list covers most of the territory, it is by no means an exclusive listing. There are new and different forms of misconduct appearing regularly for lawyers.

One purpose of this work is (hopefully) to cause lawyers to re-examine their practices and, where problems exist, formulate a plan for preventing or correcting some of the problems described herein.

These materials were originally prepared by Charles M. Kidd and Kevin McGoff.

They were last updated in August 2021 by Margaret M. Christensen of Dentons Bingham Greenebaum LLP.

# 2021 Rule Updates

| Issue Date | Eff. Date(s) | |
|---|---|---|
| 7-15-2021 | 7-15-2021 | Order Amending Administrative Rules |
| 7-15-2021 | 7-15-2021 | Order Amending Rules of Trial Procedure |
| 7-15-2021 | 7-15-2021 | Order Amending Rules of Appellate Procedure |
| 7-15-2021 | 1-1-2022 | Order Amending Rules of Small Claims |
| 2-24-2021 | 2-24-2021 | Order Amending Rules of Admission to the Bar and the Discipline of Attorneys |
| 1-20-2021 | 1-20-2021 | Order Amending Commercial Court Rules |

# In the
# Indiana Supreme Court



Cause No. 21S-MS-19

## Order Amending Administrative Rules

Under the authority vested in this Court to provide by rule for the procedure employed in all courts of this state and this Court's inherent authority to supervise the administration of all courts of this state, the Administrative Rules are amended as follows (deletions shown by ~~striking~~ and new text shown by underlining):

…

**Rule 6. Court Case Records Media Storage Standards**

…

**(K) Disposal of Records.** Court records which have been preserved in accordance with the standards set out in this rule may be destroyed or otherwise disposed but only after the court or its clerk files a "Destruction Certificate" with the Division certifying that the records have been microfilmed or digitized in accordance with the standards set out in this rule, and the Division issues a written authorization for the destruction of such records. The Division shall make available a form "Destruction Certificate" for this purpose. It is not necessary for a clerk or court to file a "Destruction Certificate" when a clerk or court converts a conventionally filed document into an electronic record as required by Trial Rule 87(D)~~86(F)~~.

…

The amendment is effective as of the date of this order.

Done at Indianapolis, Indiana, on 7/15/2021.

Loretta H. Rush
Chief Justice of Indiana

All Justices Concur.

# In the Indiana Supreme Court



Cause No. 21S-MS-19

## Order Amending Rules of Trial Procedure

Under the authority vested in this Court to provide by rule for the procedure employed in all courts of this state and this Court's inherent authority to supervise the administration of all courts of this state, the Rules of Trial Procedure are amended as follows (deletions shown by ~~striking~~ and new text shown by underlining):

…

**Rule 3.1 Appearance**

**(A) Initiating party.** At the time an action is commenced, the attorney representing the party initiating the proceeding or the party, if not represented by an attorney, shall file with the clerk of the court an appearance form setting forth the following information:

…

(4) Unless required by Trial Rule 86(BC~~G~~), a statement that the party will or will not accept service by FAX or by e-mail from other parties;

…

**Rule 5. Service and Filing of Pleadings, Documents, and Other Papers**

…

**(F) Filing With the Court Defined.** The filing of pleadings, motions, and other papers with the court as required by these rules shall be made by one of the following methods:

…

(6) Electronic filing, as approved by the Indiana Office of Judicial Administration (IOJA) pursuant to Trial Rule 8786~~86~~.

…

**Rule 9.2. Pleading and proof of written instruments**

**(A) When instrument or copy, or an Affidavit of Debt shall be filed.** When any pleading allowed by these rules is founded on a written instrument, the original, or a copy thereof, shall be included in or filed with the pleading. Such instrument, whether copied in the pleadings or not, shall be taken as part of the record. Further,

…

(2) in addition to the requirements set forth above in subsection (1), if the claim is on an account, the plaintiff is not the original creditor, and the claim arises from a debt that is primarily for personal, family, or household purposes, the plaintiff shall provide

an Affidavit of Debt that shall have attached as one or more Exhibits which shall include:

…

(d) Subsection (2) does not apply to mortgage foreclosures.

…

**Rule 53.3. Motion to correct error: time limitation for ruling**

…

**(B) Exceptions.** The time limitation for ruling on a motion to correct error established under Section (A) of this rule doesshall not apply where:

~~(1) The party has failed to serve the judge personally; or~~

(12) The parties who have appeared or their counsel stipulate or agree on record that the time limitation for ruling set forth under Section (A) doesshall not apply; or

(23) The time limitation for ruling has been extended by Section (D) of this rule.

…

**Rule 59. Motion to correct error**

…

**(C) Time for filing~~: Service on judge~~.** The motion to correct error, if any, mustshall be filed not later than thirty (30) days after the entry of a final judgment is noted in the Chronological Case Summary. ~~A copy of the motion to correct error shall be served, when filed, upon the judge before whom the case is pending pursuant to Trial Rule 5.~~ The time at which the court is deemed to have ruled on the motion is set forth in T.R. 53.3.

**…**

**Rule 63. Disability and Unavailability of Judge**

**(A) Disability and unavailability after the trial or hearing.** The judge who presides at the trial of a cause or a hearing at which evidence is received shall, if available, hear motions and make all decisions and rulings required to be made by the court relating to the evidence and the conduct of the trial or hearing after the trial or hearing is concluded. If the judge before whom the trial or hearing was held is not available by reason of death, sickness, absence or unwillingness to act, then any other judge regularly sitting in the judicial circuit or assigned to the cause may perform any of the duties to be performed by the court ~~after the verdict is returned or the findings or decision of the court is filed~~; but if he is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial or new hearing, in whole or in part. The unavailability of any such trial or hearing judge shall be determined and shown by a court order made by the successor judge at any time.

…

**Rule 84. ~~Effective Date~~ [Vacated]**

~~These rules will take effect on January 1, 1970. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.~~

…

**Rule 86. General Electronic Filing and Electronic Service**

**(A) Definitions. For purpose of Trial Rules 86, 87, 88:**

…

(12) *User.* ~~User is a Registered User or Filing User.~~ A User is a person or entity with a user ID and password assigned by the IEFS or its designee who is authorized to use the IEFS for the electronic filing or service of documents. A User must execute a User Agreement with one or more EFSP before that User may utilize the IEFS.

**(B) Service of Pleadings, Documents, and Other Papers.**

…

(3) *Service of Subsequent Documents and Other Papers~~Pleadings~~*

…

The amendments are effective as of the date of this order.
Done at Indianapolis, Indiana, on 7/15/2021.

Loretta H. Rush
Chief Justice of Indiana

All Justices concur.

# In the Indiana Supreme Court



Cause No. 21S-MS-19

## Order Amending Rules of Appellate Procedure

Under the authority vested in this Court to provide by rule for the procedure employed in all courts of this state and this Court's inherent authority to supervise the administration of all courts of this state, the Rules of Appellate Procedure are amended as follows (deletions shown by ~~striking~~ and new text shown by underlining):

…

**Rule 28. Preparation of Transcript By Court Reporter**

…

**C. Submission of Electronic Transcript.**

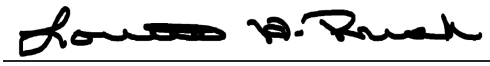
(1) Following certification of the Transcript, the Court Reporter shall submit the electronic Transcript using one of the following methods:

(a) *Submission by E-Filing.* If e-filing is required in the trial court by Trial Rule 87(B)(1)~~86(D)(1)~~ and the documentary exhibits are in electronic form, then the Court Reporter shall transmit the electronic Transcript to the trial court clerk through the IEFS.

…

The amendment is effective as of the date of this order.

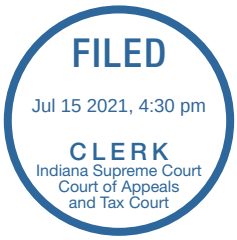
Done at Indianapolis, Indiana, on 7/15/2021.



Loretta H. Rush
Chief Justice of Indiana

All Justices concur.

# In the
# Indiana Supreme Court




Cause No. 21S-MS-19

## Order Amending Rules for Small Claims

Under the authority vested in this Court to provide by rule for the procedure employed in all courts of this state and this Court's inherent authority to supervise the administration of all courts of this state, the Rules for Small Claims are amended as follows (deletions shown by ~~striking~~ and new text shown by underlining):

…

**Rule 2. Commencement of Action**

**(A) In General.**

(1) An action under these rules shall be commenced by the filing of an unverified notice of claim in a court of competent jurisdiction and by payment of the prescribed filing fee or filing an order waiving the filing fee.

(2) A plaintiff filing an action under these rules waives the excess of the plaintiff's claim over the jurisdictional maximum of the small claims court or docket in which the case is decided, and the plaintiff may not later bring a separate action for the remainder of such claim.

**(B) Form of Notice of Claim.** The notice of claim shall contain:

…

(2) The name, mailing address, email address, or filing a petition for an order granting an exemption as to the e-mail address, and telephone number of the plaintiff ~~claimant~~ and the name, mailing address, and if available, telephone number of the defendant(s);

…

(4) A brief statement of the nature and amount of the claim; and

…

(c) in addition to the requirements set forth above in subsection 4(a) and (b), if the plaintiff is not the original creditor, and the claim arises from a debt that is primarily for personal, family, or household purposes, the plaintiff shall provide an Affidavit of Debt that shall have attached as one or more Exhibits which shall include:

i. ~~1)~~ a copy of the contract or other writing evidencing the original debt, which shall contain a signature of the defendant. If a claim is based on credit card or other debt and no such signed writing evidencing the original debt ever existed, then copies of documents generated when

the debt was incurred or the credit card was actually used shall be attached; and

ii. ~~2)~~ a chronological listing of the names of all prior owners of the debt and the date of each transfer of ownership of the debt, beginning with the name of the original creditor; and

iii. ~~3)~~ a certified or other properly authenticated copy of the bill of sale or other document that transferred ownership of the debt to the plaintiff.

(5) A statement that ~~the parties may appear either in person or by an attorney~~ S.C. 8(C) governs who may represent the parties; and a statement that before an employee who is designated pursuant to that rule to represent a corporate entity, sole proprietorship, partnership, LLC, LLP, or a trustee who is designated to represent a Trust may act on behalf of a party in a small claims case, the designated employee or trustee must file in each case the certificate of compliance and affidavit required by S.C. 8(C);

…

(10) Notice of the defendant's right to a jury trial and that such right is waived unless a jury trial is requested within ten (10) days after receipt of the notice of claim; that once a jury trial request has been granted, it may not be withdrawn without the consent of the other party or parties; and within ten (10) days after the jury trial request has been granted, the party requesting a jury trial shall pay the clerk the additional amount required by statute to transfer the claim to the plenary docket or, in the Marion Small Claims Court, the filing fee necessary to file a case in the appropriate court of the county; otherwise, the party requesting a jury trial shall be deemed to have waived the request; ~~and~~

(11) A statement that a court may sanction a designated employee or trustee and the entity the employee or trustee represents for failure to comply with these rules or local rules of court. Sanctions may include assessment of costs or reasonable attorney's fees, the entry of a default judgment, the dismissal of a claim with or without prejudice, fines, and/or incarceration; and

(12~~1~~) Any additional information which may facilitate proper service.

…

**Rule 4. Responsive pleadings**

…

**(B) Entry of Appearance.** For the purpose of administrative convenience the court may request that the defendant enter an appearance prior to trial. Such appearance may be made in person, by telephone or by mail but the fact that no appearance is entered by the defendant shall not be grounds for default judgment. Whether or not an appearance is required, a party that wishes to be represented by a designated employee or trustee must file a certificate of compliance and affidavit required by S.C. 8(C )(5).

…

**Rule 8. Informality of Hearing**

…

**(C) Party Representation~~Appearance~~.** Any assigned or purchased claim, or any debt acquired from the real party in interest by a third party cannot be presented or defended by said third party unless this third party is represented by counsel. In all other cases, the following rules shall apply:

(1) *Natural Persons.* A natural person may represent him/herself ~~appear *pro se*~~ or may be represented by counsel in any small claims proceeding.

(2) *Sole Proprietorship and Partnerships.* A sole proprietorship or partnership may be represented~~appear~~ by the sole proprietor or partner, owner, counsel, or by a designated full-time employee of the business in the presentation or defense of claims arising out of the business, if the claim does not exceed six thousand~~one thousand five hundred~~ dollars($6,000) ~~($1,500.00)~~. However, claims exceeding six thousand~~one thousand five hundred~~ dollars ($6,000)~~($1,500.00)~~ must either be defended or presented by counsel or *pro se* by the sole proprietor, ~~or a~~ partner, or owner.

(3) *Corporate Entities, Limited Liability Companies (LLC's), Limited Liability Partnerships (LLP's), Trusts.* All corporate entities, Limited Liability Companies (LLC's), and Limited Liability Partnerships (LLP's), and Trusts may be represented by counsel, owner, or ~~appear~~ by a designated full-time employee of the corporate entity, or, in the case of a trust by a trustee, in the presentation or defense of claims arising out of the business if the claim does not exceed six thousand~~one thousand five hundred~~ dollars ($6,000)~~($1,500.00)~~. However, claims exceeding six thousand~~one thousand five hundred~~ dollars ($6,000)~~($1,500.00)~~ must be defended or presented by counsel.

(4) *Full-Time Employee Designations--Binding Effect of Designations and Requirements.*

(a) ~~In the event~~ If a corporate entity, sole proprietorship, partnership, LLC, LLP, or trust designates a full-time employee or trustee to represent it ~~appear in its stead~~, the corporate entity, sole proprietorship, partnership, LLC, LLP, or trust will be bound by any and all agreements and acts relating to the small claims proceedings entered into by the designated employee or trustee and will be liable for any and all costs, including those assessed by reason of contempt, levied by a court against the designated employee.

(b) By authorizing a designated full-time employee or trustee to appear under this Rule, the corporate entity, sole proprietorship, partnership, LLC, LLP, or trust waives any present or future claim in this or any other forum in excess of six thousand~~ one thousand five hundred~~ dollars ($6,000)~~($1,500.00)~~.

(c) No person who is disbarred or suspended from the practice of law in Indiana or any other jurisdiction may appear as counsel for a corporate entity or on behalf of a sole proprietorship, partnership, LLC, LLP, or trust under this rule, but may appear as a designated full-time employee of a corporate entity, LLC, or LLP, if employed in a non-legal capacity, or as sole proprietor, partner, trustee, or owner.

(5) *Full-Time Employee or Trustee Designations--Contents.* ~~Before a designated employee or trustee is allowed to appear in a small claims proceeding, the corporate entity, sole proprietorship, partnership, LLC, LLP, or trust must have on file with the~~

~~court exercising jurisdiction of the proceedings, a certificate of compliance with the provisions of this rule, wherein the~~ A corporate entity, sole proprietorship, partnership, LLC, LLP, or trust that wishes to designate an employee or trustee to represent it must execute a certificate of compliance in each case expressly ~~accept,~~ appointing the person as its representative and must state by a duly adopted resolution in the case of a corporate entity, LLC or LLP; or a document signed under oath by the sole proprietor or managing partner of a partnership, or trustee that the entity shall be bound by ~~the binding character of~~ the designated employee's or trustee's acts and agreements relating to the small claims proceeding, and shall be liable ~~the liability of the corporate entity, sole proprietorship, partnership, LLC, LLP, or trust~~ for assessments and costs levied by a court relating to the small claims proceeding, and that the corporate entity, sole proprietorship, partnership, LLC, LLP, or trust waives any claim for damages in excess of six thousand~~one thousand five hundred~~ dollars ($6,000)~~($1,500.00)~~ associated with the facts and circumstances alleged in the notice of claim.

Additionally, the designated employee or trustee must file in each case ~~have on file with the court exercising jurisdiction of the proceedings~~ an affidavit stating that he/she is not disbarred or suspended from the practice of law in Indiana or any other jurisdiction.

(6) Any party represented by a designated employee or trustee who fails to comply with these rules or local rules of court may be ordered by the court to appear by counsel and subject to sanctions, including the assessment of costs or reasonable attorney's fees, the entry of a default judgment, and the dismissal of a claim with or without prejudice. Anyone who engages in conduct that is uncivil or disruptive to the proceeding may be found in contempt of court, which is punishable by a fine, incarceration, or both.

**Rule 9. Continuances**

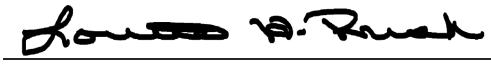
…

**(B) Court Designat~~ed~~ing Employee.** The court may, by a duly executed order recorded in the Record of Judgments and Orders, designate a specifically named employee to be responsible for scheduling hearings under specific directions ~~spelled out by~~ of the court in said order.

…

This amendment is effective January 1, 2022.

Done at Indianapolis, Indiana, on 7/15/2021.



Loretta H. Rush
Chief Justice of Indiana

All Justices concur.

# In the Indiana Supreme Court

Cause No. 21S-MS-19



## Order Amending Rules of Admission to the Bar and the Discipline of Attorneys

Under the authority vested in this Court pursuant to Article 7, Section 4 of the Indiana Constitution providing for the admission and discipline of attorneys in this state, the Indiana Rules for Admission to the Bar and the Discipline of Attorneys are amended as follows (deletions shown by ~~striking~~ and new text shown by underlining):

. . .

**Rule 6. Admission on Foreign License**

**Section 1. Provisional License**

A person who has been admitted to practice law in the highest court of law in any other state (herein defined as state or territory of the United States or the District of Columbia), may be granted a provisional license to practice law in Indiana upon a finding by the State Board of Law Examiners that said person has met each of the following conditions:

. . .

(g) The applicant has not failed the Indiana ~~B~~bar examination or scored below 264 on the Uniform Bar Examination (whether administered in Indiana or another jurisdiction) within five (5) years of the date of application.

. . .

**Section 2. Business Counsel License**

A person who establishes an office or other systematic and continuous presence in Indiana in order to accept or continue employment by a person or entity engaged in business in Indiana other than the practice of law may be granted a business counsel license to practice law in Indiana without examination so long as granting the license is in the public interest and such person:

(f) has not failed the Indiana ~~B~~bar examination or scored below 264 on the Uniform Bar Examination (whether administered in Indiana or another jurisdiction) within five (5) years of the date of the application.

. . .

**Rule 6.1 Temporary License for Clinical Faculty, Legal Services, Public Defender, and Pro Bono Representation**

. . .

**Section 2. Conditions and Limitations on Practice Under Temporary License**

. . .

(c) The temporary license issued under this rule shall expire on the earliest of the following dates:

. . .

(2) the date the person's application for the Indiana bar is denied for any reason, including but not limited to failing to achieve a passing score on a qualifying ~~the~~ bar examination or failing to satisfy character and fitness or other eligibility requirements;

. . .

**Rule 14. Review**

~~Review of final action by the State Board of Law Examiners shall be as follows:~~

**Section 1.** ~~The State Board of Law Examiners shall adopt such procedure for review of an applicant, aggrieved by failure of said board to award said applicant a satisfactory grade upon the bar examination, as shall be approved by the Supreme Court of Indiana. All applicants who have achieved a combined scaled score of 255 to 263 shall be eligible to appeal. The eligible examinees must make a written request to appeal on forms provided by the Board within fourteen (14) days of the issuance by the Board of the eligible examinee's results. No response other than the written request to appeal is permitted. The President of the Board shall designate certain of the Board's members as Appeals Reviewers. The Appeals Reviewers shall consider and decide all appeals of bar examination results. In the appeals process, all of an eligible examinee's responses shall be subject to review by the Appeals Reviewers. Multistate Bar Examination scores will also be available to the Appeals Reviewers. Eligible examinees that are deemed to have passed after review shall be treated as having passed that administration of the Indiana Bar Examination. No change in score shall be effectuated.~~ Before the release of the results of the Indiana bar examination, the Board of Law Examiners shall review the written answers of all applicants who are within five (5) points of achieving a passing score of 264 on the examination to confirm that the written answers have been graded correctly. Applicants may not appeal the results of the examination. The determination by the ~~Appeals Reviewers~~ Board of Law Examiners whether to treat an ~~appealing~~ applicant as having passed the bar examination shall be final, subject to general principles of procedural due process.

**Section 2.** Any applicant aggrieved by the final action of the State Board of Law Examiners in refusing to recommend to the Supreme Court of Indiana the admission of the applicant to practice law in Indiana for any reason other than the failure to pass any examination ~~as set forth~~

~~in section (1)~~ may, within twenty (20) days of receipt of notification setting forth the reason for refusal, file a petition with the Supreme Court of Indiana requesting review by this Court of such final determination. The notification referenced herein shall be sent to the applicant by certified mail with return receipt requested. In the petition the applicant shall set forth specifically the reasons, in fact or law, assigned as error in the Board's determination. The Court may order further consideration of the application, in which event the State Board of Law Examiners shall promptly transmit to the Court the complete file relating to such applicant and his or her application, including the transcript of the record of any hearing held by the State Board of Law Examiners relating thereto. The Court shall enter such order as in its judgment is proper, which shall thereupon become final. The petition for review must be accompanied by a fifty dollar ($50.00) filing fee unless the petitioner previously paid an application fee to the State Board of Law Examiners as provided in these rules.

. . .

**Rule 17. Admission Upon Examination~~s~~**

**Section 1.** The Indiana bar examination shall consist of the Uniform Bar Examination (UBE) developed by the National Conference of Bar Examiners. To qualify for admission upon examination, an applicant must achieve a scaled score of at least 264 on the Indiana bar examination.

**Section 2.** No person shall be licensed to practice law in this state who has not taken and passed ~~a~~ the Indiana ~~B~~bar examination as provided in these rules, except applicants admitted on a transferred UBE score under these rules or attorneys who are licensed in another jurisdiction and who qualify for admission without examination under the provisions of Admission and Discipline Rule 6.

**Section 3.** Any applicant for admission upon examination on any Indiana bar examination administered after July 1, 2021, shall be required to complete the Indiana Law Course, a jurisdiction-specific component on Indiana law, not later than six (6) months after the date of the applicant's admission to the Indiana bar. If an applicant fails to complete the Indiana Law Course within the required time period, the Board of Law Examiners may certify such fact to the Supreme Court with the recommendation that the applicant's license be suspended pending completion of the course.

**Section ~~2~~4.** In addition, each applicant for admission upon examination, before being admitted, must pass the Multistate Professional Responsibility Examination (MPRE). The passing score for the MPRE shall be a scaled score of eighty (80) and must be achieved no earlier than two (2) years before the date the applicant successfully ~~takes~~ sits for the Indiana ~~two-day essay~~ bar examination.

**Section ~~3~~5.** An applicant who successfully passes the Indiana ~~B~~bar examination must complete all requirements for, and receive, a law degree and be admitted to the practice of law before the

Court within ~~two~~ five (~~2~~5) years of the last date of the applicant's bar examination, or the bar examination must be repeated.

**Section ~~4~~6.** The bar examination shall be administered with the identity of the applicant remaining anonymous throughout the examination, grading and review. The Executive Director shall adopt such procedures necessary for the identity of all applicants by number only. It shall be a violation of these Rules for the applicant, or anyone upon the applicant's behalf, to attempt to reveal the identity~~, origin, gender~~ or ~~race~~ any identifying characteristics of the applicant at any time throughout the examination and review process.

~~**Section 5.** The Executive Director of the Board of Law Examiners shall notify each applicant, promptly after request for application, of the subject matter which the applicants may expect to be covered in the bar examination interrogatories.~~

~~Since the bar examination attempts to establish the applicant's ability to practice law in the State of Indiana, questions requiring answers determining an understanding of Indiana law will be expected. From time to time, the Board shall publish a listing of subject matters to be covered on examinations~~

. . .

**Rule 17.1. Admission by Transferred Uniform Bar Examination Score**

**Section 1.** An applicant who has taken the UBE in a jurisdiction other than Indiana and achieved a scaled score of at least 264 may be admitted to the Indiana bar if he or she satisfies the following conditions:

(a) The scaled score was attained on a UBE administered within five (5) years preceding the date of application;
(b) The applicant received a scaled score of eighty (80) on the MPRE no earlier than two (2) years before the applicant sat for the UBE on which he or she achieved a scaled score of 264;
(c) The applicant is a member in good standing of the bar(s) of admission;
(d) The applicant meets the character and fitness requirements of Indiana; and
(e) The applicant graduated from an ABA accredited law school.

**Section 2.** Any applicant for admission by a transferred UBE score shall be required to complete the Indiana Law Course, a jurisdiction-specific component on Indiana law, not later than six (6) months after the date of the applicant's admission to the Indiana bar. If an applicant fails to complete the Indiana Law Course within the required time period, the Board of Law Examiners may certify such fact to the Supreme Court with the recommendation that the applicant's license be suspended pending completion of the course.

**Section 3.** Applications for admission by a transferred UBE score shall be filed through the electronic application procedures prescribed by the Board of Law Examiners. The application shall be in such form and shall request such information as may be required by the Board of Law Examiners. The Board of Law Examiners may require additional information deemed by it to be necessary.

**Section 4.** An affidavit of the dean of the applicant's law school, or the dean's designee, to the effect that there is nothing in the school records or personal knowledge of the dean or faculty of such school to indicate that the applicant is not of good moral character or that the applicant is not fit for admission to the practice of law must be filed with the Board of Law Examiners. The Board shall provide forms for such certification.

**Section 5.** A certified transcript of the law school record of the applicant showing the date of graduation and the degree conferred must be filed with the Board of Law Examiners before the applicant can be admitted to the bar.

**Section 6.** Applications for admission by a transferred UBE score shall be accompanied by a filing fee of five hundred dollars ($500).

. . .

**Rule 18. Report on Examinations**

**Section 1.** Unless otherwise ordered by the Court, there shall be two (2) bar examinations held annually, in February and July. The examination shall be supervised by the Board. ~~The number and form of the questions and the subject matter tested shall be determined by the Board of Law Examiners with the approval of the Supreme Court.~~

. . .

This amendment shall take immediate effect.
Done at Indianapolis, Indiana, on 2/24/2021.

Loretta H. Rush
Chief Justice of Indiana

All Justices concur.

# In the
# Indiana Supreme Court



Cause No. 21S-MS-19

## Order Amending Commercial Court Rules

Under the authority vested on this Court to provide by rule for the procedure employed in all courts of this state and this Court's inherent authority to supervise the administration of all courts of this state, the Commercial Court Rules are amended as follows (deletions shown by ~~striking~~ and new text shown by underlining):

…

**Rule 7. Appointment of Commercial Court Judges.**

The Indiana Supreme Court has sole authority to appoint Commercial Court Judges.

(A). If a judicial vacancy occurs or is expected to occur in an existing Commercial Court, or if a request is made to establish a new Commercial Court, the Indiana Supreme Court will announce the open position and establish a deadline for filing applications.

(B). Any Judge in the Administrative District where the open position occurs or is expected to occur or where a new Commercial Court is sought to be established, may submit an application for the open position to the Commercial Court Committee. Applications must be submitted by the established deadline to be considered.

(C). The Commercial Court Committee, or a designated subcommittee thereof, must review each application. The Committee must solicit input from members of the bench, bar, and business community, and may conduct other due diligence concerning each applicant.

(D). Within forty-five (45) days after the application deadline, the Commercial Court Committee must provide the Indiana Supreme Court a list of up to three (3) applicants that the Commercial Court Committee considers to be best suited to fill the open position.

(E). The Indiana Supreme Court will appoint the new Commercial Court Judge from the list submitted by the Committee. If no applications are submitted to fill the open position or the Supreme Court is not satisfied with the applicant(s) recommended by the Committee, the Supreme Court may solicit additional applications or appoint the new Commercial Court Judge from:

a county in the Administrative District where the open position occurs; or,

an Administrative District adjacent to the Administrative District where the open position occurs, after further input from the Committee.

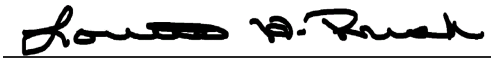
(F). Upon the appointment of the new Commercial Court Judge, the Clerk must transfer and assign the Commercial Court Docket of the outgoing Commercial Court Judge to the new Judge's docket without assessing any fees that might otherwise apply. Unless agreed to by the

parties, all proceedings will occur in the county where the Commercial Court was first established, notwithstanding that the new Judge may be from a different county.

(G). Appointment of a new Commercial Court Judge does not affect the assignment of cases to that Judge's Commercial Court Docket. If the new Judge disqualifies or recuses himself/herself from a case, the parties may agree to have the case transferred to another Commercial Court Docket in the State, but if no agreement can be reached, the parties must seek the appointment of a Special Judge under Indiana Rule of Trial Procedure 79(D) and (H).

This amendment is effective as of the date of this order.

Done at Indianapolis, Indiana, on 1/20/2021.



Loretta H. Rush
Chief Justice of Indiana

All Justices concur.

# Section Two

# THE U.S. SUPREME COURT – 2020-2021 TERM

Kenneth J. Falk
ACLU of Indiana
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## Section Two

## The U.S. Supreme Court – 2020-2021 Term……..Kenneth J. Falk

## I. Introduction

This last term saw significant decisions across a wide variety of constitutional and related issues. Patterns emerged that may, or may not, continue in the new term.

## II. The Affordable Care Act – *California v. Texas*, 141 S. Ct. 2104 (2021)

This is the most recent assault on the Affordable Care Act. As originally passed, the law contained a small penalty for persons who did not have insurance. This is the minimum essential coverage provision. In upholding the Act in a previous attack, the Court rejected a commerce clause basis for the statute, instead holding that the penalty provision made the statute valid under Congress's enumerated authority to tax. *Nat'l Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012). However, in 2017 Congress set the penalty to $0.

This led 18 states and two individuals to bring suit claiming that the statute was now unconstitutional as beyond Congress's delegated powers. Much to the surprise of many, a district court struck down the law in its entirety, finding that the minimum essential coverage provision was unconstitutional, making the whole Act unconstitutional, as the provision was not severable. The Court of Appeals agreed that the penalty provision was unconstitutional but remanded on the severability question.

States intervened to support the law as the Trump administration supported the challengers. The Supreme Court (7-2) found that the plaintiffs did not have standing. The individual plaintiffs claimed that they were harmed because the law still required them

to purchase insurance, although there was no penalty attached to the failure to purchase it. The Court found that this harm was not fairly traceable to the Act as there was no threat of enforcement of the provision. The States argued that the requirement to purchase insurance leads to more state residents enrolling in state-operated medical insurance programs and this caused financial harm. But like the individual plaintiffs, the states could not show how this harm was traceable to the statute as there is no penalty for not obtaining insurance and there is no risk of enforcement. There may be administrative and other costs attendant to the Act, but these costs are not caused by the minimum essential coverage provision. Therefore, the lower court decision was vacated as plaintiffs do not have standing.

III. First Amendment – Free Expression

a. *Americans for Prosperity v. Bonta*, 141 S. Ct. 2373 (2021)

California regulations require that charitable organizations must disclose to the state Attorney General's office the identities of their major donors—those who give more than $5,000 in a year or 2% of its total contributions. The plaintiff organizations refused to make the disclosures, citing the need to preserve their donors' anonymity and claimed a violation of both their donors and their First Amendment rights.

The Court agreed that the mandatory disclosures requirement was unconstitutional, with three justices dissenting. The Court, by the Chief Justice, held that government-mandated disclosure regimes must be subjected to exacting scrutiny. The

regime must be narrowly tailored to the government's asserted interest. The requirement does not meet this narrow tailoring requirement. Although California has an interest in preventing charitable wrongdoing, the disclosures are far too broad. It might be administratively convenient to collect this much information. But administrative convenience does not meet the narrow tailoring requirement.

b. *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038 (2021)

The plaintiff, a high school student, was suspended from the JV cheerleading squad after posting a profane social media post, on a Saturday, occasioned by her displeasure about not making the varsity squad. The Court's seminal case on free speech, *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969), allowed for student expression in school that did not materially disrupt classwork or cause substantial disorder in the school. The question in the case concerned the ability of schools to punish out-of-school speech.

The Court (8-1) found that the student's Snapchat posts were protected by the First Amendment and the suspension violated her constitutional rights. It is possible for schools to punish out-of-school speech under certain circumstance, *e.g.*, bullying or harassment, breaching school security devices, using school-issued computers. However, the school's interests regarding out-of-school speech are certainly diminished. The school does not act *in loco parentis* when the student is out of school and so it does not have a

strong interest in reducing vulgarity and there was no evidence here that the post caused a substantial disruption of the school or that it was likely to cause such a disruption.

IV. First Amendment - Free Exercise

a. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021)

In *Employment Div., Dep't of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), the Court held that a neutral rule that is generally applicable but that affects free exercise is not subject to strict scrutiny but will be upheld if reasonable. Philadelphia imposes a requirement on agencies that provide foster care services that agencies must consider potential foster parents regardless of their sexual orientation. Catholic Social Services, as part of its religious beliefs, does not allow same-sex married couples to be foster parents. Philadelphia indicated that it would therefore not contract with Catholic Social Services.

When the Court took *certiorari* on this case it was felt that this would be a potential case to overrule *Smith*, which would have caused an enormous sea change in free exercise law. However, the Court avoided this and unanimously found in favor of Catholic Social Services without answering the question of the continued validity of *Smith.* While three justices would overrule *Smith*, the Court instead concluded that *Smith* simply was not applicable as the non-discrimination provision enforced by Philadelphia was not neutral and generally applicable as the City retains the right to make exceptions to the policy. This ability to make discretionary exceptions meant that the non-discrimination

provision is not generally applicable. Given this, strict scrutiny applies. The City does not have a compelling interest in refusing to contract with Catholic Social Services.

b. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020)

This is an example of the Court's "shadow docket," where decisions are made on requests for stays or injunctions pending full review by the Court. Religious groups challenged COVID-19 restrictions imposed by the governor of New York. The religious groups argued that the restrictions violated Free Exercise. The lower courts upheld the restrictions.

In a *per curiam* decision the Court held that plaintiffs were likely to succeed on the merits and an injunction pending review was appropriate. Specifically, the plaintiffs were likely to show that the limitations were not neutral and of general applicability and therefore they had to satisfy strict scrutiny. The Chief Justice dissented as the regulations had been revised and it was unnecessary, in his estimation, to decide the case. Justices Breyer, Sotomayor, and Kagan dissented, arguing that although the regulations treated religious gatherings less favorably than essential businesses, the essential business classification was distinguishable from religious services. Further, the dissenting justices noted that given the ongoing pandemic it was appropriate to defer to member of the scientific and medical communities.

V. Fourth Amendment—Search and Seizure

a. *Caniglia v. Strom*, 141 S. Ct. 1596 (2021)

The plaintiff was taken from his home by the police for a psychiatric evaluation at a hospital. He argued that the police violated the Fourth Amendment when they entered his home without a warrant and seized him and weapons that were in the home. The plaintiff had talked to the police on his porch and agreed to go to the hospital if the police did not take his weapons. The police nevertheless entered his home and took the weapons. The police argued that removing of the plaintiff without a warrant and seizing the weapons were justified by a "community caretaking exception" to the warrant requirement.

Although previous cases speak of noncriminal community caretaking exceptions for officers patrolling highways, this does not apply when the search and seizure occurs in the home. The Court therefore unanimously found that plaintiff's Fourth Amendment's rights were violated.

b. *Lange v. California*, 141 S. Ct. 2011 (2021)

A police officer sought to give Lange, a motorist, a ticket for playing loud music and honking his horn. Lange did not respond to the officer's lights and, instead, pulled into his driveway and entered his garage. The officer followed Lange into the garage, questioned him, put him through a sobriety test, and arrested him. After blood tests he was arrested for DUI. The lower court found that the search was constitutional as when pursuing a suspected fleeing misdemeanant there is a Fourth Amendment exception under the exigent circumstances exception to the warrant requirement.

The Court reversed. The Court held that there is no blanket exception to the Fourth Amendment for a fleeing misdemeanant. Whether a search of a fleeing misdemeanant may occur without a warrant must be assessed on a case-by-case basis.

c. *Torres v. Madrid*, 141 S. Ct. 989 (2021)

This case clarified the law as to when the application of force to a person by police is a seizure. The plaintiff was shot by police as she attempted to elude them. She claimed that this was excessive force—an unreasonable seizure under the Fourth Amendment—even though she was not physically seized.

The Court (5-3, with the Chief Justice writing for the Court and with Justice Barrett not participating) held that an application of force with the intent to restrain movement is a seizure, even if control is not attained. The Court did not rule on whether the officers' actions were unreasonable and whether the officers should receive qualified immunity.

d. *United States v. Cooley*, 141 S. Ct. 1638 (2021)

This is not a constitutional case. The question was whether an Indian tribe's police officer may detain and search non-Native Americans on a public road going through a reservation. Cooley had parked on the side of the highway and the police officer approached the vehicle and saw guns on the front seat. He patted Cooley down and saw drugs in the car in plain view. The Court unanimously found that the tribal officer has this power as a tribe has inherent authority to address conduct that threatens or has a direct effect on the health or welfare of the tribe.

VI. Separation of Powers – *Collins v. Yellen*, 141 S. Ct. 1761 (2021)

This is one of a continuing number of cases that limits the ability of Congress to insulate "independent" executive agencies from presidential control. *See, e.g., Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020). In this case Congress provided that the director of the Federal Housing Finance Agency could only be removed by the President for cause. The agency was created by Congress in 2008 in the wake of the bursting of the housing bubble and was designed to regulate the Federal Financial Mortgage Association and the Federal Home Loan Mortgage Corporation.

The Court concluded that the for cause restriction on the President's authority to remove the director violated the separation of powers. The President's ability to remove executive officers cannot be regulated in this way. However, the Court concluded that actions that had been taken by the agency were not void.

VII. Takings – *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021)

California regulations allow labor organizations to gain access to an agricultural employer's property to pursue union efforts up to three hours per day for 120 days per year. The Court, with the Chief Justice writing for the majority, found that the regulation effected an uncompensated taking in violation of the Fifth and Fourteenth Amendments. Governmental-authorized physical invasions of property require just compensation.

The Court stressed that the government may require property owners to allow inspections as a condition of receiving a permit or other benefits. But that was not the

case here. Instead, the regulation created a *per se* physical taking. It is an appropriation of private property without compensation and is unconstitutional.

VIII. Election Law - *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021)

Section 5 of the Voting Rights Act of 1965 requires that certain jurisdiction obtain federal prior approval before changing any voting practices. Section 4(b) of the Act sets the formula as to what jurisdiction Section 5 applies to. In *Shelby County v. Holder*, 570 U.S. 529 (2013), the Court, by the Chief Justice, held that the preclearance requirement was unconstitutional as the formula in Section 4(b) was no longer responsive to current needs and therefore exceeded the power provided to Congress. The preclearance requirement therefore ended.

*Shelby County* did not disturb Section 2 of the Voting Rights Act that prohibits voting practices or procedures that deny or abridge the right to vote on account of race or color. *Brnovich* concerned an Arizona statute making it a crime for anyone other than a family member or election officer to handle or collect early voting or absentee ballots. Another policy that was challenged in the case required election official to reject ballots of voters who vote in the wrong precinct, including votes for state and federal offices. The 9th Circuit concluded that the laws had a significant disparate burden on minorities. It also concluded that the ballot collection law was enacted with discriminatory intent. It therefore found a violation of Section 2 of the Voting Rights Act.

The Supreme Court (6-3) reversed with the majority opinion written by Justice Alito. The Court concluded that the provisions were not enacted with a racially discriminatory purpose and there is no proof of an unconstitutional disparate impact.

The core of Section 2 is that voting be "equally open." In determining this the totality of circumstances must be considered. The size of the burden is highly relevant as is the degree to which a voting rule departs from standard practice when Section 2 was amended in 1982. The size of any disparities on a rule's impact on members of different racial or ethnic groups must be considered. The Court concluded that neither challenged policy had a large effect on elections. They do not exceed the usual burdens on voting. Any racial disparity is small. The State has legitimate justifications for its policies that advance the State's compelling interest in preserving election integrity.

IX. Criminal Cases of Interest

a. *Borden v. U.S.*, 141 S. Ct. 1817 (2021)

Sentences are enhanced under the Armed Career Criminal Act if a person is found guilty of possessing a firearm and has three or more prior convictions for a "violent felony," which is defined as "the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(2)(2)(B)(i). Courts have struggled to determine what is, or is not, a violent felony. In this case the Court held that a criminal offense with a *mens rea* of only recklessness (here, reckless aggravated assault) does not qualify as a "violent felony."

b. *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021)

In *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), the Court held that the Sixth Amendment requires a unanimous verdict to convict a defendant of a serious offense. Only Louisiana and Oregon used non-unanimous juries. *Ramos* prompted persons who were convicted by non-unanimous juries to collaterally attack their convictions. The Court (6-3) held that new rules of criminal procedure apply to cases on direct review. Traditionally, new procedural rules apply on collateral review only if the rule represent a "watershed" rule of criminal procedure. However, the Court has never found the watershed rule to apply, and the Court therefore concludes it has no vitality. The Court flatly holds that new procedural rules do not apply retroactively on federal collateral review.

c. *Jones v. Mississippi*, 141 S. Ct. 1307 (2021)

The defendant was sentenced to life without parole as a juvenile. In *Miller v. Alabama*, 567 U.S. 460 (2012), the Court held that the 8th Amendment is violated by an imposition of life without parole on a person committing murder when a juvenile unless the sentence is not mandatory and the sentencer has discretion to impose a lesser punishment. The trial judge resentenced the defendant after *Miller* and acknowledged that he could impose a sentence less than life without parole, but he chose not to. Jones argued that to impose life without parole in this instance, the sentencer must make a factual finding that the defendant is permanently incorrigible. The trial judge had not

made such a finding. The Court (6-3) found that no such finding was constitutionally necessary. It is enough that the sentencer possesses sentencing discretion.

X. Miscellaneous Cases

a. *Uzuegbunam v. Preczewski.* 141 S. Ct. 792 (2021)

The plaintiffs sought injunctive relief and nominal damages to challenge an alleged violation of their First Amendment rights. The case became moot, ending the possibility of obtaining an injunction. The 11th Circuit held that a claim for nominal damages cannot, by itself, establish standing. The Supreme Court (8-1) disagreed. A request for nominal damages is sufficient to support standing in the same manner as compensatory damages. It meets the redressability requirement for standing.

b. *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020)

The federal Religious Freedom Restoration Act ("RFRA") allows for relief against federal officials or federal departments and agencies where the plaintiff's religious rights are substantially burdened unless the defendant establishes that the burden is justified by a narrowly tailored compelling governmental interest. In this case the Court unanimously held that RFRA's remedies encompass money damages against federal government officials sued in their individual capacities.

c. *NCAA v. Alston*, 141 S. Ct. 2141 (2021)

In this case the Court unanimously held that the NCAA's restrictions on compensation for student-athletes violated anti-trust laws. This was not an across-the-

board challenge to NCAA rules, but only to those that limited certain education-related benefits. The Court concluded that the injunction issued by the lower courts against the limitation imposed by the NCAA was not erroneous. The significance for future developments in this area is that the Court recognized that the NCAA has monopoly power, and its restraints are subject to the ordinary analysis under antitrust law.

d. *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021)

Federal immigration law allows a nonpermanent resident who is ordered to be removed from the United State to obtain discretionary relief if they can establish their continuous presence in the country for at least 10 years. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 has a provision—the stop-time rule—that states that this period of continuous presence ends when the alien receives a notice to appear in a removal proceeding. The term "notice to appear" is defined as "written notice . . . specifying" certain information. If any of the statutorily required information is omitted, the stop-time rule is not triggered. Mr. Niz-Chavez received the required information in two documents sent two months apart. The government argued this was sufficient to trigger the stop-time rule. The Supreme Court, in a 6-3 decision by Justice Gorsuch, disagreed. The language of the statute and its structure and history makes it clear that Congress intended a single notice.

e. *Trump v. New York*

The Supreme Court agreed to review this case challenging former-President Trump's attempt to exclude non-citizens from census data use to determine congressional apportionment. Given that census authorities indicated that it would be impossible to do this for the current census, and that nothing had yet happened to implement the directive, standing and ripeness requirements prohibited the Court from deciding the case.

XI. Coming Attractions in the 2021-2022 Term (the questions presented are quoted directly from the petitions for certiorari or the Court's articulation of the question(s) presented). Review has been granted in all these cases.

a. *New York State Rifle & Pistol Ass'n v. Bruen*, No. 20-843

Question(s): Whether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment.

b. *Dobbs v. Jackson Women's Health Org.*, No. 19-1392

Question(s): Whether all pre-viability prohibitions on elective abortions are unconstitutional.

c. *Cameron v. EMW Women's Surgical Center, PSC*, No. 20-601

Question(s): Whether a state attorney general vested with the power to defend state law should be permitted to intervene after a federal court of appeals invalidates a state statute when no other state actor will defend the law.

d. *Carson v. Makin*, No. 20-1088

Question(s): Does a state violate the Religion Clauses or Equal Protection Clause of the United States Constitution by prohibiting students participating in an otherwise generally available student-aid program from choosing to use their aid to attend schools that provide religious, or "sectarian," instruction?

e. *Thompson v. Clark*, No. 20-659

Question(s): I. Whether the rule that a plaintiff must await favorable termination before bringing a Section 1983 action alleging unreasonable seizure pursuant to legal process requires the plaintiff to show that the criminal proceeding against him has "formally ended in a manner not inconsistent with his innocence," *Laskar v. Hurd*, 972 F.3d 1278, 1293 (11th Cir. 2020), or that the proceeding "ended in a manner that affirmatively indicates his innocence," *Lanning v. City of Glens Falls*, 908 F.3d 19, 22 (2d Cir. 2018); *see also Laskar*, 972 F.3d at 1293 (acknowledging 7-1 circuit conflict).

II. Where a Section 1983 plaintiff brings a Fourth Amendment claim for unlawful warrantless entry of his home and the government pursues a justification of exigent circumstances, does the government have the burden to prove exigency existed (as the Third, Sixth, Ninth and Tenth Circuits have held), or does the plaintiff have to prove its non-existence (as the Second, Seventh and Eighth Circuits have held).

f. *U.S. v. Zubaydah*, No. 20-827

Question(s): Whether the court of appeals erred when it rejected the United States' assertion of the state-secrets privilege based on the court's own assessment of potential harms to the national security, and required discovery to proceed further under 28 U.S.C. 1782(a) against former Central Intelligence Agency (CIA) contractors on matters concerning alleged clandestine CIA activities.

g. *Houston Community College System v. Wilson*, No. 20-804

Question(s): Does the First Amendment restrict the authority of an elected body to issue a censure resolution in response to a member's speech?

h. *City of Austin, Texas v. Reagan Nat'l Advertising of Texas, Inc.*, No. 20-1029

Question(s): Is the city code's distinction between on- and off-premise signs a facially unconstitutional content-based regulation under Reed [v. Town of Gilbert, 57 U.S. 155 (2015)?

i. *Cummings v. Premier Rehab Keller, P.L.L.C.*, No. 20-219

Question(s): Whether the compensatory damages available under Title VI and the statutes that incorporate its remedies include compensation for emotional distress.

j. *U.S. v. Vaello-Madero*, No. 20-303

Question(s): Whether Congress violated the equal-protection component of the Due Process Clause of the Fifth Amendment by establishing Supplemental Security Income—a program that provides benefits to needy aged, blind, and disabled individuals—in the 50 States and the District of Columbia, and in the Northern Mariana Islands pursuant to a negotiated covenant, but not extending it to Puerto Rico

k. *Johnson v. Arteaga-Martinez*, No. 19-896

Question(s): Whether an alien who is detained under 8 U.S.C. 1231 is entitled by statute, after six months of detention, to a bond hearing at which the government must prove to an immigration judge that the alien is a flight risk or a danger to the community.

# Section Three

# 2021 RECENT DEVELOPMENTS IN ESTATE and TRUST PLANNING

## Estates, Trusts, Guardianships
## Advanced Directives, Non-Probate


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## Section Three

## Recent Developments in Estate & Trust Planning..... Todd I. Glass

**Appendix**

**Case Law and Legislation in Estates,**
**Trusts, Guardianships and Advance Directives……Todd I. Glass**

## I. ESTATE PLANNING AND ADMINISTRATION

### A. WILL – EXECUTION. HOUSE ENROLLED ACT 1255 PROBATE CODE REVISIONS. [1]

The following are the changes that HEA 1255 makes in the Probate Code effective April 29, 2021, relating to traditional signing of paper wills.

1. HEA 1255 adds new definitions of "presence," "in the presence of," "observe," and "observing" to IC 29-1-1-3(a), so that the "presence" requirement can be satisfied through the use of technology for real-time two-way interaction between the testator and the witnesses, if they are not directly present with each other in the same physical space.
2. For traditional paper wills, electronic wills, and POAs signed on paper or electronically, HEA 1255 adds a new defined term, "directed paralegal," meaning a nonlawyer assistant who is employed or retained by a licensed attorney and who works under that attorney's direct supervision.
3. For traditional wills signed on paper, HEA 1255 amends IC 29-1-5-3 by inserting two new lettered subsections (c) and (d), which allow the will to be signed by the testator and the two witnesses on separate but identical paper

[1] *Special thanks to Jeffrey S. Dible, Esq., Frost Brown Todd, LLC, for his permission to use his summaries of House and Senate Enrolled Acts in these materials. Jeff is a venerable contributor to legislative efforts in Indiana that apply to Estates, Trusts, Guardianships, Tax and Real Estate issues, and has permitted this author to reprint his summaries that originally were published in the Probate Trust and Real Property Section Newsletters.*

counterparts, which must be combined after signing into a single composite document that contains all signatures. This signing method will be useful to competent testators who are unable to use electronic or digital signature technology and in situations where the testator and the witnesses cannot physically handle and pass around the single original will printed on paper.

4. Under new subsection (d) of IC 29-1-5-3, if a traditional will is going to be signed and witnessed on paper in counterparts:
    a. An attorney or directed paralegal must supervise the execution and witnessing of the will in counterparts.
    b. The attorney or paralegal who supervises must sign an "affidavit of compliance" after assembling the completed will that was signed and witnessed in counterparts.
    c. The attorney's or paralegal's affidavit of compliance must be filed with the probate petition or at any later time ordered by the probate court.
    d. Under the last sentence of subsection (d), if the will was signed in counterparts without the required supervision by an attorney or directed paralegal, the will is not void but is voidable in the discretion of the probate court, or if an objection to probate is filed under IC 29-1-7- 16, or if a timely will contest is filed under IC 29-1-7-17.
5. For traditional wills signed on paper in counterparts, HEA 1255 adds a new subsection (e) to IC 29-1-5-3.1, prescribing a new self-proving clause.

6. HEA 1255 amends IC 29-1-5-3.2 to clarify that an audio recording, photograph(s), or video recording made during part or all of the signing of a traditional will may be admissible in evidence.
7. Section 5 of HEA 1255 adds a new IC 29-1-5-3.3, which makes it unnecessary for a testator to re-execute a traditional will under pre-pandemic (2020) rules, if the testator signed a will on or after March 31, 2020 and before January 1, 2021 and used remote witnessing in reliance on the Indiana Supreme Court's order in Case MS-237.

The following are the changes that HEA 1255 makes in the Probate Code effective April 29, 2021, relating to the provisions for electronic wills:

8. HEA 1255 amends the execution and witnessing requirements for electronic wills in IC 229-1-21-4 to permit "remote witnessing," so long as the testator and the witnesses interact in real time in ways that satisfy the new, broader definitions of "presence" and "observe." In the prescribed self-proving clause for electronic wills in IC 29-1-21-4(e) and elsewhere in IC 29-1-21-4, the words "actual presence" and "actual and direct physical presence" are replaced by "presence."
9. For electronic wills, HEA 1255 adds definitions of "presence," "in the presence of," "observe," and "observing," to IC 29-1-21-3.
10. For electronic wills, HEA 1255 adds two new subsections (b) and (c) to I.C. 29-1-21-4, to add these requirements if remote witnessing is used:

a. An attorney or a directed paralegal must supervise the execution and witnessing of that electronic will.
b. The attorney or paralegal who supervises the execution and remote witnessing of the electronic will must sign an "affidavit of compliance" containing prescribed content.

11. If that electronic will is offered for probate, the proponent must file a copy of the affidavit of compliance with the probate petition or later when ordered to do so by the probate court.
12. Under the last sentence of subsection (d), if the electronic will was signed with remote witnessing but without the required supervision by an attorney or directed paralegal, the electronic will is not void but is voidable in the discretion of the probate court, or if an objection to probate is filed under IC 29-1-7-16, or if a timely will contest is filed under IC 29-1-7-17.
13. HEA 1255 modifies the prescribed content of the self-proving clause for an electronic will in what will be subsection (e) of IC 29-1-21-4, so that "presence" replaces "actual and direct physical presence."
14. Section 8 of HEA 1255 adds a new IC 29-1-21-4.1, which makes it unnecessary for a testator to re-execute an electronic will under pre-pandemic (2020) rules, if the testator signed an electronic will on or after March 31, 2020 and before January 1, 2021 and used remote witnessing in reliance on the Indiana Supreme Court's order in Case MS- 237.

Note that under IC 29-1-5-5 (for traditional paper wills) and IC 29-1-21-7 (for electronic wills), a testator who is physically present in Indiana when he or she signs a will has to comply with these Indiana execution requirements; the testator won't be able to use an on-line document assembly service (Willing.com, Trust and Will.com, etc.) that purports to rely on and invoke the law of another jurisdiction (e.g., Nevada) that has looser standards for remote witnessing.

**B. WILL CONTEST - UNDUE INFLUENCE. *Moriarty v. Moriarty*, 150 N.E.3d 616 (Ind. App. 2020).** William and Doreen Moriarty had 2 daughters, Cathy and Paula. Doreen died in April 2016 after being married to William for 58 years. William was a devoted husband and father. Cathy and Paula had close relationships with their parents. Dr. Fry is a cardiologist who treated both Doreen and William. Doreen was his patient until her death. In April 2015, William became Dr. Fry's patient after he was hospitalized and diagnosed with congestive heart failure. At an appointment in May 2016, right after Doreen's death, William told Dr. Fry that he had been under a great deal of stress due to the prolonged and complex illness of his wife. Eve (Appellant), who had met William at Holy Spirit Parish when Doreen was still living, began dating William within weeks of Doreen's death. Cathy learned about Eve in an email from her father but did not realize that they were dating. William never mentioned Eve to Paula. Paula noticed a change in her relationship with her father when he stopped calling or emailing her in June 2016. That same month William told Cathy not to visit him which she thought was very strange. In August 2016, Cathy visited her father anyway and he told her that he was "engaged to be engaged". Cathy had no idea what he meant. On October 25, 2016, Eve and William married. It was Eve's fourth marriage.

William's daughters, grandsons, sister, sister-in-law, and longtime close friends were not invited to the wedding and many did not even know he was getting married. In the Fall of 2016, William and Eve purchased a home in Fishers for $412,620.11 in cash from an account owned solely by William. William was physically reliant on others for assistance with activities of daily living. Yet in March 2017, Eve fired William's long-time home healthcare service provider. In March 2017, William signed a request to surrender his Prudential life insurance policy. Eve testified that she had not seen the request before William died, however she later admitted to writing everything on the form except William's signature. The policy's surrender value was deposited into an account owned jointly by William and Eve.

On April 6, 2017, William executed the Purported Will. The Purported Will bequeathed all tangible personal property and the residue of William's estate to Eve and nominated Eve as personal representative. The Purported Will provided that if Eve did not survive William, his estate was to be distributed to Cathy and Paula. The Purported Will was prepared by Eve's attorney, who did not follow his ordinary practices when meeting with a client to prepare an estate plan. He dropped off a draft of the Purported Will at William and Eve's house but did not have in-person interaction with William until the signing of the Purported Will. Eve was home when the Purported Will was signed at the residence. Eve prepared the check that William signed to pay for the preparation of the Purported Will. A month later, William died. On May 22, 2017, Cathy and Paula filed a verified petition for supervised administration of their father's estate. The following day, Eve filed a petition for probate of the Purported Will without court supervision. The two matters were consolidated, and the Court appointed a special administrator. Cathy and Paula filed a verified complaint alleging that the Purported Will was invalid because William was of unsound mind when he executed

it and/or the Purported Will was a product of undue influence. They also alleged that Eve tortiously interfered with their inheritance.

Based on the evidence presented at trial, and specifically based on, (a) the testimony of Cathy and Paula and William's long-time friends that William would never have excluded Cathy and Paula from his life or estate plan, (b) the expert medical testimony of Dr. Stephen Rappaport (a geriatrician who frequently determines patients' decision-making capacity) who opined that William lacked the capacity to reasonably evaluate and judge the treatment of him by third parties, and (c) William giving Doreen's sentimental personal property to Scott Bowers at a time when he and Paula were in the midst of a highly contentious, drawn-out divorce, the trial court found that William lacked the mental capacity to determine Paula and Cathy's deserts, with respect to their treatment of and conduct toward him. Further the trial court concluded that William was susceptible to undue influence based on (a) the death of Doreen, (b) his untreated anxiety and depression, (c) his severe CHF, (d) his isolation from his family and long-time friends, and (e) his dependency on others. The trial court found that Eve exercised undue influence over William at the time he executed the Purported Will. The trial court held that Eve's exercise of undue influence over William was tortious interference with Paula's and Cathy's expected inheritance which allowed them to attach joint bank accounts, the house, and their new car. Eve appealed.

The Court of Appeals affirmed. It held that the trial court's findings supported the conclusion that Eve exercised undue influence over William at the time he executed the Purported Will. Accordingly, the trial court's order that the Purported Will was a product of Eve's exercise of undue influence over William is not clearly erroneous and therefore affirmed the trial court's judgment in favor of Cathy and Paula that the Purported Will is

invalid. Eve also contended that the evidence and findings failed to support the conclusion that William did not intend for her to receive the lifetime transfers. The Court of Appeals felt that Eve's argument ignored findings related to undue influence, many of which applied to the lifetime transfers as well. The Court concluded that Eve's argument was a request to reweigh the evidence, which they declined to do. The trial court's judgment in favor of Cathy and Paula on their tortious interference of inheritance claim was also affirmed.

**C. WRONGFUL DEATH - DISTRIBUTION - ADULTERY. *Estate of Phe1ps v. Book*, 152 N.E.3d 1 (Ind. App. 2020).** Kara, Hailey, and Colby are the children of decedent Thomas with his first wife. Thomas and Erica were married in October 2013 and had one daughter together. Prior to their marriage, Tom and Erica entered into a prenuptial agreement which provided that in the event that their marriage was terminated other than by the death of one of them, or in the event of a legal separation, Erica agreed to waive all rights to Tom's property. Tom and Erica separated in August 2014, and Erica left the marital home to live with her parents. In February 2015, Erica filed for divorce. Erica became romantically involved with another man and became pregnant with that man's child. On October 19, 2015, Tom was killed when he was struck by a car. He died intestate. Maloy was appointed as special administratrix to file a wrongful death action which was ultimately settled. The trial court held a hearing to determine how to distribute the wrongful death proceeds and pay estate administration fees. The court determined that (1) Erica was living in a state of adultery and therefore not entitled to one-half of Tom's net probate estate; (2) Erica was entitled to a share of the proceeds of the wrongful death claim because such proceeds were not part of Tom's probate estate and because under the terms of the prenuptial agreement, Erica and Tom were not legally separated at the time of his death; and (3) Erica was entitled

to one-half of the net proceeds of the wrongful death claim, with Tom's four children each entitled to a one-eighth share. The Phelps children appealed alleging that the trial court erred in allocating Erica a share of the net proceeds of the wrongful death action.

The Court of Appeals affirmed. The Indiana Wrongful Death Statute (IC 34-23-1-1) provides that the portion of any wrongful death payment made for medical, hospital, funeral and burial expense inures to the estate for payment of those expenses and the remainder of the damages inure to the exclusive benefit of the widow or widower and to the dependent children, to be distributed in the same manner as the personal property of the deceased. The Phelps children argued that Erica should not receive one-half of the net proceeds of the wrongful death action because the Indiana intestacy statutes provides that if a spouse has left the other and is living in adultery at the time of the other spouse's death, the adulteress spouse shall take no part of the estate or trust of the deceased spouse. Since the wrongful death statute provides that the widow is entitled to a share of the net proceeds of the wrongful death action in the same manner as the personal property of the deceased, and since Erica was not entitled to a share of the intestate estate due to the fact that she was living in a state of adultery, the children argue that Erica should not be entitled to any share of the net proceeds of the wrongful death action. The Court noted that although the adultery section of the intestacy statute may deprive Erica of the right to receive distributions from Tom's estate, the wrongful death proceeds are not part of Tom's estate. The adultery statute acts to bar an adulterous spouse from taking part of decedent's estate, which does not include the proceeds from a wrongful death claim. Therefore, the trial court properly determined that Erica was entitled to one-half of the net proceeds of the wrongful death settlement.

The Court of Appeals affirmed. The Indiana Wrongful Death Statute (IC 34-23-1-1) provides that the portion of any wrongful death payment made for medical, hospital, funeral and burial expense inures to the estate for payment of those expenses and the remainder of the damages inure to the exclusive benefit of the widow or widower and to the dependent children, to be distributed in the same manner as the personal property of the deceased. The Phelps children argued that Erica should not receive one-half of the net proceeds of the wrongful death action because the Indiana intestacy statutes provides that if a spouse has left the other and is living in adultery at the time of the other spouse's death, the adulteress spouse shall take no part of the estate or trust of the deceased spouse. Since the wrongful death statute provides that the widow is entitled to a share of the net proceeds of the wrongful death action in the same manner as the personal property of the deceased, and since Erica was not entitled to a share of the intestate estate due to the fact that she was living in a state of adultery, the children argue that Erica should not be entitled to any share of the net proceeds of the wrongful death action. The Court noted that although the adultery section of the intestacy statute may deprive Erica of the right to receive distributions from Tom's estate, the wrongful death proceeds are not part of Tom's estate. The adultery statute acts to bar an adulterous spouse from taking part of decedent's estate, which does not include the proceeds from a wrongful death claim. Therefore, the trial court properly determined that Erica was entitled to one-half of the net proceeds of the wrongful death settlement.

**D. WRONGFUL DEATH – DEPENDENT – SUMMARY JUDGMENT.**

***Franciscan Aco v. Newman*, 154 N.E.3d 841 (Ind. App. 2020).** Virginia Newman died after her wheelchair was not properly fastened in the van and tipped over. Her children filed a wrongful death lawsuit along with a survivor action against the owner of the van and the

driver. The wrongful death action alleged that one of the sons of the decedent was a dependent. The defendants filed a motion for summary judgement claiming that damages were only allowed under the adult wrongful death statute and that the survivor claim should be dismissed. The trial court denied the motion for summary judgement but granted the interlocutory appeal.

The Court of Appeals reversed and remanded. While the son lived rent free in the mother's duplex, the facts showed that he had a $45,000 a year income and no need really for the mother's help. The mother's payment of his bills and the cost of his automobiles were really gifts from the mother to the son out of love and affection. The Court also agreed that the survival action was properly dismissed because the adult wrongful death statute applied.

**E. WILL – CONSTRUED – GIFT OR OPTION TO PURCHASE. *Schaefer v. Estate of Cletus P. Schaefer*, 167 N.E. 3d 1173 (Ind. App. 2021)**. Cletus Schaefer ("Cletus") had four children: Joy, Jill, Donald, and Kenneth. Cletus executed a Last Will and Testament and three codicils. This case involves the language in the third codicil ("Third Codicil"). Cletus and Kenneth jointly owned Schaefer & Schaefer, LLC. and Cletus and Kenneth owned the farm real estate as joint tenants with rights of survivorship. The language of the Third Codicil stated "unto my son, Kenneth J. Schaefer, I bequeath the following: all my interest and ownership in Schaefer and Schafer, LLC, any and all farm machinery, tools and farm vehicles, all conditioned upon said Kenneth paying unto my estate the sum of one thousand Dollars ($1,000.00) per acre for the approximate 240 acres more specifically described in Deeds bearing instrument numbers 2009R-03979 and 2009R-03980 which said sum shall be paid within five (5) calendar months from the date of my estate being opened

for administration, and I hereby direct my Co-Executrixes to distribute said sum unto my daughters, Joy Brock and Jill Mehling, and my son, Donald Schaefer, share and share alike equally as joint tenants with rights of survivorship and not as tenants in common. Should my son, Kenneth, not fully perform this condition precedent, then, and upon that event, farm machinery, tools, farm vehicles, and my interest in Schaefer and Schaefer, LLC shall be sold, and the proceeds shall be divided equally, share and share alike among my four (4) children as joint tenants with rights of survivorship and not as tenants in common." When Cletus died, the title to the real estate referenced above vested in Kenny automatically by virtue of joint title on the deeds. Within five months of Cletus' death, Kenneth paid the monies as directed under the Third Codicil and the Estate accepted the payment. The Personal Representatives filed a Petition for Beneficiary Kenneth Schaefer to Disclose Assets, Respond to Discovery Request, and Permit Appraisal of the assets owned by the LLC and held by Kenneth. Kenneth objected arguing that the Personal Representatives of the Estate were not entitled to proceed with the collection and investment of the various farm equipment because Kenneth purchased the equipment in question under the terms of the Third Codicil three years prior. The Personal Representatives took the position that Kenneth's payment pursuant to the Third Codicil was a condition precedent to the vesting of a specific bequest of the stated assets (farm machinery, tools and farm vehicles) instead of option to purchase, and that paying the required $1,000.00 per acre he purchased his bequest free and clear of any claim by the beneficiaries. The trial court declared that Cletus' intent from the language the Third Codicil was to provide a gift to Kenneth that was contingent upon the satisfaction of the condition precedent. Accordingly, the property covered by paragraph D (2) of the Third Codicil was

subject to abatement and the Personal Representatives were authorized to conduct discovery regarding the property. Kenneth appealed.

The Court of Appeals affirmed, in part, and reversed, in part. Kenneth argued that the trial court erred when it held the language created a gift; contending the language created an option to purchase. If the language created a gift, the property was still part of the estate, and subject to abatement. If the language created an option to purchase, Kenneth would own the property free and clear, and it is not subject to abatement for debts of the estate. The Court of Appeals identified the issue to be the interpretation of the language to evince Cletus' intent to bequeath a gift or as an option to purchase. The Court of Appeals analyzed the amount Kenneth paid pursuant to that language, and noted it was not the market value of the property at the time Kenneth purchased it. Relying on Drake v. Old Nat'l Trust Co., 871 N.E.2d 352, 355 (Ind. App. 2007), the Court described an option to purchase when the party may purchase something at its appraised value, not at a greatly reduced price. The Court reached its decision that the portion Kenneth paid for, $277,500, was a testamentary option to purchase and the remaining value of the property was a testamentary gift.

**F. WILL CONTEST – SUMMARY JUDGMENT – TR 56(F).** ***In Re Estate of Dean C. Kreiger v. Nancy Y. Wigent*****, 165 N.E. 3d 623 (Ind. App. 2021)**. Nancy Wigent is personal representative of the Estate of Dean C. Kreiger. Finton challenged the will of Dean Kreiger on the basis of undue influence and unsoundness of mind. After years of delays, Wigent finally provided Finton with releases regarding Kreiger's medical records. Before Finton could complete discovery, Wigent filed a Motion for Summary Judgment. Finton

sought denial of the Motion for Summary Judgment and requested a continuance pursuant to TR 56(F). The trial court granted Wigent's Motion for Summary Judgment.

The Court of Appeals reversed and remanded finding that the trial court errored in not granting Finton's motion pursuant to TR 56(F). Given the fact that Finton's contest was based on the decedent's medical history and that Wigent had not responded to discovery timely, the Court of Appeals found that Finton was prejudiced in his efforts to prove his case.

## II. TRUST PLANNING AND ADMINISTRATION

### A. TRUST – EXECUTION. HOUSE ENROLLED ACT 1255 TRUST CODE REVISIONS.

HEA 1255 is effective 4-29-2021. In 2020, the signing procedures for inter vivos trusts signed on paper and for electronic inter vivos trust instruments were revised to explicitly allow the competent settlor to direct someone else to sign the trust instrument at the settlor's presence and at the settlor's direction —a technique that was already permitted for wills and durable powers of attorney. However, the 2020 amendments did not limit who could act to sign the settlor's name on a trust instrument at the settlor's direction. Because valid inter vivos trust instruments can be validly signed with just the settlor's signature (no witnesses or notarization required), there is some potential that a dishonest individual could use undue influence or trickery to have the settlor direct that individual to sign the settlor's name on a trust instrument, which names the individual as the controlling trustee or which names the individual as a significant beneficiary.

1. Sections 14 and 15 of HEA 1255 amend IC 30-4-1.5-4 [for electronic trust instruments] and IC 30-4-2-1 [for trust instruments signed on paper] to prohibit

the following persons from signing the trust instrument at the settlor's direction:

a. A trustee named in the trust instrument.
b. A relative of the settlor. A person who is entitled to receive a beneficial interest in the trust assets or a power of appointment under the terms of the trust.

If settlor's signature is placed on the trust instrument by an eligible individual who signs for the settlor and at the settlor's direction, the trust instrument must state that the signer is not in any of the above three categories.

**B. ELECTION AGAINST WILL - TRUST ASSETS NOT SUBJECT TO ELECTION.** ***Sarker v. Naugle, In re Trust Agreement,*** **145 N.E.3d 802 (Ind. App. 2020).** Dipa Sarkar and Anil Sarkar were married for 56 years until Anil's death on February 24, 2015. The couple had separate bank accounts, pension plan accounts, and investment accounts. Anil had two children living in India and the couple had a child of their own. The couple retained an attorney to create revocable trusts, essentially providing for their children and leaving nothing for each other. The couples met with the attorney together and were aware of the provisions in each other's revocable trusts. Neither of the parties established a waiver of the election to take against a deceased spouse's will. Eventually, their attorney informed them he could no longer represent them due to a conflict of interest as Dipa no longer wished to discuss her estate planning with Anil. Subsequently, Anil restated his entire Trust Agreement, choosing to leave no provisions to Dipa. Anil amended his Trust Agreement seven times after that, and in the final amendment he left $50,000 to Dipa if she

survived him for 30 days. The couple utilized the same financial advisor and transferred their respective trust accounts and IRAs to Morgan Stanley. Anil also executed a pour-over will transferring any remaining assets to the Trust Agreement and left nothing to Dipa aside from his tangible personal property. After Anil's death, their child, Rumu, filed a petition to probate the will. Dipa filed a petition to docket the Trust and filed an election to take against the will. Anil's child, Mili, moved for summary judgment for Dipa's election being filed untimely. The trial court granted summary judgment to Mili. Dipa appealed and the Court of Appeals determined that Dipa made a timely election to take against the will and remanded to the trial court. After trial, the trial court found in favor of Mili indicating that Anil's assets were not subject to Dipa's elective share. Dipa appealed.

The Court of Appeals affirmed. There was no written agreement executed by Dipa waiving her right to take against the will. However, Anil's trust was not written in contemplation of death. He created the trust in 1993, restated it in 1997, and amended it 7 times thereafter. He did not pass away until 2015, almost one year after his last amendment to the Trust. The purpose of the restated trust was to simplify the means of accomplishing both lifetime and death transfers of his assets. Further, while Anil had cardiac health problems, the court found no evidence that indicated Anil expected to die in the near future. The investment account and IRA were transferred to the Trust in 1998 and the addition of social security payments was not major enough to be considered an addition in contemplation of death. Further, the court found no intention to disinherit Dipa. There was explicit intent from the beginning to make no provision for Dipa, and throughout their lives they kept their financial assets completely separate. The parties met with their first attorney

for estate planning jointly and were aware of the provisions in each other's documents. Even when they retained separate attorneys, they had the same financial advisor whom they met jointly with. There is overwhelming evidence that both Dipa and Anil were aware of each other's provisions and that Dipa knew and approved of Anil's trust agreements. Thus, Anil did not create the Trust in contemplation of death and did not intend to disinherit Dipa, and so she cannot satisfy her statutory election to take against the will.

### C. SETTLEMENT - VERBAL - SUFFICIENCY - DEAD MAN'S STATUTE.

***Bergal v. Sanders*, 153 N.E.3d 243 (Ind. App. 2020).** Linda and Dr. Milton Bergal were married in 2009, Dr. Milton had 4 children. Dr. Milton created an estate plan in 2009, including a Trust, with Linda and his accountant, Sanders, as successor co-trustees. The Trust had a Trust A for Linda and a Trust B for Dr. Milton's son, David. Dr. Milton eventually succumbed to dementia and Alzheimer's and during the years he was losing his mental and physical capacity, six assets were moved out of his Trust with Linda named as primary beneficiary of the assets. Those assets were a JPMorgan Chase IRA Account, Nicholas Fund Asset, JPMorgan Chase Brokerage transfer on death account, Fidelity brokerage transfer on death account, Vanguard Brokerage transfer on death account, and a Vanguard Rollover IRA Account which was not initially part of the Trust. Dr. Milton's attorney, Roth, and Sanders were not aware of these transfers which caused the Trust to receive $200,000 instead of $8 million and effectively disinherited David. Dr. Milton died in November of 2016 and Linda met with Roth, Sanders, and David in December of 2016. The parties came to an agreement that Linda would resign as co-trustee and return all the assets to the Trust in exchange for David's agreement to refrain from filing a lawsuit. Linda began

performing the agreement, she resigned as trustee and transferred the Vanguard TOD but took no further action. David then filed a complaint, followed by an amended complaint, and a motion to dismiss filed by Linda. The trial court granted the motion to dismiss on two of the three counts. David then filed a second amended complaint for undue influence, lack of testamentary capacity, breach of fiduciary duty, fraud, constructive fraud, conversion, and breach of contract. Linda responded with a motion to dismiss arguing the December 2016 agreement was not written and was therefore unenforceable and a motion for summary judgment which were denied. The trial court found that the agreement did not need to be in writing and Linda filed her answer and affirmative defenses. David filed a motion in limine to prevent Linda from testifying about statements made by Dr. Milton citing the Dead Man's Statute which was granted by the trial court. The jury found in favor of David unanimously and each asset was ordered to be restored to the trust, some assets for various reasons. The trial court entered an oral judgment followed by a first amended and a second amended judgment. The second amended judgment clarified that although there were overlapping claims, there would be no duplicative recovery, and an accounting was ordered to determine the monetary amounts needed to be returned to the trust. Linda appealed.

The Court of Appeals affirmed in part, reversed in part, and remanded. It found that the agreement between the parties did not need to be in writing under IC 30-4-2-1.5 because the agreement did not relate to the administration of the trust. The agreement did not impact the construction, operation, or management of the trust and did not change the terms or the intent of the trust. The agreement was regarding property that was taken outside of the trust wrongly. Further, there is credible evidence in the record which supports the jury's finding

that an oral agreement was reached by the parties. However, the Vanguard IRA was never included in the trust, and because the agreement was to replace everything in the trust, the contract was insufficient to include the Vanguard IRA. The Court of Appeals reversed the trial court's decision with respect to the Vanguard IRA. The Court of Appeals also found that the trial court did not err in finding that the Dead Man's Statute prohibited Linda from testifying about Dr. Milton's statements. This Trust was the primary estate plan for Dr. Milton and his Will was a pour over. The Trust is sufficiently related to probate that the Dead Man's Statute applies. The Court of Appeals granted in part Linda's motion for guidance and remanded Linda's request for reimbursement of the fee she paid for transcript preparation.

**D. TRUST -- SUMMARY JUDGMENT REVERSAL -- RESTRAINT ON MARRIAGE.** ***Rotert v. Stiles,*** **159 N.E. 3d 46 (Ind. App. 2020).** A split appellate panel reversed in a trust dispute between siblings, concluding that the language in their mother's trust regarding her son was ultimately a restraint on marriage and therefore void. In February 2018, siblings Roger Rotert and Connie Stiles found themselves on opposite sides of the courtroom following a disagreement they had over language in a sub-trust to their mother's Marcille Borcherding Revocable Living Trust. Language in the trust documents at issue stated that in the event Rotert was unmarried at the time of Marcille's death, he would receive his share of her estate outright and the provisions of the trust would have no effect. However, in the event Rotert was married at the time of Marcille's death — which he was — his share of the rest and residue of her property would be given to Stiles, including insurance proceeds, as trustee of the subtrust, known as the Roger D. Rotert Trust.

The Jackson Circuit Court ultimately denied Rotert's motion for summary judgment contending certain language in the Rotert Trust was void under Indiana law as a restraint against marriage, and instead granted Stiles' cross-motion. Rotert appealed, asserting that the requirement that he is unmarried at the time of Marcille's death as a prerequisite to take his inheritance outright can only be interpreted as a restraint on marriage and therefore is void as against public policy. A split Indiana Court of Appeals panel agreed with Rotert, ultimately reversing and remanding for the trial court to enter summary judgment in his favor and against Stiles. "Here, in absence of any evidence establishing a support reason or economic basis, the marriage provision simply cannot be interpreted as anything other than an encouragement for Rotert to divorce his wife of almost twenty years upon the opening of the estate and the condition operates to divest Rotert of an outright ownership of his interest in the Trust estate upon Marcille's death," Judge Patricia Riley wrote, joined by Judge Robert Altice.

The majority rejected Stiles' argument that Rotert waived his challenge to the Rotert Trust by agreeing to the accord and satisfaction to settle the Beneficiary's Request for Distribution. Instead, it concluded that because the marriage provision never had any legal existence, the provision cannot be saved by an agreement or waiver of the parties. "In a similar effort to protect the Rotert Trust, Stiles argues that even if the marriage provision is declared void, Rotert would still receive any distributions in trust pursuant to the language in the Borcherding Trust. However, this is an incorrect interpretation of the mechanism of the interlocking trusts," the appellate majority wrote.

Judge Melissa May, writing in dissent, said she would not find the trust language at issue to be void as a restraint on marriage or as an incentive to divorce in the case of Roger D. Rotert v. Connie S. stiles, 20A-TR-773. Noting that the form of Rotert's inheritance was fixed at the moment of Marcille's death, May wrote that, "By the very terms of that devise, any action Rotert might take with regard to his marriage after the opening of the estate would be inconsequential to the form of his inheritance." The dissenting judge further said she would hold instead that the devise is enforceable as written in accordance with Dickey v. Citizens' State Bank of Fairmount, 180 N.E. 36, 98 Ind. App. 58 (1932). "In accordance with the (Restatement (Second) of Property) and Dickey, I would uphold the Trust provision and, therefore, I dissent from the Majority's reversal of the trial court's judgment," May concluded.

**E. FRAUDULENT TRANSFERS – BADGES OF FRAUD. *Mandir Trust v. Mich. City,* 170 N.E. 3d 247 (Ind. App. 2021).** This case involves efforts by Michigan City to satisfy default judgments against Sheonarayan and Jaidevi for incurred and future investigation and remediation costs associated with property where the Erincraft Manufacturing facility operated (the "Erincraft Property"). In 1985, the President of Erincraft Enclosures, Inc., filed an "Assumed Business Name Certificate" for Erincraft Manufacturing Co. located on the Erincraft Property. The certificate named twelve partners, including three of Sheonarayan and Jaidevi's children; Sheela, Srawan and Anil, who resided in Michigan City. Srawan and Anil conveyed the Erincraft Property to Jaidevi in 1994. In August 2001, Sheonarayan executed a deed as "settler" establishing a public trust in the name of his deceased mother, with its registered office in India. Twelve originating trustee members,

including Sheonarayan and Anil, signed the deed which indicated that Sheonarayan was to serve as the first managing trustee.

In 2003, the Redevelopment Commission authorized an environmental assessment at the Erincraft Property. The assessment revealed soil and groundwater contamination above the default closure concentrations. In 2006, Michigan City obtained ownership of the Erincraft Property from Jaidevi through court action. In 2009, Jaidevi, Sheonarayan, and the trust, signed an agreement written in Hindi which, when translated into English, indicated that Jaidevi and Sheonarayan were "in need of money for [their] personal matters" and addressed the transfer to the trust of eight parcels of property in LaPorte County (the "Parcels") purportedly owned and possessed by them, including their primary residence. On July 20, 2015, Michigan City filed a complaint against several prior owners and operators, including Jaidevi, Erincraft, Inc., to recover costs associated with investigating and remediating the properties. On August 3, 2015, Jaidevi deeded the Parcels to Sheonarayan, and Srawan served as a witness.

On December 4, 2017, the court entered a default judgment against Jaidevi and held her liable for Michigan City's incurred and future investigation and remediation costs, prejudgment interest, and reasonable attorney fees and expenses. On June 4, 2019, Michigan City sought to add Sheonarayan as a new defendant, as well as Srawan, Anil, and various Erincraft entities. The court granted the motion, as well as Michigan City's motion for leave to serve by publication, indicating it had attempted to serve Sheonarayan by certified mail in August and that the summonses and complaint were returned unserved. In September 2019, Sheonarayan recorded a notarized Indiana general warranty deed purporting to convey seven

of the Parcels, including their residence, to the trust and Jaidevi recorded a notarized Indiana general warranty deed purporting to convey the eighth Parcel to the trust. On March 20, 2020, the trust manager filed a response to the motion to set aside fraudulent transfers, providing a spreadsheet that listed purported payment amounts, dates, and check numbers and an affidavit stating the trust purchased the property. On July 31, 2020, the court held a hearing. The trust was represented by counsel, but neither Jaidevi nor Sheonarayan appeared by counsel or in person. The court heard arguments from Michigan City and the trust and took the matter under advisement. On September 3, 2020, the trial court entered its order granting Michigan City's Motion to Set Aside Fraudulent Transfers as voidable under I.C. 32-18-2-14 (Indiana UFTA).

The Court of Appeals affirmed. The decision includes a thorough discussion of the Indiana UFTA. In support of their finding that the trial court did not commit error, the Court concluded there was an absence of sales disclosure forms or other documents proving the payment of consideration, and therefore a reasonable factfinder could conclude the trust was not a good faith purchaser of the Parcels for reasonably equivalent value. Further, the evidence failed to reveal any receipts, cancelled checks, or other documentary evidence indicating that any payments, including the $10.00 initial payment, have, in fact, been made, or that the balance due has been paid in full. "This lack of evidence gives rise to the reasonable inference, as the trial court concluded, that 'there was no consideration."

**F. TRUSTEE – BREACH – DAMAGES – FEES. *Zartman v. Zartman*, 168 N.E. 3d 770 (Ind. App. 2021).** William Zartman Jr. ("William Jr.") and Marilyn Zartman were married and had three children: William III, Brenda, and Paul. William Jr. and Marilyn

owned a 303-acre farm in Miami County and Fulton County. In 1980, William Jr. and Marilyn established the William Zartman Jr. Revocable Trust ("William Jr.'s Trust") and the Marilyn Zartman Revocable Trust ("Marilyn's Trust"). In 1993, William Jr. and Marilyn executed First Amendments to both trusts. This appeal concerns only Marilyn's Trust. This is the second appeal in this matter. The parties only have the first and last pages of Marilyn's Trust and were unable to locate a copy of the First Amendment to her Trust. William Jr. and Marilyn showed the First Amendment of their respective trusts to Paul shortly after the documents were signed. Paul read the documents, which were identical except for the names of the trusts, signatures, and the pronouns used in the documents. Paul saw the documents again in 2009. In a deposition, William III testified that the First Amendment of William Jr.'s Trust and the First Amendment of Marilyn's Trust were identical except for the names. By 2003, each trust owned a one-quarter interest in the farm, and William III and his wife, Kim, owned a one-half interest in the farm. Marilyn died in August 2004, and William Jr. died in February 2010. In March 2011, William III, as trustee of Marilyn's Trust, conveyed Marilyn's Trust's one-quarter interest in the farm to himself and his wife, Kim, as tenants in common. In the trustee's deeds, William III warranted that he was appointed the successor trustee under the trust and that, under the trust agreements, he had the "full power to execute" the trustee's deeds. William III and Kim immediately transferred the one-quarter interest in the farm to Zartman Farms, of which William III and Kim are member managers. William III and Kim warranted as Grantors in the deeds that they were lawfully seized of said land in fee simple; and that they had good right and lawful authority to sell and convey said land. The other family members filed a motion for summary judgment and argued, in part, that the March 2011 deeds conveying Marilyn's Trust's one-quarter interest in the farm to William

III and Kim were void. In February 2018, the trial court denied the motion for summary judgment. The trial court determined that the content of Marilyn's Trust had to be resolved by a jury. The jury returned a verdict For William III and the siblings filed the first appeal. On remand after the first appeal, it was determined that upon Marilyn's death, William Jr. and William III became co-trustees of Marilyn's Trust. Upon the death of William Jr., William III and Brenda became the co-trustees of Marilyn's Trust. Therefore, William III's transfer of Marilyn's Trust's interest in the farm to himself and his wife violated IC 30-4- 3-4 because the power to transfer property was required to be exercised by the co- trustees jointly. The Trustee's Deeds dated March 14, 2011, were therefore null and void. On remand the trial court: (1) determined the content of Marilyn's Trust; (2) determined that William III committed breach of trust by transferring the property to himself; (3) voided the transfer of property; (4) ordered William III to pay for lost income to the trust; and (5) ordered William III to pay Appellees' attorney's fees. The trial court ordered the payment of $134,799.98 in lost income for 2011 to 2019. The trial court then ordered William III to pay reasonable attorney fees in the amount of $110,000.00 as a result of his breach of trust as authorized by IC 30-4-3-22(e), William III appealed that decision.

The Court of Appeals affirmed. The opinion contains a review of Indiana law on breach of trust and remedies for breach of trust. The Court reasoned that given the extraordinarily lengthy litigation, which involved complex issues, two summary judgment proceedings, a jury trial, and two appeals, it could not say that the trial court abused its discretion when it awarded Appellees $110,000.00 in attorney's fees. Further, the trial court

properly granted summary judgment to Appellees, voided the deeds at issue here, ordered Appellants to pay lost profits, and ordered William III to pay Appellees' attorney's fees.

## III. GUARDIANSHIPS

### A. SENATE ENROLLED ACT 276 -- POWERS OF GUARDIAN AFTER DEATH.

Senate Enrolled Act 276, effective July 1, 2021, authorizes certain guardians to make certain arrangements and control the disposition of a decedent's body after the death of a protected person.

### B. HOUSE ENROLLED ACT 1252 - GUARDIANSHIP – CLAIMS – PRIORITY.

House Enrolled Act 1252, effective July 1, 2021, revises subsection (e) of IC 29-3-12-1, so that if a guardianship of the property terminates as result of the death of the protected person, and if the probate court authorizes the guardian to spend or distribute the remaining guardianship property to pay final expenses (instead of transferring those remaining assets to the deceased protected person's estate, the order in which expenses and claims must be paid is consistent with the Probate Code's priorities in IC 29-1-14-9. On the Senate side, the specific wording of the amendments to subsection (e) were the result of successful negotiations between Jeff R. Hawkins and the Indiana Attorney General's Office.

### C. SENATE ENROLLED ACT 259 – PARENTS WITH DISABILITIES.

Senate Enrolled Act 259, effective July 1, 2021, specifies that it is the policy of the state to recognize the parenting rights of a parent regardless of whether the parent has a disability. It provides that the right of a person with a disability to parent the person's child may not be denied or restricted solely because the person has a disability. It provides that (1) a court, in: (A) considering the appointment of a person as a guardian; (B) hearing an action to modify

custody or an action to determine or modify parenting time; or (C) determining whether to grant a petition for adoption; and (2) the department of child services, in determining whether to grant a person a license to operate a foster family home; may not discriminate against, and shall take into consideration the provision of reasonable accommodations to, a person with a disability.

**D. GUARDIAN – POWERS AFTER DEATH – CHECK – ESTATE PLANNING. *In re Donnell Lee Roberts,* 169 N.E. 3d 148 (Ind. App. 2021)**. Frady and Roberts were longtime friends. They opened a joint checking account with Greenfield Banking Company ("Greenfield Bank"). Several months later, Frady petitioned for appointment as guardian over the person and estate of Roberts with Roberts consent. Merrill Lynch issued Roberts a required minimum distribution check ("RMD Check") from his Individual Retirement Rollover Account in the amount of $145,754.33.

After Roberts received the RMD Check, he prepared a deposit ticket, and gave the check and the deposit slip to Frady. Before Frady and Roberts could get to the bank that week Roberts passed away. Frady deposited the RMD Check in the joint Greenfield Bank account on the same day that Roberts died. Roberts died intestate, but Roberts and his attorney discussed writing a will in which Roberts intended to leave almost everything to Frady. However, the attorney never drafted anything for Roberts. An Estate was opened for Roberts, and his nephew was appointed as Personal Representative. Frady submitted a final accounting in the guardianship and a petition to approve the final accounting. The Estate filed objections to the final accounting in the guardianship, including an objection to the deposit of the RMD Check after Roberts' death, claiming that the RMD Check became an

asset of the Estate when Roberts died. Nearly a year after Roberts' death, Frady filed a request for authority to exercise estate planning powers: the first requested authority to change the beneficiary designation on a Merrill Lynch bank account containing over $700,000; and for authority to make gifts on behalf of Roberts. The following day, without holding a hearing, the trial court denied both petitions. The trial court held a hearing on the petition to approve the final accounting and the Estate's objections. The trial court concluded, in part, that: "The RMD Check was received by [Roberts] prior to his death, and Merrill Lynch reflected the RMD Check funds as having been withdrawn from the Merrill Lynch IRRA on November 17, 2017. The Guardian Final Accounting also reflects the disbursement of the RMD Check funds on November 17, 2017, from the Merrill Lynch IRA, and the corresponding addition to the Greenfield Bank Account ending in 1415 on November 22, 2017. Frady testified at the hearing that Roberts had not endorsed the check at the time of his death. The RMD Check funds became an asset of the Estate at the time of Roberts's passing, and Frady as guardian was required to deliver the RMD Check to the representative of the Estate, pursuant to IC 29-3-12-1(e)(1) (B)." Frady appealed arguing that the deposit of the check was valid and that the trial court should have held a hearing on estate planning for Roberts.

The Court of Appeals reversed, in part, affirmed, in part, and remanded. It held that even though a Guardian's powers cease upon the protected person's death, the guardian may "exercise other powers that are necessary to complete the performance of the guardian's trust." IC 29-3-12-1(e) (1)(A). The Court found that the record was clear that Roberts gave Frady the RMD check to be deposited in the Greenfield Bank account. The fact that the

account was jointly owned by Roberts and Frady was a coincidence and did not negate the fact that depositing the check constituted the completion, as guardian, of a task entrusted to him. The Court concluded that Frady depositing a check as instructed after the death of Roberts falls within the purview of IC 29-3-12-1(e)(1)(A). Therefore, the trial court erred in sustaining the Estate's objection regarding the RMD check. As to estate planning for Roberts, the Court held that upon Roberts' death and the termination of the guardianship, the guardian's ability to estate plan does not constitute an action necessary to "complete the performance of the guardian's trust." The court concluded that the trial court was not required to hold a hearing prior to dismissing Frady's petition to exercise estate planning.

**E. GUARDIAN – GRANDPARENT VISITATION. *Welbourne v. Mays,* 165 N.E. 3d 117 (Ind. App. 2021).** Lori Welbourne and her husband Daniel became guardians of M.N.M., Lori's grandchild because of the parent's drug usage. The father of the grandchild consented to the guardianship and the mother's whereabouts were unknown. May, the paternal grandmother, requested grandparent visitation. The order granted visitation by agreement of the guardians and aunt, and the grandmother requesting visitation. If there was a dispute, the court would revisit the issue. A dispute soon arose. The father of the child was not to see the child without supervised visitation. It appears the paternal grandmother was using visitation to take the child to visit the father. With the dispute back in court, the paternal grandmother requested bi-weekly overnight visitations. The guardians resisted believing the grandmother to be untruthful. The trial court issued an order granting the paternal grandmother visitation six weekends per year, one week per summer and twelve hours in proximity to child's birthday and Christmas. The guardians appealed.

The Court of Appeals did not affirm or reverse but simply remanded, finding that the trial court had not made sufficient findings of facts to support its order of visitation. The Court of Appeals relied on the U.S. Supreme Court case of Troxle v. Grandville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2nd 49(2000) which set out four factors that any order of grandparent visitation should address.

**F. GUARDIAN – MOTHER'S VISITATION. *Prater v. Wineland,* 160 N.E. 3d 540 (Ind. App. 2020).** Prater is the Mother of an eleven-year-old daughter, R.W., who is under guardianship with her paternal grandparents, the Winelands. In 2016, Mother, who was incarcerated, wrote the trial court that Grandparents had not allowed her to speak on the phone with R.W. Mother, who had been attending parenting classes and A.A. meetings, informed the trial court that she was being released from jail on December 1, 2016. She asked the trial court to schedule a hearing on visitation. A hearing was scheduled in October 2016. However, the Grandparents' made numerous requests for continuances, and the hearing was not held until May 2017. Following the hearing, the trial court declined modification of the guardianship order. In August 2017, Mother sent the trial court another letter requesting visitation with R.W. because she had not seen her daughter in eight months, and Grandparents were not returning calls or texts. Mother was again incarcerated and so the trial court took no action on Mother's request. Mother sent the trial court additional letters in 2018 and 2019 requesting contact with R.W. She asked the court to review her requests. In June 2019, Mother, who was then incarcerated in the Department of Correction, asked the trial court to please have a court hearing to at least give her a chance. The trial court took no action. In March 2020, Mother filed a pro se petition for visitation. The trial court summarily

denied the petition without a hearing, finding that the guardians may decide what is best for the child. Mother appealed.

The Court of Appeals reversed and remanded. It noted that Indiana has long recognized that the rights of parents to visit their children is a precious privilege that should be enjoyed by noncustodial parents. Patton v. Patton, 48 N.E.3d 17, 21 (Ind. App. 2015) (quoting Duncan v. Duncan, 843 N.E.2d 966, 969 (Ind. App.2006), trans. denied). Indiana Code 31-17-4-1 specifically provides that "a parent not granted custody of the child is entitled to reasonable parenting time rights, unless the court finds, after a hearing, that parenting time by the noncustodial parent might endanger the child's physical health or significantly impair the child's emotional development." The Court of Appeals held that the trial court erred when it denied Mother's visitation petition without a hearing. The Court further noted that "in Manis v. McNabb, 104 N.E.3d 611, 621 (Ind. App. 2018), this Court held that "a trial court has the authority to determine whether parenting time is warranted and order reasonable parenting time for a parent whose child is placed with a guardian." In that case, the Court of Appeal also held that when a trial court orders parenting time in a guardianship, it cannot allow the guardian to determine the parent's parenting time with her child during the course of the guardianship as it would have the potential to deprive the parent and child of time together and an opportunity to develop a meaningful relationship.

**G. GUARDIAN – TEMPORARY – MARRIAGE.** ***Estate of Moster v. Deschand,*** **158 N.E. 3d 775 (Ind. App. 2020)**. On November 30, 2012, Voltz, one of Donald L. Moster's, Sr. ("Donald") daughters, filed a Verified Emergency Petition for Emergency Guardianship over Donald. The Petition stated that the Protected Person was

physically and mentally disabled and unable to provide for his care. It stated that Donald had been diagnosed with Parkinson's Disease resulting in dementia and memory loss. The Petition listed Donald's residence as being in Noblesville and stated that he had left Indiana and has been in Illinois for two weeks. The Petition sought emergency relief without a hearing or notice to Donald, alleging that there would be immediate and irreparable injury to the protected person because he was not receiving adequate medical care, did not have his anti-psychotic medication and was not receiving his insulin. A physician's report was attached stating that Donald was incapacitated by his psychosis. The same day the Petition was filed the Court issued an order appointing Voltz as an emergency temporary guardian over Donald and his estate. On January 10, 2013, Donald filed a motion to terminate the temporary guardianship. He filed a report from an Illinois physician, dated December 5, 2012, which concluded that the patient is competent to understand the decisions he makes and the consequences thereof. On February 6, 2013, the trial court issued an order affirming the appointment of a temporary guardian. On March 2, 2013, Donald married Rose M. Deschand ("Rose") in Illinois. March 4, 2013, Donald filed a "Motion for Order Clarifying Term of Appointment of Temporary Guardian," stating that under 29-3-3-4(a)(4), the order was to have been for a specified period not to exceed ninety (90) days' and that the ninety days ran on February 28, 2013, at which time, by operation of law, the temporary guardianship terminated. On March 6, 2013, Donald was examined by another physician but with the assistance of a sign language interpreter. That examination reported Donald's Mini-Mental Status examination score as 29/30, ruling out any significant cognitive problems. Thereafter, Donald filed a "Motion to Compel Delivery of Property and Petition for Contempt and for Sanctions," stating that Voltz closed bank accounts containing assets

belonging to Donald and had two cashier's checks issued in her own name. An entry was made on the Guardianship docket that the temporary guardianship expired and ordering Voltz to file her final report and accounting within thirty days. Voltz filed her final accounting and the parties filed a stipulation of dismissal, reporting to the court that they reached a mediated settlement agreement. The mediated settlement agreement, signed by each of Donald's children, acknowledged that Donald was married to Rose and required that all of Donald's real and personal property be placed in a revocable trust to be maintained and managed for the benefit of Donald during his lifetime, and upon his death, would pass to Donald's children in accordance with Donald's will. The Guardianship was dismissed without the appointment of a permanent guardian, and the mediated settlement agreement was not filed with the court. Donald remained married to Rose up until his death. Upon Donald's death, Rose petitioned to be appointed personal representative of Donald's estate. The trial court issued an order appointing Rose and ordering supervised administration of Donald's estate. Months later, Voltz filed her petition to probate Donald's Last Will and Testament and to be appointed personal representative. The trial court granted Voltz's petition and appointed her as successor personal representative. She then filed a motion to void the marriage of Rose and Donald. The trial court held a hearing on Voltz's motion and denied the motion to void the marriage. Voltz filed a motion for leave to file an interlocutory appeal, which the trial court granted.

The Court of Appeals affirmed. Voltz argued that the trial court erred in denying her motion to void the marriage. Voltz maintains that the trial court found Donald to be incapacitated on November 30, 2012 when the temporary guardianship was granted and

reaffirmed that finding on February 5, 2013 when it denied Donald's motion to terminate the guardianship and that there was no further event that changed the court's determination. The Court of Appeals first noted that marriage is a civil contract, the validity of which may be challenged in court. In re Estate of Holt, 870 N.E.2d 511, 514 (Ind. Ct. App. 2007), trans. denied. IC 31-11-8-4 provides: "A marriage is void if either party to the marriage was mentally incompetent when the marriage was solemnized. The burden rests upon the challenger to prove that a party was incapable of understanding the nature of the marriage contract." Id. 'The presumption in favor of the validity of a marriage consummated according to the forms of law is one of the strongest known.' " Id. (quoting Bruns v. Cope, 182 Ind. 289, 105 N.E. 471, 473 (1914), overruled in part on other grounds by Nat'l City Bank of Evansville v. Bledsoe, 237 Ind. 130, 144 N.E.2d 710 (1957)). In reaching its decision the Court reasoned that the temporary guardianship was done ex parte and without a hearing or notice to Donald. The order was issued based exclusively on Voltz's allegations in the Guardianship Petition and the attached physician's report, which was done without a sign language interpreter, and the physician relied heavily upon statements made by Voltz. Under IC 29-3-3-4, the temporary guardianship over Donald expired after ninety days as a matter of law. Therefore, the temporary guardianship expired on March 1, 2013. At no point in the proceedings was there a motion to extend or renew the temporary guardianship and the accompanying finding of incapacity or an order extending or renewing the same. Therefore, the temporary guardianship expired on March 1, 2013 as did the finding of incapacity. The trial court found that there was insufficient evidence of a lack of physical and mental capacity of Donald to void his marriage to Rose. This finding is bolstered by the fact that no one pursued any legal proceeding to void the marriage prior to Donald's death. Further,

evidence presented during the proceedings, including a psychiatric evaluation of Donald and a neurological examination conducted on March 6, 2013, contained no finding or opinion that Donald was either physically or mentally incapacitated, and these examinations also contained statements by Donald that contradicted allegations in the Guardianship Petition that was filed by Voltz. Therefore, the trial court did not err when it denied Voltz's motion to void the marriage between Rose and Donald.

## IV. ADVANCE DIRECTIVES AND NON-PROBATE PLANNING

**A. SENATE ENROLLED ACT 204 – HEALTH CARE DIRECTIVES**. The provisions of Senate Enrolled Act 204 effective July 1, 2021, create a new single type of health care advance directive for the purpose of (1) appointing one or more health care representatives and/or (2) stating specific instructions, wishes, and/or treatment preferences, and includes some of the following changes:

1. A competent individual who signs a new-style advance directive is a "declarant" under new IC 16-36-7, and the surrogate decision maker who is named in an is a "health care representative." IC 16-36-7-4 and 13.
2. IC 16-36-7-28 specifies the permitted content and functions of the new advance directive. Now declarants can include in the new form statements of specific instructions, wishes and treatment preferences.
3. New and improved definitions for numerous terms are included in IC 16-36-7.
4. Clarity is provided by stating a declarant that is not incapacitated retains authority over decisions as opposed to the health care representative or any specific treatment preferences or instructions stated in the health care form. IC

16-36-7-27(e), IC 16-36-7-32(a), IC 16-36-7-34(11), IC 16-36-7-35(b), and IC 16-36-7-36(a).

5. Specific treatment preferences or instructions in the advance directive supercedes any oral instructions by the declarant. IC 16-36-7-27(g).
6. The advance directive may be signed electronically or on paper, and must contain:
    a. The signatures of two adult witnesses, at least one of whom is not the spouse or other relative of the declarant. IC 16-36-7-28(b)(1) and (c)(1); or
    b. Signing or acknowledgement by the declarant in the presence of a notarial officer, including any method of remote on-line notarization that satisfies the requirements for remote notarial acts. IC 16-36-7-28(b)(1) and (c)(2).
7. IC 16-36-7-28 explicitly permits a competent declarant to accomplish the signing and witnessing of a valid advance directive when necessary by two additional methods other than electronic witnessing: (a) declarants and witnesses being able to sign in separate counterparts, so long certain steps are taken, and (b) declarants and witnesses being able to us telephonic/audio interaction if the witnesses have verified the declarant's identity and capacity to consent.

**B. HOUSE ENROLLED ACT 1255 – POWER OF ATTORNEY – EXECUTION**. The following are main changes made by HEA 1255 to IC 30-5. Sections 16 through 21 of HEA 1255 are effective upon passage and apply to durable powers of attorney signed on paper on or after March 31, 2020 using the signatures of two or more attesting witnesses instead of a notarized acknowledgement. The public policy objective is to permit a

competent principal to sign a durable POA with two witnesses if it is logistically too difficult to arrange for the principal to interact with a notary public or other notarial officer.

The following are the changes that HEA 1255 makes in the Power of Attorney Act effective April 29, 2021, relating to traditional paper POAs:

1. New IC 30-5-4-1.3 defines which persons are treated as "having an interest in the power of attorney" and who therefore cannot act as attesting witnesses.
2. New IC 30-5-4-1.5 specifies the signing procedures when a durable POA is signed on paper with two attesting witnesses instead of notarization, either with or without "signing in counterparts."
3. If the POA will be signed in paper counterparts with 2 attesting witnesses, subsection (d) of new IC 30-5-4-1.5 requires that an attorney or a directed paralegal supervise the signing and requires that the supervising attorney or paralegal make and keep an "affidavit of compliance" with content specified in subsection (e).
4. New IC 30-5-4-1.7 specifies the content of two optional self-proving clauses that can be included in a durable POA that is signed on paper with two attesting witnesses or signed and attached to the POA later. Subsections 1.7(d) and (e) state the content of a self-proving clause to use when the POA is not signed and witnessed in separate counterparts. Subsection (f) states the content of the self-proving clause that should be used when the POA is signed and witnessed on paper in separate counterparts.

5. New IC 30-5-4-1.9 explicitly makes photographs and audio and/or video recordings of POA signings admissible in evidence to show validity and compliance with signing formalities.

The following are the changes that HEA 1255 makes in the Power of Attorney Act effective April 29, 2021, relating to electronic POAs:

6. For durable POAs that are signed electronically, HEA 1255 adds definitions of "observe" and "observing" to IC 30-5-11- 3, so that real-time two-way interaction using audiovisual technology can be used by the principal and by the notary or the witnesses to satisfy the "in the presence" requirement.
7. For electronic powers of attorney, HEA 1255 amends IC 30-5-11-4 to permit either electronic signing in the presence of a notary or electronic signing in the "presence" of two witnesses.
8. Sections 25 through 28 of HEA 1255 add four new sections (4.3, 4.5, 4.7, and 4.9) to the electronic POAs chapter, which are analogous in purpose and content to the new sections described above for durable POAs signed on paper.
9. New IC 30-5-11-4.3 defines which persons are treated as "having an interest in the electronic power of attorney" and who therefore cannot act as attesting witnesses.
10. New IC 30-5-11-4.5 specifies the signing procedures when POA is signed electronically with two attesting witnesses instead of notarization.
11. If the durable POA will be signed electronically with 2 attesting witnesses who use technology to interact with the principal, subsection (d) of new IC 30-5-11-4.5 requires that an attorney or a directed paralegal supervise the signing and

requires that the supervising attorney or paralegal make and keep an "affidavit of compliance" with content specified in subsection (e).

12. New IC 30-5-11-4.7 specifies the content of the optional self-proving clause that can be included in an electronic POA that is signed on paper with two attesting witnesses or signed and attached to the electronic POA later. Subsections 4.7(d) and (e) state the content of a self-proving clause for use when the electronic POA is signed and witnessed with direct presence among the principal and the witnesses or when the principal and witnesses use technology to interact and to satisfy the "presence" requirement.
13. New IC 30-5-11-4.9 explicitly makes photographs and audio and/or video recordings of electronic POA signings admissible in evidence to show validity and compliance with signing formalities.
14. New IC 30-5-11-4.1 applies to any electronic POA that is signed and notarized on or after March 31, 2020 and on or before January 1, 2022. If such an electronic POA was electronically notarized using audiovisual technology that allowed the notary to positively identify the principal or someone signing at the principal's direction, and if the electronic POA complied with the other requirements of IC 30-5-11-4, then the electronic POA must be treated as executed in compliance with chapter 30-5-11, even if the methods used for electronic notarization technically did not comply with other legal requirements in effect in 2020.

**C. TRANSFER ON DEATH CONVEYANCES.** Finally, and for transfers or registrations of tangible personal property in TOD beneficiary form on or after the date of

enactment [in late April or early May, 2021], HEA 1255 amends IC 32-17-14-12 so that a deed of gift, bill of sale, or other document used to designate the "owner" and the TOD beneficiaries can be signed in the presence of a disinterested witness instead of with a notarized acknowledgement. New subsection (d) defines "disinterested witness."

**D. JOINT ACCOUNT – CLOSE – OWNERSHIP. *Solomon v. Lindsey,* 163 N.E. 3d 302 (Ind. App. 2020)**. In 1998, Martin invested $50,000 with Rydex. The application listed Paul J. Martin as owner and his daughter, Lia J. Lindsey, as joint owner with right of survivorship. Lindsey did not contribute any funds to the account but both she and her father signed the application. The Rydex account was retitled with Guggenheim. The account was always owned by "Paul J. Martin or Lia J. Lindsey" as joint tenants with right of survivorship. In 2018, Solomon, Martin's wife, called Guggenheim and requested that all funds in the joint account be withdrawn and the account closed. Solomon did most of the talking, but Martin gave his consent. The Guggenheim representative gave Solomon a confirmation number to confirm the actual redemption. Martin died three days later on July 9, 2018. On the day of Martin's death, Guggenheim issued a check to "Paul J. Martin or Lia J. Lindsey" in the amount of $351,878.68. Solomon was appointed personal representative of Martin's estate. On August 20, 2018, Solomon, as PR, endorsed the check and deposited it into the Estate account. Approximately 45 days later, Lindsey contacted Guggenheim and learned about Martin's request and the check. Lindsey filed a Verified Complaint to Recover Property Transfer, naming Solomon in both her individual and representative capacities, seeking recovery of $351,878.68. After Solomon filed an answer, Lindsey filed a motion for summary judgment, alleging that she was the surviving party to the joint account and the proceeds are hers by operation of law. The trial court entered an order granting summary

judgment to Lindsey and directing that the funds be immediately paid to Lindsey. The trial court reasoned that Martin did not follow the statutory procedure to close a joint account and on his date of his death the funds remined in a joint account with Lindsey. Solomon appealed.

The Court of Appeals affirmed. Solomon PR first claimed that the trial court erred in applying Indiana law to this case, arguing that the Guggenheim accounts are located in Maryland and Maryland law applied. The Court of Appeals noted that the choice of law for contract and tort cases is the law of the place where the breach or wrong took place or the place with the most contacts. It held that Indiana law applied. Martin lived in Indiana, the paperwork was signed in Indiana and the statements were mailed to Indiana. The Court reviewed IC 32-17-11-18(a) which defines ownership of a joint account upon death and states that "[s]ums remaining on deposit at the death of a party to a joint account belong to the surviving party ... as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created." There is a presumption that a survivor to a joint account is the intended recipient of the proceeds in the account. The Court found that the fact that Martin withdrew all the funds does not overcome the presumption that Lindsey, named a joint owner with rights of survivorship when the account was created, was the intended recipient of the proceeds in the account because Martin did not communicate to Guggenheim in writing that his intent had changed. IC 32-17-11- 19 states that the "provisions of section 18 ... as to rights of survivorship are determined by the form of the account at the death of a party." When Martin died, the form of the account was a joint account with rights of survivorship in Lindsey. Until the check was

cashed, the funds retained their original characteristic as sums on deposit in a joint account with rights of survivorship. The fact that the check was made out to Martin or Lindsey on a joint account did not strip the account of its survivorship rights.

First Regular Session of the 122nd General Assembly (2021)



# HOUSE ENROLLED ACT No. 1255

AN ACT to amend the Indiana Code concerning probate.

*Be it enacted by the General Assembly of the State of Indiana:*

SECTION 1. IC 29-1-1-3, AS AMENDED BY P.L.231-2019, SECTION 5, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 3. (a) The following definitions apply throughout this article, unless otherwise apparent from the context:

(1) "Child" includes an adopted child or a child that is in gestation before the death of a deceased parent and born within forty-three (43) weeks after the death of that parent. The term does not include a grandchild or other more remote descendants, nor, except as provided in IC 29-1-2-7, a child born out of wedlock.

(2) "Claimant" means a person having a claim against the decedent's estate as described in IC 29-1-14-1(a).

(3) "Claims" includes liabilities of a decedent which survive, whether arising in contract or in tort or otherwise, expenses of administration, and all taxes imposed by reason of the person's death. However, for purposes of IC 29-1-2-1 and IC 29-1-3-1, the term does not include taxes imposed by reason of the person's death.

(4) "Court" means the court having probate jurisdiction.

(5) "Decedent" means one who dies testate or intestate.

(6) "Devise" or "legacy", when used as a noun, means a testamentary disposition of either real or personal property or both.





(7) "Devise", when used as a verb, means to dispose of either real or personal property or both by will.

(8) "Devisee" includes legatee, and "legatee" includes devisee.

**(9) "Directed paralegal" means a nonlawyer assistant who is employed, retained, or otherwise associated with a licensed attorney or law firm and whose work is directly supervised by a licensed attorney, as required by Rule 5.3 of the Rules of Professional Conduct.**

~~(9)~~ **(10)** "Distributee" denotes those persons who are entitled to the real and personal property of a decedent under a will, under the statutes of intestate succession, or under IC 29-1-4-1.

~~(10)~~ **(11)** "Estate" denotes the real and personal property of the decedent or protected person, as from time to time changed in form by sale, reinvestment, or otherwise, and augmented by any accretions and additions thereto and substitutions therefor and diminished by any decreases and distributions therefrom.

~~(11)~~ **(12)** "Expenses of administration" includes expenses incurred by or on behalf of a decedent's estate in the collection of assets, the payment of debts, and the distribution of property to the persons entitled to the property, including funeral expenses, expenses of a tombstone, expenses incurred in the disposition of the decedent's body, executor's commissions, attorney's fees, and miscellaneous expenses.

~~(12)~~ **(13)** "Fiduciary" includes a:

(A) personal representative;

(B) guardian;

(C) conservator;

(D) trustee; and

(E) person designated in a protective order to act on behalf of a protected person.

~~(13)~~ **(14)** "Heirs" denotes those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the real and personal property of a decedent on the decedent's death intestate, unless otherwise defined or limited by the will.

**(15) For purposes of IC 29-1-5, and with respect to testators and attesting witnesses, "in the presence of" has the meaning set forth in subdivision (16).**

**(16) For purposes of IC 29-1-5, and with respect to testators and attesting witnesses, "presence" means a process of signing and witnessing in which:**

**(A) the testator and witness are:**

**(i) directly present with each other in the same physical**

**space; or**

**(ii) able to interact with each other in real time through use of any audiovisual communications technology now known or later developed;**

**(B) the testator and witness are able to positively identify each other; and**

**(C) each witness is able to interact with the testator and with each other by observing:**

**(i) the testator's expression of intent to make a will;**

**(ii) the testator's actions in executing or directing the execution of the testator's will; and**

**(iii) the actions of other witnesses when signing the will.**

**The term includes the use of technology or learned skills for the purpose of assisting with hearing, eyesight, and speech, or for the purpose of compensating for a hearing, eyesight, or speech impairment.**

~~(14)~~ **(17)** "Incapacitated" has the meaning set forth in IC 29-3-1-7.5.

~~(15)~~ **(18)** "Interested persons" means heirs, devisees, spouses, creditors, or any others having a property right in or claim against the estate of a decedent being administered. This meaning may vary at different stages and different parts of a proceeding and must be determined according to the particular purpose and matter involved.

~~(16)~~ **(19)** "Issue" of a person, when used to refer to persons who take by intestate succession, includes all lawful lineal descendants except those who are lineal descendants of living lineal descendants of the intestate.

~~(17)~~ **(20)** "Lease" includes an oil and gas lease or other mineral lease.

~~(18)~~ **(21)** "Letters" includes letters testamentary, letters of administration, and letters of guardianship.

~~(19)~~ **(22)** "Minor" or "minor child" or "minority" refers to any person under the age of eighteen (18) years.

~~(20)~~ **(23)** "Mortgage" includes deed of trust, vendor's lien, and chattel mortgage.

~~(21)~~ **(24)** "Net estate" refers to the real and personal property of a decedent less the allowances provided under IC 29-1-4-1 and enforceable claims against the estate.

~~(22)~~ **(25)** "No contest provision" refers to a provision of a will that, if given effect, would reduce or eliminate the interest of a beneficiary of the will who, directly or indirectly, initiates or





otherwise pursues:

(A) an action to contest the admissibility or validity of the will;

(B) an action to set aside a term of the will; or

(C) any other act to frustrate or defeat the testator's intent as expressed in the terms of the will.

**(26) "Observe" means to perceive another's actions or expressions of intent through the senses of eyesight or hearing, or both. The term includes perceptions involving the use of technology or learned skills to:**

**(A) assist the person's capabilities of eyesight or hearing, or both; or**

**(B) compensate for an impairment of the person's capabilities of eyesight or hearing, or both.**

**(27) "Observing" has the meaning set forth in subdivision (26).**

~~(23)~~ **(28)** "Person" means:

(A) an individual;

(B) a corporation;

(C) a trust;

(D) a limited liability company;

(E) a partnership;

(F) a business trust;

(G) an estate;

(H) an association;

(I) a joint venture;

(J) a government or political subdivision;

(K) an agency;

(L) an instrumentality; or

(M) any other legal or commercial entity.

~~(24)~~ **(29)** "Personal property" includes interests in goods, money, choses in action, evidences of debt, and chattels real.

~~(25)~~ **(30)** "Personal representative" includes executor, administrator, administrator with the will annexed, administrator de bonis non, and special administrator.

~~(26)~~ **(31)** "Petition for administration" means a petition filed under IC 29-1-7-5 for the:

(A) probate of a will and for issuance of letters testamentary;

(B) appointment of an administrator with the will annexed; or

(C) appointment of an administrator.

~~(27)~~ **(32)** "Probate estate" denotes the property transferred at the death of a decedent under the decedent's will or under IC 29-1-2, in the case of a decedent dying intestate.

~~(28)~~ **(33)** "Property" includes both real and personal property.

~~(29)~~ **(34)** "Protected person" has the meaning set forth in IC 29-3-1-13.

~~(30)~~ **(35)** "Real property" includes estates and interests in land, corporeal or incorporeal, legal or equitable, other than chattels real.

~~(31)~~ **(36)** "Unit" means the estate recovery unit of the office of Medicaid policy and planning established under IC 12-8-6.5-1.

~~(32)~~ **(37)** "Unit address" means the unit's mailing address that appears on the unit's Internet web site.

~~(33)~~ **(38)** "Will" includes all wills, testaments, and codicils. The term also includes a testamentary instrument which merely appoints an executor or revokes or revives another will.

(b) The following rules of construction apply throughout this article unless otherwise apparent from the context:

(1) The singular number includes the plural and the plural number includes the singular.

(2) The masculine gender includes the feminine and neuter.

SECTION 2. IC 29-1-5-3 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 3. (a) This section applies to a will executed before, on, or after July 1, 2003. A will, other than a nuncupative will, must be executed by the signature of the testator and of at least two (2) witnesses on:

(1) a will under subsection (b);

(2) a self-proving clause under section 3.1(c) of this chapter; or

(3) a self-proving clause under section 3.1(d) of this chapter.

(b) A will may be attested as follows:

(1) The testator, in the presence of two (2) or more attesting witnesses, shall signify to the witnesses that the instrument is the testator's will and either:

(A) sign the will;

(B) acknowledge the testator's signature already made; or

(C) at the testator's direction and in the testator's presence have someone else sign the testator's name.

(2) The attesting witnesses must sign in the presence of the testator and each other.

An attestation or self-proving clause is not required under this subsection for a valid will.

**(c) Under the supervision of an attorney or directed paralegal, the testator and the witnesses may execute and complete the will in two (2) or more original counterparts that exist in a tangible and readable paper form with:**





**(1) the testator's signature placed on one (1) original counterpart in the presence of attesting witnesses; and**

**(2) the signatures of the witnesses placed on one (1) or more different counterparts of the same will;**

**in a tangible and readable paper form. If a will is signed and witnessed in counterparts under this subsection, the testator or an individual acting at the testator's specific direction must physically assemble all of the separately signed paper counterparts of the will and the signatures of the testator and all attesting witnesses not later than five (5) business days after all the paper counterparts have been signed by the testator and witnesses. If the testator directs another individual to assemble the separate, signed paper counterparts of the will into a single composite paper document, the five (5) business day period does not commence until the compiling individual receives all of the separately signed paper counterparts. Any scanned copy or photocopy of the composite document containing all signatures shall be treated as validly signed under this section and may be electronically filed to offer the will for probate under IC 29-1-7. If the testator dies after executing a will under this subsection but before the separate counterparts are assembled into a single composite paper document, the intervening death of the testator shall not affect the validity of the will.**

**(d) An attorney or directed paralegal must supervise the execution of a will that is signed and witnessed in counterparts as described in subsection (c). An attorney or directed paralegal may supervise the execution of a will in counterparts even if the supervising attorney or directed paralegal is one (1) of the will's attesting witnesses. When an attorney or directed paralegal supervises the execution of a will in counterparts as described in subsection (c), the attorney or directed paralegal must sign, date, and complete an affidavit of compliance within a reasonable time after all paper counterparts of the will have been signed by the testator and the witnesses. An affidavit of compliance under this subsection must be sworn or affirmed by the signing attorney or directed paralegal under the penalties of perjury and must contain the following information:**

**(1) The name and residence address of the testator.**

**(2) The name and:**

**(A) residential address; or**

**(B) business address;**

**for each witness who signs the will.**

**(3) The address, city, and state in which the testator was physically located at the time the testator signed an original counterpart of the will.**

**(4) The city and state in which each attesting witness was physically located when the witness signed an original counterpart of the will as a witness.**

**(5) A description of the method and form of identification used to confirm the identity of the testator to the witnesses and to the supervising attorney or directed paralegal, as applicable.**

**(6) A description of the audiovisual technology or other method used by the supervising attorney or paralegal, as applicable, the testator, and the witnesses for the purpose of interacting with each other in real time during the signing process.**

**(7) A description of the method used by the testator and the witnesses to identify the location of each page break within the text of the will and to confirm that the separate paper counterparts of the will were identical in content.**

**(8) A general description of how and when the attorney or paralegal, as applicable, physically combined the separate, signed paper counterparts of the will into a single composite paper document containing the will, the signature of the testator, and the signatures of all attesting witnesses.**

**(9) The name, business or residence address, and telephone number of the attorney or directed paralegal who supervised the execution and witnessing of the will in counterparts.**

**(10) Any other information that the supervising attorney or directed paralegal, as applicable, considers to be material with respect to:**

**(A) the testator's capacity to sign a valid will; and**

**(B) the testator's and witnesses' compliance with subsection (c).**

**(e) When a party files a petition under IC 29-1-7 to probate a will that was executed and witnessed in counterparts under subsection (c), the party shall file a true copy of the affidavit of compliance under subsection (d) with the petition or at any time ordered by the court. A party who files a copy of the affidavit of compliance may redact private information from the affidavit in a manner consistent with Rule 5 of the Indiana Rules on Access to Court Records. If a will is executed and witnessed in counterparts under subsection (c) but without the supervision of an attorney or**





**directed paralegal and that will is later offered for probate under IC 29-1-7, the will is voidable in the discretion of the court, upon objection to probate filed under IC 29-1-7-16, or upon a timely filed will contest under IC 2-29-7-17.**

~~(c)~~ **(f)** A will that is executed substantially in compliance with subsection (b) will not be rendered invalid by the existence of:

(1) an attestation or self-proving clause or other language; or

(2) additional signatures;

not required by subsection (b).

~~(d)~~ **(g)** A will executed in accordance with subsection (b) is self-proved if the witness signatures follow an attestation or self-proving clause or other declaration indicating in substance the facts set forth in section 3.1(c) or 3.1(d) of this chapter.

~~(e)~~ **(h)** This section shall be construed in favor of effectuating the testator's intent to make a valid will.

SECTION 3. IC 29-1-5-3.1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 3.1. (a) This section applies to a will executed before, on, or after July 1, 2003. When a will is executed, the will may be:

(1) attested; and

(2) made self-proving;

by incorporating into or attaching to the will a self-proving clause that meets the requirements of subsection (c) or (d). If the testator and witnesses sign a self-proving clause that meets the requirements of subsection (c) or (d) at the time the will is executed, no other signatures of the testator and witnesses are required for the will to be validly executed and self-proved.

(b) If a will is executed by the signatures of the testator and witnesses on an attestation clause under section 3(b) of this chapter, the will may be made self-proving at a later date by attaching to the will a self-proving clause signed by the testator and witnesses that meets the requirements of subsection (c) or (d).

(c) A self-proving clause must contain the acknowledgment of the will by the testator and the statements of the witnesses, each made under the laws of Indiana and evidenced by the signatures of the testator and witnesses (which may be made under the penalties for perjury) attached or annexed to the will in form and content substantially as follows:

We, the undersigned testator and the undersigned witnesses, respectively, whose names are signed to the attached or foregoing instrument declare:

(1) that the testator executed the instrument as the testator's will;

(2) that, in the presence of both witnesses, the testator signed or acknowledged the signature already made or directed another to sign for the testator in the testator's presence;

(3) that the testator executed the will as a free and voluntary act for the purposes expressed in it;

(4) that each of the witnesses, in the presence of the testator and of each other, signed the will as a witness;

(5) that the testator was of sound mind when the will was executed; and

(6) that to the best knowledge of each of the witnesses the testator was, at the time the will was executed, at least eighteen (18) years of age or was a member of the armed forces or of the merchant marine of the United States or its allies.

_____
Testator

_____ _____
Date Witness

_____
Witness

(d) A will is attested and self-proved if the will includes or has attached a clause signed by the testator and the witnesses that indicates in substance that:

(1) the testator signified that the instrument is the testator's will;

(2) in the presence of at least two (2) witnesses, the testator signed the instrument or acknowledged the testator's signature already made or directed another to sign for the testator in the testator's presence;

(3) the testator executed the instrument freely and voluntarily for the purposes expressed in it;

(4) each of the witnesses, in the testator's presence and in the presence of all other witnesses, is executing the instrument as a witness;

(5) the testator was of sound mind when the will was executed; and

(6) the testator is, to the best of the knowledge of each of the witnesses, either:

(A) at least eighteen (18) years of age; or

(B) a member of the armed forces or the merchant marine of the United States or its allies.

**(e) If the testator and the attesting witnesses executed the will in two (2) or more counterparts on paper under section 3(c) of this chapter, the self-proving clause, if applicable, for the will must**





**substantially be in the following form:**

**"We, the undersigned testator and undersigned witnesses, respectively, whose names are signed to the attached or foregoing instrument, declare the following:**

**(1) That the undersigned testator and witnesses interacted with each other in real time through the use of technology, and each witness was able to observe the testator and other witnesses throughout the signing process.**

**(2) That the testator executed a complete counterpart of the instrument, in a readable form on paper, as the testator's will.**

**(3) That, in the presence of both witnesses, the testator:**

**(A) signed the paper counterpart of the will;**

**(B) acknowledged the testator's signature already made; or**

**(C) directed another individual to sign the paper counterpart of the will for the testator in the testator's presence.**

**(4) That the testator executed the will as a free and voluntary act for the purpose expressed in the will.**

**(5) That each of the witnesses, in the presence of the testator and of each other, signed one (1) or more other complete paper counterparts of the will as a witness.**

**(6) That each paper counterpart of the will that was signed by the witness was complete, in readable form, and with content identical to the paper counterpart signed by the testator.**

**(7) That the testator was of sound mind when the will was executed.**

**(8) That, to the best knowledge of each witness, the testator was at least eighteen (18) years of age at the time the will was executed or was a member of the armed forces or of the merchant marine of the United States or its allies.".**

~~(e)~~ **(f)** This section shall be construed in favor of effectuating the testator's intent to make a valid will.

SECTION 4. IC 29-1-5-3.2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 3.2. Subject to the applicable Indiana Rules of Trial Procedure **and the Indiana Rules of Evidence,** a ~~videotape~~ **video recording, one (1) or more photographs, or an audio recording made or captured during part or all of a will's execution** may be admissible as evidence of the following:

(1) The proper execution of a will.

(2) The intentions of a testator.

(3) The mental state or capacity of a testator.



(4) The authenticity of a will.

(5) Matters that are determined by a court to be relevant to the probate of a will.

SECTION 5. IC 29-1-5-3.3 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 3.3. (a) This section applies to a will that is signed and witnessed:**

**(1) on or after March 31, 2020;**

**(2) before January 1, 2021; and**

**(3) in reliance on the Indiana supreme court's order signed and filed on March 31, 2020, under case number 20S-MS-237, or, as supplemented or extended by the supreme court's order signed and filed on May 1, 2020, under case number 20S-MS-237, and by the supreme court's orders signed and filed on May 29, 2020, and November 10, 2020, under case number 20S-CB-123.**

**(b) Notwithstanding any other law or provision, a will described in subsection (a) that was signed and witnessed in compliance with:**

**(1) the procedures and requirements set forth in the Indiana supreme court's order signed and filed on March 31, 2020, under case number 20S-MS-237, or, as supplemented or extended by the supreme court's order signed and filed on May 1, 2020, under case number 20S-MS-237 and by the supreme court's order signed and filed on November 10, 2020, under case number 20S-CB-123; or**

**(2) the procedures and requirements set forth in section 3.1 of this chapter or IC 29-1-21-4;**

**is not required to be reexecuted or reratified by the testator or the witnesses in compliance with the witnessing procedures specified under section 3 or 3.1 of this chapter as those chapters existed on June 30, 2020.**

**(c) A proponent who offers a will for probate may demonstrate prima facie compliance with subsection (b) by relying on the contents of a self-proving clause or by describing compliance in a verified petition under IC 29-1-7-4. A person contesting the validity of a will described in subsection (a) has the burden of proving noncompliance with subsection (b).**

SECTION 6. IC 29-1-21-3, AS AMENDED BY P.L.231-2019, SECTION 18, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 3. The following terms are defined for this chapter:

~~(1) "Actual presence" means that:~~





~~(A) a witness; or~~

~~(B) another individual who observes the execution of the electronic will;~~

~~is physically present in the same physical location as the testator. The term does not include any form of observation or interaction that is conducted by means of audio, visual, or audiovisual telecommunication or similar technological means.~~

~~(2)~~ **(1)** "Affidavit of regularity" means an affidavit executed by a custodian or other person under section 13 of this chapter with respect to the electronic record for an electronic will or a complete converted copy of an electronic will.

~~(3)~~ **(2)** "Complete converted copy" means a document in any format that:

(A) can be visually perceived in its entirety on a monitor or other display device;

(B) can be printed; and

(C) contains:

(i) the text of the electronic will;

(ii) the electronic signatures of the testator and the witnesses;

(iii) a readable copy of any associated document integrity evidence that may be a part of or attached to the electronic will; and

(iv) a self-proving clause concerning the electronic will, if the electronic will is self-proved.

~~(4)~~ **(3)** "Custodian" means a person, other than:

(A) the testator who executed the electronic will;

(B) an attorney;

(C) a person who is named in the electronic will as a personal representative of the testator's estate; or

(D) a person who is named or defined as a distributee in the electronic will;

who has authorized possession or control of the electronic will. The term may include an attorney in fact serving under a living testator's durable power of attorney who possesses general authority over records, reports, statements, electronic records, or estate planning transactions.

~~(5)~~ **(4)** "Custody" means the authorized possession and control of at least one (1) of the following:

(A) A complete copy of the electronic record for the electronic will, including a self-proving clause if a self-proving clause is executed.

(B) A complete converted copy of the electronic will, if the complete electronic record has been lost or destroyed or the electronic will has been revoked.

**(5) "Directed paralegal" means a nonlawyer assistant who is employed, retained, or otherwise associated with a licensed attorney or law firm and whose work is directly supervised by a licensed attorney, as required by Rule 5.3 of the Rules of Professional Conduct.**

(6) "Document integrity evidence" means the part of the electronic record for the electronic will that:

(A) is created and maintained electronically;

(B) includes digital markers showing that the electronic will has not been altered after its initial execution and witnessing;

(C) is logically associated with the electronic will in a tamper evident manner so that any change made to the text of the electronic will after its execution is visibly perceptible when the electronic record is displayed or printed;

(D) will generate an error message, invalidate an electronic signature, make the electronic record unreadable, or otherwise display evidence that some alteration was made to the electronic will after its execution; and

(E) displays the following information:

(i) The city and state in which, and the date and time at which, the electronic will was executed by the testator and the attesting witnesses.

(ii) The text of the self-proving clause, if the electronic will is electronically self-proved through use of a self-proving clause executed under section ~~4(c)~~ **4(f)** of this chapter.

(iii) The name of the testator and attesting witnesses.

(iv) The name and address of the person responsible for marking the testator's signature on the electronic will at the testator's direction and in the ~~actual~~ presence of the testator and attesting witnesses.

(v) Copies of or links to the electronic signatures of the testator and the attesting witnesses on the electronic will.

(vi) A general description of the type of identity verification evidence used to verify the testator's identity.

(vii) The text of the advisory instruction, if any, that is provided to the testator under section 6 of this chapter at the time of the execution of the electronic will.

(viii) The content of the cryptographic hash or unique code used to complete the electronic record and make the





electronic will tamper evident if a public key infrastructure or similar secure technology was used to sign or authenticate the electronic will and if the vendor or the software for the technology makes inclusion feasible.

Document integrity evidence may, but is not required to, contain other information about the electronic will such as a unique document number, client number, or other identifier that an attorney or custodian assigns to the electronic will or a link to a secure Internet web site where a complete copy of the electronic will is accessible. The title, heading, or label, if any, that is assigned to the document integrity evidence (such as "certificate of completion", "audit trail", or "audit log") is immaterial.

(7) "Electronic" has the meaning set forth in IC 26-2-8-102.

(8) "Electronic record" has the meaning set forth in IC 26-2-8-102. The term may include one (1) or both of the following:

(A) The document integrity evidence associated with the electronic will.

(B) The identity verification evidence of the testator who executed the electronic will.

(9) "Electronic signature" has the meaning set forth in IC 26-2-8-102.

(10) "Electronic will" means the will of a testator that:

(A) is initially created and maintained as an electronic record;

(B) contains the electronic signatures of:

(i) the testator; and

(ii) the attesting witnesses; and

(C) contains the date and times of the electronic signatures described by clause (B)(i) and (B)(ii).

The term may include a codicil that amends an electronic will or a traditional paper will if the codicil is executed in accordance with the requirements of this chapter.

(11) "Executed" means the signing of an electronic will. The term includes the use of an electronic signature.

(12) "Identity verification evidence" means either:

(A) a copy of the testator's government issued photo identification card; or

(B) any other information that verifies the identity of the testator if derived from one (1) or more of the following sources:

(i) A knowledge based authentication method.

(ii) A physical device.

(iii) A digital certificate using a public key infrastructure.

(iv) A verification or authorization code sent to or used by the testator.

(v) Biometric identification.

(vi) Any other commercially reasonable method for verifying the testator's identity using current or future technology.

(13) "Logically associated" means electronically connected, cross referenced, or linked in a reliable manner.

**(14) "Observe" means to perceive another's actions or expressions of intent through the senses of eyesight or hearing, or both. The term includes perceptions involving the use of technology or learned skills to:**

**(A) assist the person's capabilities of eyesight or hearing, or both; or**

**(B) compensate for an impairment of the person's capabilities of eyesight or hearing, or both.**

**(15) "Observing" has the meaning set forth in subdivision (14).**

**(16) "In the presence of" has the meaning set forth in subdivision (17).**

**(17) "Presence" means a process of signing and witnessing a will in which:**

**(A) the testator and the witnesses:**

**(i) are directly present with each other in the same physical space; or**

**(ii) are able to interact with each other in real time through the use of audiovisual technology now known or later developed;**

**(B) the testator and witnesses are able to positively identify each other; and**

**(C) each witness is able to interact with the testator and with each other by observing:**

**(i) the testator's expression of intent to execute the electronic will;**

**(ii) the testator's actions in executing or directing the execution of the testator's electronic will; and**

**(iii) the actions of every other witness in signing the will.**

**The term includes the use of technology or learned skills for the purpose of assisting with hearing, eyesight, and speech, or for the purpose of compensating for a hearing, eyesight, or speech impairment.**





~~(14)~~ **(18)** "Sign" means valid use of a properly executed electronic signature.

~~(15)~~ **(19)** "Signature" means the authorized use of the testator's name to authenticate an electronic will. The term includes an electronic signature.

~~(16)~~ **(20)** "Tamper evident" means the feature of an electronic record, such as an electronic will or document integrity evidence for an electronic will, that will cause any alteration of or tampering with the electronic record, after it is created or signed, to be perceptible to any person viewing the electronic record when it is printed on paper or viewed on a monitor or other display device. The term applies even if the nature or specific content of the alteration is not perceptible.

~~(17)~~ **(21)** "Traditional paper will" means a will or codicil that is signed by the testator and the attesting witnesses:

(A) on paper; and

(B) in the manner specified in IC 29-1-5-3 or IC 29-1-5-3.1.

~~(18)~~ **(22)** "Will" includes all wills, testaments, and codicils. The term includes:

(A) an electronic will; and

(B) any testamentary instrument that:

(i) appoints an executor; or

(ii) revives or revokes another will.

SECTION 7. IC 29-1-21-4, AS ADDED BY P.L.40-2018, SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 4. (a) To be valid as a will under this article, an electronic will must be executed by the electronic signature of the testator and attested to by the electronic signatures of at least two (2) witnesses in the following manner:

(1) ~~The testator and the attesting witnesses must be in each other's actual presence when the electronic signatures are made in or on the electronic will. The testator and witnesses must directly observe one another as the electronic will is being signed by the parties.~~ **The testator, the attesting witnesses, and any individual who signs for the testator under subdivision (4)(B) must be in each other's presence when the electronic signatures are made in or on the electronic will. A person, including an attorney or directed paralegal, who supervises the execution of the electronic will may act and sign as one (1) of the attesting witnesses if the person does not sign the electronic will at the testator's direction under subdivision (4)(B). The testator and witnesses must be able to interact**



**with each other and the witnesses must be able to observe the testator and each other as the electronic will is being signed.**

(2) The testator and attesting witnesses must comply with:

(A) the prompts, if any, issued by the software being used to perform the electronic signing; or

(B) the instructions by the person, if any, responsible for supervising the execution of the electronic will.

(3) The testator must state, in the ~~actual~~ presence of the attesting witnesses, that the instrument to be electronically signed is the testator's will.

(4) The testator must:

(A) electronically sign the electronic will in the ~~actual~~ presence of the attesting witnesses; or

(B) direct another adult individual who is not an attesting witness to sign the electronic will on the testator's behalf in the ~~actual~~ presence of the testator and the attesting witnesses.

(5) The attesting witnesses must electronically sign the electronic will in the ~~actual~~ presence of:

(A) the testator; and

(B) ~~one another;~~ **each other;**

after the testator has electronically signed the electronic will.

(6) The:

(A) testator; or

(B) other adult individual who is:

(i) not an attesting witness; and

(ii) acting on behalf of the testator;

must command the software application or user interface to finalize the electronically signed electronic will as an electronic record.

The process described in this section may include as part of the electronic record for the electronic will any identity verification evidence pertaining to the testator or any document integrity evidence for the electronic will.

**(b) If the testator and the witnesses are not in each other's physical presence when the electronic will is signed and witnessed and if the testator and the witnesses use audiovisual technology to satisfy the presence requirement in subsection (a) and section 3(17) of this chapter, an attorney or a directed paralegal must supervise the signing and the witnessing of the electronic will.**

**(c) Within a reasonable time after an attorney or a directed paralegal supervises the signing and witnessing of an electronic will in the manner described in subsection (b), the attorney or directed**





**paralegal must sign an affidavit of compliance. An affidavit of compliance under this subsection must be sworn to or affirmed by the signing attorney or directed paralegal under the penalties of perjury and must contain:**

**(1) the name and residential address of the testator;**

**(2) the name and:**

**(A) residential address; or**

**(B) business address;**

**for each witness who signs the electronic will;**

**(3) the address, city, and state in which the testator is physically located at the time the testator signs the electronic will;**

**(4) the city and state in which each attesting witness is physically located when the witness signs the electronic will as a witness;**

**(5) a description of the method and form of identification used to confirm the identity of the testator to the witnesses and supervising attorney or directed paralegal;**

**(6) a description of the method used by the supervising attorney or paralegal, testator, and the witnesses for the purpose of interacting with each other in real time during the signing process;**

**(7) a brief description of the method used to add or capture the electronic signature of the testator and the witnesses;**

**(8) the name, business or residential address, and telephone number of the attorney or directed paralegal who supervised the execution of the electronic will; and**

**(9) any other information that the supervising attorney or directed paralegal considers to be material to:**

**(A) the testator's capacity to sign a valid will; and**

**(B) the testator's and witnesses' compliance with subsection (a).**

**(d) When a party files a petition under IC 29-1-7 to probate an electronic will that was executed and witnessed in the manner described in subsection (b), the party shall file a true copy of the affidavit of compliance under subsection (c) with the petition or at any time ordered by the court. A party who files a copy of the affidavit of compliance may redact private information from the affidavit in a manner consistent with Rule 5 of the Rules on Access to Court Records. If an electronic will is executed and witnessed under subsection (c) but without the supervision of an attorney or directed paralegal and that will is later offered for probate under**

**IC 29-1-7, the will is voidable in the discretion of the court, upon objection to probate filed under IC 29-1-7-16, or upon a timely filed will contest under IC 29-1-7-17.**

~~(b)~~ **(e)** An electronic will may be self-proved:

(1) at the time that it is electronically signed; and

(2) before it is electronically finalized;

by incorporating into the electronic record of the electronic will a self-proving clause described under subsection ~~(c).~~ **(f).** An electronic will is not required to contain an attestation clause or a self-proving clause in order to be a valid electronic will.

~~(c)~~ **(f)** A self-proving clause under subsection ~~(b)~~ **(e)** must substantially be in the following form:

"We, the undersigned testator and the undersigned witnesses, whose names are signed to the attached or foregoing instrument, declare:

(1) That the testator executed the instrument as the testator's will;

(2) That, in the ~~actual and direct physical~~ presence of both witnesses, the testator signed the will or directed another individual who is not one of the witnesses to sign for the testator in the testator's presence and in the witnesses' ~~actual and direct physical~~ presence;

(3) That the testator executed the will as a free and voluntary act for the purposes expressed in it;

(4) That each of the witnesses, in the ~~actual and direct physical~~ presence of the testator and each other, signed the will as a witness;

(5) That the testator was of sound mind when the will was executed; and

(6) That, to the best knowledge of each attesting witness, the testator was, at the time the will was executed, at least eighteen (18) years of age or was a member of the armed forces or of the merchant marine of the United States or its allies.

_____ _____

(insert date) (insert signature of testator)

_____ _____

(insert date) (insert signature of witness)

_____ _____

(insert date) (insert signature of witness)".

A single signature from the testator and from each attesting witness may be provided for any electronic will bearing or containing a self-proving clause.

~~(d)~~ **(g)** An electronic will that is executed in compliance with subsection (a) shall not be rendered invalid by the existence of any of





the following attributes:

(1) An attestation clause.

(2) Additional signatures.

(3) A self-proving clause that differs in form from the exemplar provided in subsection ~~(c).~~ **(f).**

(4) Any additional language that refers to the circumstances or manner in which the electronic will was executed.

~~(e)~~ **(h)** This section shall be construed in a manner that gives effect to the testator's intent to execute a valid will.

SECTION 8. IC 29-1-21-4.1 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 4.1. (a) This section applies to a will or codicil that is electronically signed and witnessed:**

**(1) on or after March 31, 2020;**

**(2) before January 1, 2021; and**

**(3) in reliance on the Indiana supreme court's order signed and filed on March 31, 2020, under case number 20S-MS-237, as supplemented or extended by the supreme court's order signed and filed on May 1, 2020, under case number 20S-MS-237, and by the supreme court's orders signed and filed on May 29, 2020, and November 10, 2020, under case number 20S-CB-123.**

**(b) Notwithstanding any other law or provision, a will or codicil described in subsection (a) that was electronically signed and witnessed in compliance with:**

**(1) the procedures and requirements set forth in the Indiana supreme court's order signed and filed on March 31, 2020, under case number 20S-MS-237 and as supplemented or extended by the supreme court's order signed and filed on May 1, 2020, under case number 20S-MS-237 and by the supreme court's order signed and filed on November 10, 2020, under case number 20S-CB-123; or**

**(2) the procedures and requirements set forth in section 4 of this chapter;**

**does not need to be reexecuted or reratified in compliance with the witnessing procedures specified under section 4 of this chapter or IC 29-1-5-3 as they existed on June 30, 2020.**

**(c) A proponent who offers an electronic will for probate may demonstrate prima facie compliance with subsection (b) by relying on the contents of a self-proving clause or by describing compliance in a verified petition under IC 29-1-7-4. A person contesting the validity of an electronic will described in subsection**

**(b) has the burden of proving noncompliance with subsection (b).**

SECTION 9. IC 29-1-21-5, AS ADDED BY P.L.40-2018, SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 5. Subject to the **applicable** Indiana Rules of Evidence and the Indiana Rules of Trial Procedure, a video recording, **one (1) or more photographs, or an audio recording of part or all** of an electronic will's execution or a video recording of a testator either before or after the execution of an electronic will may be admissible as evidence of the following:

(1) The proper execution of an electronic will in compliance with section 4 of this chapter.

(2) The intentions of the testator.

(3) The mental state or capacity of the testator.

(4) The absence of undue influence or duress with respect to the testator.

(5) Verification of the testator's identity.

(6) Evidence that a complete converted copy of an electronic will should be admitted to probate.

(7) Whether a will whose execution failed to fully comply with section 4 of this chapter should be admitted to probate as a valid traditional paper will.

(8) Any other matter the court considers relevant to the probate of an electronic will.

SECTION 10. IC 29-1-21-6, AS ADDED BY P.L.40-2018, SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 6. (a) As used in this section, "form vendor" means any person who provides a testator with an electronic will form or a user interface for creating, completing, or executing an electronic will. The term includes:

(1) an attorney who prepares an electronic will for a testator; and

(2) any vendor or licensor of estate planning software of digital estate planning forms.

(b) It is consistent with best practices to provide the following advisory instruction with each electronic will:

"IMPORTANT Instructions to the ~~Signatory of~~ **Person Signing** an Electronic Will

A. The procedure for proper execution (electronic signing and witnessing) of your electronic will is as follows:

(1) You (the testator) and the two (2) attesting witnesses must be ~~actually present in the same location~~ **able to interact with each other in real time** throughout the execution process **and the witnesses must be able to observe you and each other as**





**your electronic will is being signed. Effective on and after _____, 2021 and on or after March 31, 2020 in some situations covered by emergency orders of the Indiana Supreme Court,** Indiana law ~~does not permit~~ **has permitted** attesting witnesses to observe or participate in the signing process from a location that is apart or separate from the testator's location ~~or~~ **and to** act as ~~an attesting witness~~ **witnesses** through use of remote audio, remote visual, or remote audiovisual software or technology.

(2) Both attesting witnesses must be adults and should not be individuals who will be gifted money or other property under the terms of your electronic will. If a witness named in the electronic will is named as a beneficiary or legatee or entitled to money or property under the terms of the electronic will, the beneficiary or legatee named in the electronic will may only receive money, property, or shares reserved for them under state intestacy laws.

(3) You, as the testator, must inform the attesting witnesses that the document you will be signing is your will.

(4) You (the testator) and the two (2) attesting witnesses may use the same computer or device or different computers and devices to make your respective electronic signatures on the electronic will.

(5) The online user interface or software application for your will may require you and the attesting witnesses to use a password, validation code, token, or other security feature in order to prevent identity theft or impersonation and permanently link each of you, as individuals, to your respective electronic signatures.

(6) You (the testator) and the two (2) attesting witnesses should follow the instructions provided by the online user interface or software application when making your respective electronic signatures on your electronic will. You (the testator) should electronically sign the electronic will first followed by each of the attesting witnesses. If you (the testator) are physically unable to type, press keys, or otherwise enter commands on the computer or device being used to electronically sign the electronic will, you may instruct another adult who is not an attesting witness to enter your electronic signature on your electronic will for you. Any individual who enters **or makes** your electronic signature on your electronic will on your behalf must do so in your ~~actual~~ presence. **For this purpose, and on**

**and after _____, 2021, the requirement of presence is satisfied by use of any two-way audiovisual communication method that allows you and the witnesses to interact and observe each other in real time as described in subdivision (1).**

(7) The software application or online user interface may create a date and time stamp for your electronic signature and for the electronic signature of each attesting witness.

(8) The execution of your electronic will is complete after you and the attesting witnesses have completed making your electronic signatures by clicking or executing a command that saves or submits your respective electronic signatures in the software application or online interface.

(9) You are strongly encouraged to save a complete copy of your electronic will in a portable and printable format. An electronic will preserved in this manner should include all information related to the execution process of your electronic will, including information that is compiled or stored by the software application or online user interface. The related information described in this subdivision should be viewable and printable as a self-contained and permanent part of the electronic record for your electronic will.

B. If you used a software application or an online user interface to generate, finalize, and sign your electronic will, the software or user interface may also offer you the ability to securely store the electronic record of your electronic will. You may be required to create or establish a user identification, password, or other security feature in order to store the electronic record of your electronic will in this way. You should carefully safeguard your user identification, password, security questions, and personal information used to securely save or store your electronic will. The information that you are being asked to safeguard will likely be required in order to:

(1) generate;

(2) replace;

(3) retrieve; or

(4) revoke;

your electronic will at a later date.

C. The only proper and valid way for you to revoke your electronic will is to:

(1) sign a new electronic will or a traditional paper will that revokes all previous wills executed by you; or





(2) permanently and irrevocably make unreadable and nonretrievable the electronic record for your electronic will.

If you are holding the electronic record for your electronic will on your own computer or digital storage device and not making use of a third party custodian or online storage or cloud based document storage service to store or safeguard your electronic will, you may personally delete permanently or make unreadable the electronic record associated with your electronic will. Before doing so, you are encouraged to make and save a printable, permanent copy of the complete electronic record associated with your electronic will, including any related information pertaining to the execution or signing process of your electronic will, so that the contents of your revoked electronic will may be discovered later by a probate court or any other interested persons in the event of a dispute concerning the validity of any later will that you decide to make.

If you are making use of a third party custodian or online or cloud based document storage service to store or safeguard your electronic will, the valid revocation of your electronic will requires you to personally issue a written or electronic revocation document to each third party custodian who has custody of a copy of the electronic record associated with your electronic will. A valid revocation document must instruct the custodian to permanently delete or make unreadable and nonretrievable the electronic record associated with your electronic will. A valid revocation document must be signed by you and two (2) attesting witnesses while following the same procedures required for the execution of a new traditional paper will or new electronic will.".

(c) A failure to provide the text of the advisory instruction in subsection (b) does not affect the validity of the electronic will if the electronic will is otherwise properly executed in the manner set forth in this chapter.

(d) A failure to provide the advisory instruction described in subsection (b) may not be the predicate for any form of civil or other liability.

SECTION 11. IC 29-1-21-8, AS ADDED BY P.L.40-2018, SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 8. (a) This section describes the exclusive methods for revoking an electronic will. Before a testator completes or directs the revocation of an electronic will, the testator shall:

(1) comply with; or

(2) direct a third party custodian to comply, as applicable, with; subsection (e).

(b) A testator may revoke and supersede a previously executed electronic will by executing a new electronic will or traditional paper will that explicitly revokes and supersedes all prior wills. However, if the revoked or superseded electronic will is held in the custody or control of more than one (1) custodian, the testator shall use the testator's best efforts to contact each custodian and to instruct each custodian to permanently delete and render nonretrievable each revoked or superseded electronic will in the manner described in subsection (d).

(c) If a testator is not using the services of a custodian to store the electronic record for an electronic will, the testator may revoke the electronic will by permanently deleting each copy of the electronic record associated with the electronic will in the testator's possession or control or by rendering the electronic record for the associated electronic will unreadable and nonretrievable.

(d) The testator may revoke the testator's electronic will by executing a revocation document that:

(1) is signed by the testator and two (2) attesting witnesses in a manner that complies with IC 29-1-5-3(b) or with section 4 of this chapter;

(2) refers to the date on which the electronic will that is being revoked was signed; and

(3) states that the testator is revoking the electronic will described in subdivision (2).

A revocation document under this subsection may be signed and witnessed with the electronic signature of the testator and two (2) attesting witnesses, or signed and witnessed with signatures on paper as described in IC 29-1-5-6.

(e) If a testator is using the services of an attorney or a custodian to store the electronic record associated with the testator's electronic will, the testator may revoke the electronic will by instructing the custodian or attorney to permanently delete or make unreadable and nonretrievable the electronic record associated with the electronic will. An instruction issued under this subsection must be made in writing to the custodian or attorney as applicable. A custodian or attorney who receives a written instruction described in this subsection shall:

(1) sign an affidavit of regularity under section 13 of this chapter with respect to the electronic will to be revoked by the testator;

(2) create a complete converted copy (as defined in section ~~3(3)~~ **3(2)** of this chapter) of the electronic will being revoked;

(3) make the signed affidavit of regularity a permanent attachment to or part of the complete converted copy;





(4) follow the testator's written instruction by:

(A) permanently deleting the electronic record for the revoked electronic will; or

(B) rendering the electronic record associated with the revoked electronic will unreadable and nonretrievable; and

(5) transmit or issue the complete converted copy of the revoked electronic will to the testator.

(f) If the electronic record for a particular electronic will or a complete converted copy of the electronic will cannot be found after the testator's death, the presumption that applied to a lost or missing traditional paper will shall be applied to the lost or missing electronic will.

SECTION 12. IC 29-1-21-16, AS ADDED BY P.L.40-2018, SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 16. (a) As used in this section and for the purpose of offering or submitting an electronic will in probate under IC 29-1-7, the "filing of an electronic will" means the electronic filing of a complete converted copy of the associated electronic will.

(b) When filing an electronic will, the filing of any accompanying document integrity evidence or identity verification is not required unless explicitly required by the court.

(c) If a person files an electronic will:

(1) for the purpose of probating the electronic will; and

(2) including accompanying:

(A) document integrity evidence;

(B) identity verification evidence; or

(C) evidence described in both clauses (A) and (B);

in the filing or in response to a court order under subsection (e)(2), the person shall file a complete and unredacted copy of the evidence described in clauses (A) and (B) as a nonpublic document under Ind. Administrative Rule 9(G). All personally identifying information pertaining to the testator or the attesting witnesses shall be redacted in the publicly filed copy.

(d) If an electronic will includes a self-proving clause that complies with section ~~4(c)~~ **4(f)** of this chapter, the testator's and witnesses' compliance with the execution requirements shall be presumed upon the filing of the electronic will with the court without the need for any additional testimony or an accompanying affidavit. The presumption described in this subsection may be subject to rebuttal or objection on the grounds of fraud, forgery, or impersonation.

(e) After determining that a testator is dead and that the testator's electronic will has been executed in compliance with applicable law,

the court may:

(1) enter an order, without requiring the submission of additional evidence, admitting the electronic will to probate as the last will of the deceased testator unless objections are filed under IC 29-1-7-16; or

(2) require the petitioner to submit additional evidence regarding:

(A) the proper execution of the electronic will; or

(B) the electronic will's freedom from unauthorized alteration or tampering after its execution.

The court may require the submission of additional evidence under subdivision (2) on the court's own motion or in response to an objection filed under IC 29-1-7-16.

(f) The additional evidence that the court may require and rely upon under subsection (e)(2) may include one (1) or more of the following:

(1) Readable copies of the document integrity evidence or the identity verification evidence associated with the electronic will.

(2) All or part of the electronic record (if available) in a native or computer readable form.

(3) A sworn or verified affidavit from:

(A) an attorney or other person who supervised the execution of the electronic will; or

(B) one (1) or more of the attesting witnesses.

(4) An affidavit signed under section 9(b) of this chapter by a person who created a complete converted copy of the electronic will.

(5) A sworn or verified affidavit from a qualified person that:

(A) describes the person's training and expertise;

(B) describes the results of the person's forensic examination of the electronic record associated with:

(i) the electronic will at issue; or

(ii) any other relevant evidence; and

(C) affirms that the electronic will was not altered or tampered with after its execution.

(6) Any other evidence, including other affidavits or testimony, that the court considers material or probative on the issues of proper execution or unauthorized alteration or tampering.

(g) If the court enters an order admitting an electronic will to probate after receiving additional evidence, any of the additional evidence may be disputed through a will contest that is timely filed under IC 29-1-7-17.

SECTION 13. IC 29-1-21-18, AS ADDED BY P.L.40-2018, SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE





UPON PASSAGE]: Sec. 18. (a) For ~~purpose~~ **purposes** of IC 29-3, IC 30-5, and IC 32-39:

(1) the electronic record for an electronic will is a "digital asset" as that term is defined in IC 32-39-1-10;

(2) the electronic record for an electronic will is not an "electronic communication" as defined in 18 U.S.C. 2510(12) or IC 32-39-1-12;

(3) the digital or electronic transfer or transmission of the electronic record for an electronic will between any two (2) persons other than the testator and the testator's attorney is an electronic communication as defined in 18 U.S.C. 2510(12) or IC 32-39-1-12;

(4) a custodian (as defined in section ~~3(4)~~ **3(3)** of this chapter) of an electronic will is a "custodian" as defined in IC 32-39-1-8; and

(5) the following individuals are "users" for purposes of IC 32-39 if the testator, attorney, or other authorized person contracts with another person to store the electronic record for the electronic will:

(A) The testator of an electronic will.

(B) The attorney representing the testator.

(C) Any other person with authorized possession of or authorized access to the electronic record for the electronic will.

(b) The execution or revocation of an electronic will is not a contract or a "transaction in or affecting interstate or foreign commerce" for purposes of the federal E-SIGN Act, 15 U.S.C. 7001.

(c) The execution or revocation of an electronic will is not a contract or "transaction" for purposes of IC 26-2-8 and the exclusion stated in IC 26-2-8-103(b)(1) continues in effect with respect to electronic wills and codicils.

SECTION 14. IC 29-3-14-7, AS ADDED BY P.L.68-2019, SECTION 4, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 7. (a) A supported decision making agreement must:

(1) name at least one (1) supporter;

(2) describe the decision making assistance that each supporter may provide to the adult and how supporters may work together; and

(3) if appropriate, be executed by the adult's guardian.

(b) A supported decision making agreement may:

(1) appoint more than one (1) supporter;

(2) appoint an alternate to act in the place of a supporter under circumstances specified in the agreement; or

(3) authorize a supporter to share information with any other supporter or others named in the agreement.

(c) A supported decision making agreement must be:

(1) in writing;

(2) dated; and

(3) signed by the adult in the presence of a notary.

(d) A supported decision making agreement must contain a separate consent signed by each supporter named in the agreement indicating the supporter's:

(1) relationship to the adult;

(2) willingness to act as a supporter; and

(3) acknowledgment of the duties of a supporter.

(e) An adult who meets the requirements to enter into a supported decision making agreement under section 4 of this chapter may sign a supported decision making agreement in any manner, including electronic signature, permitted under ~~IC 30-5-4-1(5)~~ **IC 30-5-4-1(b)** or IC 30-5-11-4(a).

SECTION 15. IC 30-4-1.5-4, AS AMENDED BY P.L.56-2020, SECTION 8, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 4. (a) Any of the following persons may create a valid inter vivos trust by electronically signing an electronic trust instrument, with no witness requirement or acknowledgment before any notary public, if the electronic trust instrument sufficiently states the terms of the trust in compliance with ~~IC 30-4-2-1(b).~~ **IC 30-4-2-1(c):**

(1) A settlor.

(2) An agent of a settlor who is an attorney in fact.

(3) A person who holds a power of appointment that is exercisable by appointing money or property to the trustee of a trust.

(4) An adult who **is not an ineligible person under subsection (b) and who electronically signs the electronic trust instrument:**

(A) ~~is not a trustee named in the electronic trust instrument;~~ **at the settlor's direction;** and

(B) ~~electronically signs the electronic trust instrument.~~ **in the direct physical presence of the settlor.**

~~(i) at the settlor's direction; and~~

~~(ii) in the direct physical presence of the settlor.~~

If an adult electronically signs the trust instrument under subdivision (4), the trust instrument must indicate that the adult signer is signing at the direction of the settlor and in the settlor's direct physical presence





**and must state that the adult signer is not a relative of the settlor, is not a trustee named in the electronic trust instrument, and is not entitled to any beneficial interest or power of appointment under the electronic trust instrument.** For all purposes under this article, a trust instrument electronically signed under ~~subdivisions~~ **subdivision** (1), (2), or (4) is the creation of the named settlor.

**(b) The following persons are ineligible to sign an electronic trust instrument at the direction of the settlor under subsection (a)(4):**

**(1) A trustee named in the electronic instrument.**

**(2) A relative of the settlor.**

**(3) A person who is entitled to receive a beneficial interest in the trust or a power of appointment under the electronic trust instrument.**

~~(b)~~ **(c)** The following persons may use the electronic record associated with an electronic trust instrument to make a complete converted copy of an electronic trust instrument immediately after its execution or at a later time when a complete and intact electronic record is available:

(1) The settlor.

(2) A trustee who accepts appointment under the electronic trust instrument.

(3) An attorney representing the settlor or the trustee.

(4) Any other person authorized by the settlor.

If a complete converted copy is generated from a complete and intact electronic record associated with an electronic trust instrument, the person who generates the complete converted copy is not required to sign the affidavit described in subsection ~~(d).~~ **(e).**

~~(c)~~ **(d)** If:

(1) a person discovers an accurate but incomplete copy of an electronic trust instrument;

(2) the electronic record for the electronic trust instrument becomes:

(A) lost; or

(B) corrupted; or

(3) freedom from tampering or unauthorized alteration cannot be authenticated or verified;

a living settlor, attorney, custodian, or person responsible for the discovery of the incomplete electronic trust instrument may prepare a complete converted copy of the electronic trust instrument using all available information if the person creating the complete converted copy of the electronic trust instrument has access to a substantially

complete, nonelectronic copy of the electronic trust instrument.

~~(d)~~ **(e)** A person who creates a complete converted copy of an electronic trust instrument under subsection ~~(c)~~ **(d)** shall sign an affidavit that affirms or specifies, as applicable, the following:

(1) The date the electronic trust instrument was created.

(2) The time the electronic trust instrument was created.

(3) How the incomplete electronic trust instrument was discovered.

(4) The method and format used to store the original electronic record associated with the electronic trust instrument.

(5) The methods used, if any, to prevent tampering or the making of unauthorized alterations to the electronic record or electronic trust instrument.

(6) Whether the electronic trust instrument has been altered since its creation.

(7) Confirmation that an electronic record, including the document integrity evidence, if any, was created at the time the settlor made the electronic trust instrument.

(8) Confirmation that the electronic record has not been altered while in the custody of the current custodian or any prior custodian.

(9) Confirmation that the complete converted copy is a complete and correct duplication of the electronic trust instrument and the date, place, and time of its execution by the settlor or the settlor's authorized agent.

~~(e)~~ **(f)** A complete converted copy derived from a complete and correct electronic trust instrument may be docketed under IC 30-4-6-7 or, absent any objection, offered and admitted as evidence of the trust's terms in the same manner as the original and traditional paper trust instrument of the settlor. Whenever this article permits or requires the trustee of a trust to provide a copy of a trust instrument to a beneficiary or other interested person, the trustee may provide a complete converted copy of the electronic trust instrument. A complete and converted copy is conclusive evidence of the trust's terms unless otherwise determined by a court in an order entered upon notice to all interested persons and after an opportunity for a hearing.

SECTION 16. IC 30-4-2-1, AS AMENDED BY P.L.56-2020, SECTION 9, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 1. (a) A trust in either real or personal property is enforceable only if there is written evidence of the terms of the trust bearing the signature of any of the following persons:

(1) The settlor.





(2) The settlor's authorized agent.

(3) An adult who **is not an ineligible person under subsection (b) and who signs the trust's written terms:**

(A) ~~is not a trustee named in the trust's written terms;~~ **at the settlor's direction;** and

(B) ~~signs the trust's written terms:~~ **in the direct physical presence of the settlor.**

~~(i) at the settlor's direction; and~~

~~(ii) in the direct physical presence of the settlor.~~

If an adult signs at the settlor's direction under subdivision (3), the written evidence of the trust's terms must identify that adult signer, ~~and~~ must state that the adult is signing at the direction of the settlor and in the settlor's direct physical presence, **and must state that the adult signer is not a relative of the settlor, is not a trustee named in the trust's terms, and is not entitled to any beneficial interest or power of appointment under the trust's terms.**

**(b) The following persons are ineligible to sign the written terms of a trust at the direction of the settlor under subsection (a)(3):**

**(1) A trustee named in the trust's written terms.**

**(2) A relative of the settlor.**

**(3) A person who is entitled to receive a beneficial interest in the trust or a power of appointment under the trust's written terms.**

~~(b)~~ **(c)** Except as required in the applicable probate law for the execution of wills, no formal language is required to create a trust, but the terms of the trust must be sufficiently definite so that the trust property, the identity of the trustee, the nature of the trustee's interest, the identity of the beneficiary, the nature of the beneficiary's interest, and the purpose of the trust may be ascertained with reasonable certainty.

~~(c)~~ **(d)** It is not necessary to the validity of a trust that the trust be funded with or have a corpus that includes property other than the present or future, vested or contingent right of the trustee to receive proceeds or property, including:

(1) as beneficiary of an estate under IC 29-1-6-1;

(2) life insurance benefits under section 5 of this chapter;

(3) retirement plan benefits; or

(4) the proceeds of an individual retirement account.

~~(d)~~ **(e)** A trust created under:

(1) section 18 of this chapter for the care of an animal; or

(2) section 19 of this chapter for a noncharitable purpose;

has a beneficiary.

~~(e)~~ **(f)** A trust has a beneficiary if the beneficiary can be presently ascertained or ascertained in the future, subject to any applicable rule against perpetuities.

~~(f)~~ **(g)** A power of a trustee to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails and the property subject to the power passes to the persons who would have taken the property had the power not been conferred.

~~(g)~~ **(h)** A trust may be created by exercise of a power of appointment in favor of a trustee.

SECTION 17. IC 30-5-2-3.6 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 3.6. "Directed paralegal" means a nonlawyer assistant who is employed, retained, or otherwise associated with a licensed attorney or law firm and whose work is directly supervised by a licensed attorney, as required by Rule 5.3 of the Rules of Professional Conduct.**

SECTION 18. IC 30-5-4-1, AS AMENDED BY P.L.101-2008, SECTION 9, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 1. **(a)** To be valid, a power of attorney must meet the following conditions:

(1) Be in writing.

(2) Name an attorney in fact.

(3) Give the attorney in fact the power to act on behalf of the principal.

(4) Be signed by the principal or at the principal's direction:

**(A)** in the presence of a notary public; **or**

**(B) in the presence of witnesses as described under sections 1.3, 1.5, 1.7, and 1.9 of this chapter.**

~~(5)~~ **(b)** In the case of a power of attorney signed at the direction of the principal, the notary must state that the individual who signed the power of attorney on behalf of the principal did so at the principal's direction.

SECTION 19. IC 30-5-4-1.3 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 1.3. (a) This section applies to a power of attorney executed in the presence of witnesses under section 1 of this chapter on or after March 31, 2020.**

**(b) Any person who, at the time of attestation, is competent to be a witness in this state may act as an attesting witness to the execution of a power of attorney. A subsequent incapacity of an attesting witness does not impair the effectiveness of a previously executed power of attorney.**





**(c) A power of attorney executed under section 1(a)(4)(B) of this chapter is void if:**

**(1) a subscribing witness to the execution of the power of attorney has an interest in the power of attorney as described in subsection (d); and**

**(2) the power of attorney cannot be proved without the witness's testimony or proof of the witness's signature as a witness.**

**(d) A person serving as a subscribing witness to the execution of a power of attorney has an interest in the power of attorney if:**

**(1) the power of attorney names the person as the principal's attorney in fact or successor to the attorney in fact;**

**(2) the power of attorney grants a power or beneficial interest to the person other than an appointment of the person as the principal's attorney in fact or successor to the attorney in fact; or**

**(3) the witness is related to a person described in subdivision (1) or (2).**

**(e) For purposes of this section, a witness is related to a person described in subdivision (1) or (2) if the person is:**

**(1) the spouse of the witness; or**

**(2) a descendant of the witness.**

SECTION 20. IC 30-5-4-1.5 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 1.5. (a) This section applies to a power of attorney executed in the presence of witnesses under section 1 of this chapter on or after March 31, 2020.**

**(b) A power of attorney executed in the presence of witnesses under section 1(a)(4)(B) of this chapter must be executed by the signatures of the principal and at least two (2) witnesses on:**

**(1) a power of attorney under subsection (c);**

**(2) a self-proving clause under section 1.7(c) of this chapter; or**

**(3) a self-proving clause under section 1.7(d) of this chapter.**

**(c) A power of attorney may be attested as follows:**

**(1) By having the principal, in the presence of two (2) or more attesting witnesses, signify to the witnesses that the instrument is the principal's power of attorney and:**

**(A) sign the power of attorney;**

**(B) acknowledge the principal's signature already made; or**

**(C) at the principal's direction and in the principal's presence, have someone else sign the principal's name.**

**(2) By having the attesting witnesses sign, in the presence of the principal and each other, the power of attorney.**

**An attestation or self-proving clause is not required under this subsection in order to execute a valid power of attorney.**

**(d) Only if the execution and completion of the power of attorney is supervised by an attorney or directed paralegal, a principal and at least two (2) attesting witnesses may execute and complete a power of attorney in two (2) or more original counterparts that exist in a tangible and readable paper form with:**

**(1) the principal's signature placed on one (1) original counterpart in the presence of attesting witnesses; and**

**(2) the signatures of the remaining witnesses placed on one (1) or more different counterparts affiliated with the same power of attorney;**

**in a tangible and readable paper form. If a power of attorney is signed and witnessed in counterparts under this subsection, the principal or an individual acting at the principal's specific direction must physically assemble all of the separately signed paper counterparts of the power of attorney and the signatures of the principal and all attesting witnesses not later than five (5) business days after all the paper counterparts have been signed by the principal and witnesses. If the principal directs another individual to assemble the separate, signed paper counterparts of the will into a single composite paper document, the five (5) business day period does not commence until the compiling individual receives all of the separately signed paper counterparts. Any scanned copy or photocopy of the composite document containing all signatures shall be treated as validly signed under this section.**

**(e) An attorney or directed paralegal must supervise the execution of a power of attorney in counterparts as described in subsection (d). An attorney or directed paralegal may supervise the execution of a power of attorney in counterparts even if the supervising attorney or directed paralegal is one (1) of the power of attorney's attesting witnesses.**

**(f) Within a reasonable time after an attorney or a directed paralegal supervises the execution of a power of attorney in counterparts as described in subsection (d), the attorney or directed paralegal must sign an affidavit of compliance. An affidavit of compliance under this subsection must be sworn to or affirmed by the signing attorney or directed paralegal under the penalties of perjury and must contain:**





**(1) The name and residential address of the principal.**

**(2) The name and:**

**(A) residential address; or**

**(B) business address;**

**for each witness who signs the power of attorney.**

**(3) The address, city, and state in which the principal was physically located at the time the principal signed an original counterpart of the power of attorney.**

**(4) The city and state in which each attesting witness was physically located when the witness signed an original counterpart of the power of attorney as a witness.**

**(5) A description of the method and form of identification used to confirm the identity of the principal to the witnesses and to the supervising attorney or paralegal, as applicable.**

**(6) A description of the audiovisual technology or other method used by the supervising attorney or paralegal, as applicable, the principal, and the witnesses for the purpose of interacting with each other in real time during the signing process.**

**(7) A description of the method used by the principal and the witnesses to identify the location of each page break within the text of the principal and to confirm that the separate paper counterparts of the power of attorney were identical in content.**

**(8) A general description of how and when the attorney or paralegal, as applicable, physically combined the separate, signed paper counterparts of the power of attorney into a single composite paper document containing the power of attorney, the signature of the principal, and the signatures of all attesting witnesses.**

**(9) The name, business or residential address, and telephone number of the attorney or directed paralegal who supervised the execution and witnessing of the power of attorney in counterparts.**

**(10) Any other information that the supervising attorney or paralegal, as applicable, considers to be material with respect to:**

**(A) the principal's capacity to sign a valid power of attorney; and**

**(B) the principal's and witnesses' compliance with subsection (c).**

**After the attorney or directed paralegal signs an affidavit of**

**compliance under this subsection, the attorney or directed paralegal must preserve an accurate copy of the signed affidavit with a scanned copy or photocopy of the completely signed power of attorney. An affidavit of compliance signed under this subsection is admissible as prima facie evidence that the principal and witnesses executed the power of attorney in counterparts that comply with the requirements of subsection (c).**

**(g) A power of attorney that substantially complies with subsections (c) and (d) may not be rendered invalid by the existence of:**

**(1) an attestation or self-proving clause;**

**(2) additional signatures; or**

**(3) other additional language;**

**not required by subsection (c).**

**(h) A power of attorney executed in accordance with subsections (c) and (d) is self-proved if the witness signatures follow an attestation or self-proving clause or other declaration indicating, in substance, the facts set forth in section 1.7(d) or 1.7(e) of this chapter.**

**(i) This section shall be construed to favor the effectuating of the principal's intent to make a valid power of attorney.**

SECTION 21. IC 30-5-4-1.7 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 1.7. (a) This section applies to a power of attorney executed in the presence of witnesses under section 1 of this chapter on or after March 31, 2020.**

**(b) When a power of attorney is executed, the power of attorney may be:**

**(1) attested; and**

**(2) made self-proving;**

**by incorporating into or attaching to the power of attorney a self-proving clause that meets the requirements of subsection (d) or (e). If the principal and witnesses sign a self-proving clause that meets the requirements of subsection (d) or (e) at the time the power of attorney is executed, no other signature of the principal or witnesses is required in order for the power of attorney to be validly executed and self-proved.**

**(c) If a power of attorney is executed by the signatures of the principal and witnesses on an attestation clause under section 1.5(c) of this chapter, the power of attorney may be made self-proving at a later date by attaching to the power of attorney a self-proving clause that:**





**(1) is signed by the principal and witnesses; and**

**(2) meets the requirements specified in subsections (d) and (e).**

**(d) A self-proving clause must:**

**(1) contain the acknowledgment of the power of attorney by the:**

**(A) principal; and**

**(B) statements of the witnesses;**

**under the laws of Indiana;**

**(2) evidence the acknowledgment described in subdivision (1) by the signatures of the principal and witnesses (which may be made under the penalties of perjury); and**

**(3) be attached or annexed to the power of attorney in a form that is substantially as follows:**

**"We, the undersigned principal and the undersigned witnesses, respectively, whose names are signed to the attached or foregoing instrument declare that:**

**(1) the principal executed the instrument as the principal's power of attorney;**

**(2) in the presence of both witnesses, the principal signed or acknowledged the signature already made or directed another to sign for the principal in the principal's presence;**

**(3) the principal executed the power of attorney as a free and voluntary act for the purposes expressed in it;**

**(4) each of the witnesses, in the presence of the principal and of each other, signed the power of attorney as a witness;**

**(5) the principal was of sound mind when the power of attorney was executed; and**

**(6) to the best knowledge of each witness, the principal was, at the time the power of attorney was executed, at least eighteen (18) years of age or was a member of the armed forces or the merchant marine of the United States or its allies.**

**Date _____**

**Principal _____**

**Witness _____**

**Witness _____".**

**(e) A power of attorney is attested and self-proved if the power of attorney includes or has attached a clause signed by the principal and the witnesses that indicates that:**

**(1) the principal signified that the instrument is the principal's power of attorney;**

**(2) in the presence of least two (2) witnesses, the principal signed the instrument or acknowledged the principal's**

**signature already made or directed another to sign for the principal in the principal's presence;**

**(3) the principal executed the instrument freely and voluntarily for the purposes expressed in it;**

**(4) each of the witnesses, in the principal's presence and in the presence of all other witnesses, is executing the instrument as a witness;**

**(5) the principal was of sound mind when the power of attorney was executed; and**

**(6) the principal is, to the best knowledge of each of the witnesses:**

**(A) at least eighteen (18) years of age; or**

**(B) a member of the armed forces or the merchant marine of the United States or its allies.**

**(f) If the principal and the attesting witnesses executed the power of attorney in two (2) or more counterparts on paper under section 1.5(d) of this chapter, the self-proving clause, if any, for that power of attorney must substantially be in the following form:**

**"We, the undersigned principal and the undersigned witnesses, respectively, whose names are signed to the attached or foregoing instrument declare:**

**(1) that the undersigned principal and witnesses interacted with each other in real time through the use of technology and the witnesses were able to observe the principal throughout the signing process;**

**(2) that the principal executed a complete counterpart of the instrument, in readable form on paper, as the principal's power of attorney;**

**(3) that, in the presence of both witnesses, the principal signed the paper counterpart of the power of attorney or acknowledged the principal's signature already made or directed another individual to sign the paper counterpart of the power of attorney for the principal in the principal's presence;**

**(4) that the principal executed the power of attorney as a free and voluntary act for the purposes expressed in it;**

**(5) that each of the witnesses, in the presence of the principal and of each other, signed one (1) or more other complete counterparts of the power of attorney as a witness;**

**(6) that each paper counterpart of the power of attorney that was signed by a witness was complete, in readable form, and with content identical to the paper counterpart signed by the**





**principal;**

**(7) that the principal was of sound mind when the power of attorney was executed; and**

**(8) that, to the best knowledge of each of the witnesses, the principal was, at the time the power of attorney was executed, at least eighteen (18) years of age or was a member of the armed forces or the merchant marine of the United States or its allies.**

**Date _____**

**Principal _____**

**Witness _____**

**Witness _____".**

**(g) This section shall be construed to favor the effectuating of the principal's intent to make a valid power of attorney.**

SECTION 22. IC 30-5-4-1.9 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 1.9. (a) Subject to the Indiana Rules of Evidence and the Indiana Rules of Trial Procedure:**

**(1) a video or audio recording of a principal captured or made either before or after the execution of a power of attorney; or**

**(2) a video recording, one (1) or more photographic images, or an audio recording capture made during part or all of the execution of a power of attorney;**

**may be admissible as evidence under this section.**

**(b) Recordings or images described in subsection (a) may be admissible as evidence of the following:**

**(1) The proper execution of a power of attorney.**

**(2) The intentions of the principal.**

**(3) The mental state or capacity of a principal.**

**(4) The authenticity of a power of attorney.**

**(5) Matters that are determined by a court to be relevant to the probate of a power of attorney.**

SECTION 23. IC 30-5-4-2, AS AMENDED BY P.L.143-2009, SECTION 27, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 2. (a) Except as provided in subsection (b), a power of attorney is effective on the date the power of attorney is signed in accordance with section ~~1(4)~~ **1(a)(4)** of this chapter.

(b) A power of attorney may:

(1) specify the date on which the power will become effective; or

(2) become effective upon the occurrence of an event.

(c) If a power of attorney becomes effective upon the principal's incapacity and:



(1) the principal has not authorized a person to determine whether the principal is incapacitated; or

(2) the person authorized is unable or unwilling to make the determination;

the power of attorney becomes effective upon a determination that the principal is incapacitated that is set forth in a writing or other record by a physician, licensed psychologist, or judge.

(d) A person authorized by the principal in the power of attorney to determine that the principal is incapacitated may:

(1) act as the principal's personal representative under the Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. 201 et seq.) and any rules or regulations issued under that act; and

(2) obtain access to the principal's health care information and communicate with the principal's health care provider.

SECTION 24. IC 30-5-11-3, AS AMENDED BY P.L.231-2019, SECTION 39, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 3. The following terms are defined for this chapter:

(1) "Affidavit of regularity" means an affidavit executed by a custodian or other person under section 9 of this chapter with respect to the electronic record for an electronic power of attorney or a complete converted copy of an electronic power of attorney.

(2) "Complete converted copy" means a document in any format that:

(A) can be visually viewed in its entirety on a monitor or other display device;

(B) can be printed; and

(C) contains the text of an electronic power of attorney and a readable copy of any associated document integrity evidence that may be a part of or attached to the electronic power of attorney.

(3) "Custodian" means a person other than:

(A) the principal who executed the electronic power of attorney;

(B) an attorney; or

(C) a person who is named in the electronic power of attorney as an attorney in fact or successor attorney in fact under the power of attorney.

(4) "Custody" means the authorized possession and control of at least one (1) of the following:

(A) A complete copy of the electronic record for the electronic power of attorney.





(B) A complete converted copy of the electronic power of attorney if the complete electronic record has been lost or destroyed or the electronic power of attorney has been revoked.

**(5) "Directed paralegal" means a nonlawyer assistant who is employed, retained, or otherwise associated with a licensed attorney or law firm and whose work is directly supervised by a licensed attorney, as required by Rule 5.3 of the Rules of Professional Conduct.**

~~(5)~~ **(6)** "Document integrity evidence" means the part of the electronic record for the electronic power of attorney that:

(A) is created and maintained electronically;

(B) includes digital markers showing that the electronic power of attorney has not been altered after its initial execution by the principal;

(C) is logically associated with the electronic power of attorney in a tamper evident manner so that any change made to the text of the electronic power of attorney after its execution is visibly perceptible when the electronic record is displayed or printed;

(D) will generate an error message, invalidate an electronic signature, make the electronic record unreadable, or otherwise display evidence that some alteration was made to the electronic power of attorney after its execution; and

(E) displays the following information:

(i) The city and state in which, and the date and time at which, the electronic power of attorney was executed by the principal.

(ii) The name of the principal.

(iii) The name and address of the person responsible for marking the principal's signature on the electronic power of attorney at the principal's direction and in the principal's presence, as applicable.

(iv) A copy of or a link to the electronic signature of the principal on the electronic power of attorney.

(v) A general description of the type of identity verification evidence used to verify the principal's identity.

(vi) The content of the cryptographic hash or unique code used to complete the electronic record and make the electronic power of attorney tamper evident if a public key infrastructure or a similar secure technology was used to sign or authenticate the electronic power of attorney and if the vendor or software for the technology makes inclusion feasible.



Document integrity evidence may, but is not required to, contain other information about the electronic power of attorney such as a unique document number, client number, or other identifier that an attorney or custodian assigns to the electronic power of attorney or a link to a secure Internet web site where a complete copy of the electronic power of attorney is accessible. The title, heading, or label, if any, that is assigned to the document integrity evidence (such as "certificate of completion", "audit trail", or "audit log") is immaterial.

~~(6)~~ **(7)** "Electronic" has the meaning set forth in IC 26-2-8-102.

~~(7)~~ **(8)** "Electronic power of attorney" means a power of attorney created by a principal that:

(A) is initially created and maintained as an electronic record;

(B) contains the electronic signature of the principal creating the power of attorney;

(C) contains the date and time of the electronic signature of the principal creating the power of attorney; and

(D) is notarized.

The term includes an amendment to or a restatement of the power of attorney if the amendment or restatement complies with the requirements described in section 5 of this chapter.

~~(8)~~ **(9)** "Electronic record" has the meaning set forth in IC 26-2-8-102. The term may include one (1) or both of the following:

(A) The document integrity evidence associated with an electronic power of attorney.

(B) The identity verification evidence of the principal who executed the electronic power of attorney.

~~(9)~~ **(10)** "Electronic signature" has the meaning set forth in IC 26-2-8-102.

~~(10)~~ **(11)** "Executed" means the signing of a power of attorney. The term includes the use of an electronic signature.

~~(11)~~ **(12)** "Identity verification evidence" means either:

(A) a copy of a government issued photo identification card belonging to the principal; or

(B) any other information that verifies the identity of the principal if derived from one (1) or more of the following sources:

(i) A knowledge based authentication method.

(ii) A physical device.

(iii) A digital certificate using a public key infrastructure.

(iv) A verification or authorization code sent to or used by the





principal.

(v) Biometric identification.

(vi) Any other commercially reasonable method for verifying the principal's identity using current or future technology.

~~(12)~~ **(13)** "Logically associated" means electronically connected, cross referenced, or linked in a reliable manner.

**(14) "Observe" means to perceive another's actions or expressions of intent through the senses of eyesight or hearing, or both. The term includes perceptions involving the use of technology or learned skills to:**

**(A) assist the person's capabilities of eyesight or hearing, or both; or**

**(B) compensate for an impairment of the person's capabilities of eyesight or hearing, or both.**

**(15) "Observing" has the meaning set forth in subdivision (14).**

~~(13)~~ **(16)** "Sign" means valid use of a properly executed electronic signature.

~~(14)~~ **(17)** "Signature" means the authorized use of the principal's name to authenticate a power of attorney. The term includes an electronic signature.

~~(15)~~ **(18)** "Tamper evident" means the feature of an electronic record, such as an electronic power of attorney or document integrity evidence for an electronic power of attorney, that will cause the fact of any alteration or tampering with the electronic record, after it is created or signed, to be perceptible to any person viewing the electronic record when it is printed on paper or viewed on a monitor or other display device. The term applies even if the nature or specific content of the alteration is not perceptible.

~~(16)~~ **(19)** "Traditional paper power of attorney" means a power of attorney or an amendment to or a restatement of a power of attorney that is signed by the principal on paper.

SECTION 25. IC 30-5-11-4, AS ADDED BY P.L.40-2018, SECTION 4, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 4. (a) A principal, or person acting at the principal's direction, may ~~in the presence of a notary,~~ create a valid power of attorney by electronically signing an electronic power of attorney:

**(1) in the presence of a notary; or**

**(2) in the presence of witnesses under sections 4.3, 4.5, 4.7, and 4.9 of this chapter.**



(b) The:

(1) principal;

(2) attorney in fact under the electronic power of attorney;

(3) attorney representing the principal or attorney in fact; or

(4) other person authorized by the principal;

may use the electronic record to make a complete converted copy of the electronic power of attorney on or near the time of its execution or at a later time when the full electronic record is available.

(c) A complete converted copy derived from a complete and correct electronic power of attorney may be offered and admitted into evidence as though it were an original and traditional paper power of attorney without the need for additional proof or evidence of authenticity. Whenever this article permits or requires an attorney in fact to provide a copy of a power of attorney to an interested person, the attorney in fact may provide a complete converted copy of the electronic power of attorney. A complete and converted copy is conclusive evidence of the power of attorney's terms unless otherwise determined by a court in an order entered upon notice to all interested persons and after an opportunity for a hearing.

SECTION 26. IC 30-5-11-4.1 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 4.1. (a) This section applies to a power of attorney that is electronically signed and notarized:**

**(1) on or after March 31, 2020; and**

**(2) before January 1, 2022.**

**(b) If a power of attorney described in subsection (a) was electronically signed and notarized by a notary public using audiovisual communication technology to positively identify the principal or someone signing at the principal's direction, the resulting power of attorney must be treated as validly executed under this chapter if it complies with all other requirements of section 4 of this chapter as they existed on June 30, 2020.**

SECTION 27. IC 30-5-11-4.3 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 4.3. (a) This section applies to an electronic power of attorney executed in the presence of witnesses under section 4(a)(2) of this chapter on or after March 31, 2020.**

**(b) Any person who, at the time of attestation, is competent to be a witness in this state may act as an attesting witness to the execution of an electronic power of attorney, and the witness's subsequent incapacity will not impair the effectiveness of the**





**power of attorney.**

**(c) An electronic power of attorney is void if:**

**(1) a subscribing witness to the execution of the power of attorney has an interest in the power of attorney; and**

**(2) the power of attorney cannot be proved without the witness's testimony of proof or the witness's signature.**

**(d) For purposes of this section, a person serving as a subscribing witness to the execution of an electronic power of attorney has an interest in an electronic power of attorney if:**

**(1) the power of attorney names the person as the principal's attorney in fact or successor to the attorney in fact;**

**(2) the power of attorney grants a power or beneficial interest to the person other than appointment of the person as the principal's attorney in fact or successor to the attorney in fact; or**

**(3) the witness is related to a person described in subdivision (1) or (2).**

**(e) For purposes of this section, a witness is related to a person described in subsection (d)(1) or (d)(2) if the person is:**

**(1) the spouse of the witness; or**

**(2) a descendant of the witness.**

SECTION 28. IC 30-5-11-4.5 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 4.5. (a) This section applies to an electronic power of attorney executed in the presence of witnesses under section 4(a)(2) of this chapter on or after March 31, 2020.**

**(b) An electronic power of attorney executed in the presence of witnesses under section 4(a)(2) of this chapter must be executed by the signatures of the principal and at least two (2) witnesses on:**

**(1) an electronic power of attorney under subsection (c);**

**(2) a self-proving clause under section 4.7(c) of this chapter; or**

**(3) a self-proving clause under section 4.7(d) of this chapter.**

**(c) An electronic power of attorney may be attested as follows:**

**(1) The principal, in the presence of two (2) or more attesting witnesses, shall signify to the witnesses that the instrument is the principal's power of attorney and:**

**(A) sign the power of attorney;**

**(B) acknowledge the principal's signature already made; or**

**(C) at the principal's direction and in the principal's presence, have someone else sign the principal's name.**

**(2) The attesting witnesses must sign in the presence of the principal and each other.**

**An attestation or self-proving clause is not required under this subsection for a valid power of attorney.**

**(d) If the principal and the attesting witnesses are not in each other's physical presence when the electronic power of attorney is signed and witnessed and if the principal and the witnesses use audiovisual technology to satisfy the presence requirement in subsection (a), an attorney or a directed paralegal must supervise the signing and the witnessing of the electronic power of attorney.**

**(e) Within a reasonable time after an attorney or a directed paralegal supervises the signing and witnessing of an electronic power of attorney in the manner described in subsection (d), the attorney or directed paralegal must sign an affidavit of compliance. An affidavit of compliance under this subsection must be sworn to or affirmed by the signing attorney or directed paralegal under the penalties of perjury and must contain:**

**(1) the name and residential address of the principal;**

**(2) the name and:**

**(A) residential address; or**

**(B) business address;**

**for each attesting witness who signs the electronic power of attorney;**

**(3) the address, city, and state in which the principal is physically located at the time the principal signs the electronic power of attorney;**

**(4) the city and state in which each attesting witness is physically located when the witness signs the electronic power of attorney as a witness;**

**(5) a description of the method and form of identification used to confirm the identity of the principal to the witnesses and supervising attorney or directed paralegal;**

**(6) a description of the method used by the supervising attorney or paralegal, principal, and the witnesses for the purpose of interacting with each other in real time during the signing process;**

**(7) a brief description of the method used to add or capture the electronic signature of the principal and the witnesses;**

**(8) the name, business or residential address, and telephone number of the attorney or directed paralegal who supervised the execution of the electronic power of attorney; and**

**(9) any other information that the supervising attorney or**





**directed paralegal considers to be material to:**

**(A) the principal's capacity to sign a valid power of attorney; and**

**(B) the principal's and witnesses' compliance with subsection (a).**

**After the attorney or directed paralegal signs an affidavit of compliance under this subsection, the attorney or directed paralegal must preserve an accurate copy of the signed affidavit with a scanned copy or photocopy of the completely signed power of attorney. An affidavit of compliance signed under this subsection is admissible as prima facie evidence that the principal and witnesses executed the power of attorney in counterparts that comply with the requirements of subsection (c).**

**(f) An electronic power of attorney that is executed in substantial compliance with subsection (c) will not be rendered invalid by the existence of:**

**(1) an attestation or self-proving clause or other language; or**

**(2) additional signatures;**

**not required by subsection (c).**

**(g) An electronic power of attorney executed in accordance with subsection (c) is self-proved if the witness's signatures follow an attestation or self-proving clause or other declaration indicating, in substance, the facts set forth in section 4.7(d) or 4.7(e) of this chapter.**

**(h) This section shall be construed to favor the effectuation of the principal's intent to make a valid power of attorney.**

SECTION 29. IC 30-5-11-4.7 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 4.7. (a) This section applies to an electronic power of attorney executed in the presence of witnesses under section 4(a)(2) of this chapter on or after March 31, 2020.**

**(b) When an electronic power of attorney is executed, the power of attorney may be:**

**(1) attested; and**

**(2) made self-proving;**

**by incorporating into or attaching to the power of attorney a self-proving clause that meets the requirements of subsection (d) or (e) at the time the electronic power of attorney is executed and no other signatures of the principal and witnesses are required for the power of attorney to be validly executed and self-proved.**

**(c) If an electronic power of attorney is executed by the**



**signatures of the principal and witnesses on an attestation clause under section 4.5(c) of this chapter, the power of attorney may be made self-proving at a later date by attaching to the power of attorney a self-proving clause signed by the principal and witnesses that meets the requirements of subsection (d) or (e).**

**(d) A self-proving clause must contain the acknowledgment of the power of attorney by the principal and the statements of the witnesses, each made under the laws of Indiana and evidenced by the signatures of the principal and witnesses (which may be made under the penalties of perjury) attached or annexed to the power of attorney in a form and with content substantially similar to the following:**

**"We the undersigned principal and the undersigned witnesses, respectively, whose names are signed to the attached or foregoing instrument declare:**

**(1) that the principal executed the instrument as the principal's power of attorney;**

**(2) that the principal and the witnesses interacted with each other in real time either in the same physical space or through the use of technology and the witnesses were able to observe the principal throughout the signing process;**

**(3) that, in the presence of both witnesses, the principal electronically signed the power of attorney or acknowledged the principal's electronic signature already made or directed another individual to electronically sign for the principal in the principal's presence;**

**(4) that the principal executed the power of attorney as a free and voluntary act for the purpose expressed in it;**

**(5) that each of the witnesses, in the presence of the principal and each other, signed the electronic power of attorney as a witness;**

**(6) that the principal was of sound mind when the power of attorney was executed; and**

**(7) that, to the best knowledge of each of the witnesses, the principal was, at the time the power of attorney was executed, at least eighteen (18) years of age or was a member of the armed forces or the merchant marine of the United States or its allies.**

**Date _____**
**Principal _____**
**Witness _____**
**Witness _____".**





**(e) An electronic power of attorney is attested and self-proved if the electronic record for the power of attorney includes a clause signed by the principal and the witnesses that indicates, in substance, that:**

**(1) the principal signified that the instrument is the principal's power of attorney;**

**(2) in the presence of at least two (2) witnesses, the principal electronically signed the instrument or acknowledged the principal's electronic signature already made or directed another individual to sign for the principal in the principal's presence;**

**(3) the principal executed the instrument freely and voluntarily for the purposes expressed in it;**

**(4) each of the witnesses, in the principal's presence and in the presence of each other, electronically signed the instrument as a witness;**

**(5) the principal was of sound mind when the power of attorney was executed;**

**(6) the principal was, to the best knowledge of each witness, either:**

**(A) at least eighteen (18) years of age; or**

**(B) a member of the armed forces or the merchant marine of the United States or its allies.**

**(f) This section shall be construed to favor the effectuating of the principal's intent to make a valid power of attorney.**

SECTION 30. IC 30-5-11-4.9 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: **Sec. 4.9. (a) Subject to the Indiana Rules of Evidence and the Indiana Rules of Trial Procedure:**

**(1) a video or audio recording of a principal captured or made either before or after the execution of an electronic power of attorney; or**

**(2) a video recording, one (1) or more photographic images, or an audio recording captured or made during part or all of the execution of an electronic power of attorney;**

**may be admissible as evidence under this section.**

**(b) Recordings for images described in subsection (a) may be admissible as evidence of the following:**

**(1) The proper execution of an electronic power of attorney.**

**(2) The intentions of the principal.**

**(3) The mental state or capacity of a principal.**

**(4) The authenticity of an electronic power of attorney.**



PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type.~~

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~*this style type*~~ reconciles conflicts between statutes enacted by the 2020 Regular Session of the General Assembly.

# SENATE ENROLLED ACT No. 276

AN ACT to amend the Indiana Code concerning probate.

*Be it enacted by the General Assembly of the State of Indiana:*

SECTION 1. IC 23-14-31-26, AS AMENDED BY P.L.190-2016, SECTION 32, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 26. (a) Except as provided in subsection (c), the following persons, in the priority listed, have the right to serve as an authorizing agent:

(1) A person:

(A) granted the authority to serve in a funeral planning declaration executed by the decedent under IC 29-2-19; or

(B) named in a United States Department of Defense form "Record of Emergency Data" (DD Form 93) or a successor form adopted by the United States Department of Defense, if the decedent died while serving in any branch of the United States Armed Forces (as defined in 10 U.S.C. 1481) and completed the form.

(2) An individual specifically granted the authority to serve in a power of attorney or a health care power of attorney executed by the decedent under IC 30-5-5-16.

(3) The individual who was the spouse of the decedent at the time of the decedent's death, except when:

(A) a petition to dissolve the marriage or for legal separation of the decedent and spouse is pending with a court at the time of the decedent's death, unless a court finds that the decedent





representations of a person listed in subsection (a) that any other individuals of the same degree of kinship have been notified of the final disposition instructions.

(h) If there is a dispute concerning the disposition of a decedent's remains, a funeral home is not liable for refusing to accept the remains of the decedent until the funeral home receives:

(1) a court order; or

(2) a written agreement signed by the disputing parties;

that determines the final disposition of the decedent's remains. If a funeral home agrees to shelter the remains of the decedent while the parties are in dispute, the funeral home may collect any applicable fees for storing the remains, including legal fees that are incurred.

(i) Any cause of action filed under this section must be filed in the probate court in the county where the decedent resided, unless the decedent was not a resident of Indiana.

(j) A spouse seeking a judicial determination under subsection (a)(3)(A) that the decedent and spouse were reconciled before the decedent's death may petition the court having jurisdiction over the dissolution or separation proceeding to make this determination by filing the petition under the same cause number as the dissolution or separation proceeding. A spouse who files a petition under this subsection is not required to pay a filing fee.

SECTION 5. IC 29-2-16.1-8, AS ADDED BY P.L.147-2007, SECTION 12, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 8. (a) Subject to subsections (b) and (c), unless barred by section 6 or 7 of this chapter, an anatomical gift of a decedent's body or part for the purpose of transplantation, therapy, research, or education may be made by any member of the following classes of persons who are reasonably available, in the order of priority listed:

(1) An agent of the decedent at the time of death who could have made an anatomical gift under section 3(2) of this chapter immediately before the decedent's death.

(2) The spouse of the decedent.

(3) Adult children of the decedent.

(4) Parents of the decedent.

(5) Adult siblings of the decedent.

**(6) A guardian appointed by a court under IC 29-3-5-3.**

~~(6)~~ **(7)** Adult grandchildren of the decedent.

~~(7)~~ **(8)** Grandparents of the decedent.

~~(8)~~ **(9)** An adult who exhibited special care and concern for the decedent.

~~(9) A person acting as the guardian of the decedent at the time of death.~~

(10) Any other person having the authority to dispose of the decedent's body.

(b) If there is more than one (1) member of a class listed in subsection (a)(1), (a)(3), (a)(4), (a)(5), (a)(6), (a)(7), ~~or (a)(9)~~ **or (a)(8)** entitled to make an anatomical gift, an anatomical gift may be made by a member of the class unless that member or a person to whom the gift may pass under section 10 of this chapter knows of an objection by another member of the class. If an objection is known, the gift may be made only by a majority of the members of the class who are reasonably available.

(c) A person may not make an anatomical gift if, at the time of the decedent's death, a person in a prior class under subsection (a) is reasonably available to make or to object to the making of an anatomical gift.

SECTION 6. IC 29-2-16.1-17, AS ADDED BY P.L.147-2007, SECTION 12, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 17. (a) A person who acts in accordance with this chapter is not liable for the act in a civil action or administrative proceeding.

(b) Neither the person making an anatomical gift nor the donor's estate is liable for any injury or damage that results from the making or use of the gift.

(c) In determining whether an anatomical gift has been made, amended, or revoked under this chapter, a person may rely upon representations of an individual listed in section 8(a)(2), 8(a)(3), 8(a)(4), 8(a)(5), ~~8(a)(6),~~ 8(a)(7), ~~or~~ 8(a)(8), **or 8(a)(9)** of this chapter relating to the individual's relationship to the donor or prospective donor unless the person knows that the representation is untrue.

(d) A health care provider is immune from civil liability for following a donor's unrevoked anatomical gift directive under this chapter or IC 9-24-17.

(e) A hospital or a recovery agency is immune from civil liability for determining in good faith and in compliance with this section that:

(1) an individual made a written anatomical gift; or

(2) an individual subsequently made a written revocation of an anatomical gift.

(f) A person who, in good faith reliance upon a will, card, or other document of gift, and without actual notice of the amendment, revocation, or invalidity of the will, card, or document:

(1) takes possession of a decedent's body or performs or causes to





be performed surgical operations upon a decedent's body; or

(2) removes or causes to be removed organs, tissues, or other parts from a decedent's body;

is not liable in damages in any civil action brought against the donor for that act.

SECTION 7. IC 29-2-19-17, AS AMENDED BY P.L.190-2016, SECTION 38, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 17. The right to control the disposition of a decedent's body, to make arrangements for funeral services, and to make other ceremonial arrangements after an individual's death devolves on the following, in the priority listed:

(1) A person:

(A) granted the authority to serve in a funeral planning declaration executed by the decedent under this chapter; or

(B) named in a United States Department of Defense form "Record of Emergency Data" (DD Form 93) or a successor form adopted by the United States Department of Defense, if the decedent died while serving in any branch of the United States Armed Forces (as defined in 10 U.S.C. 1481) and completed the form.

(2) An individual specifically granted the authority in a power of attorney or a health care power of attorney executed by the decedent under IC 30-5-5-16.

(3) The decedent's surviving spouse.

(4) A surviving adult child of the decedent or, if more than one (1) adult child is surviving, the majority of the other adult children. However, less than half of the surviving adult children have the rights under this subdivision if the adult children have used reasonable efforts to notify the other surviving adult children of their intentions and are not aware of any opposition to the final disposition instructions by more than half of the surviving adult children.

(5) The surviving parent or parents of the decedent. If one (1) of the parents is absent, the parent who is present has the rights under this subdivision if the parent who is present has used reasonable efforts to notify the absent parent.

(6) The decedent's surviving sibling or, if more than one (1) sibling is surviving, the majority of the surviving siblings. However, less than half of the surviving siblings have the rights under this subdivision if the siblings have used reasonable efforts to notify the other surviving siblings of their intentions and are not aware of any opposition to the final disposition instructions by

more than half of the surviving siblings.

**(7) A guardian appointed by a court under IC 29-3-5-3.**

~~(7)~~ **(8)** An individual in the next degree of kinship under IC 29-1-2-1 to inherit the estate of the decedent or, if more than one (1) individual of the same degree survives, the majority of those who are of the same degree of kinship. However, less than half of the individuals who are of the same degree of kinship have the rights under this subdivision if they have used reasonable efforts to notify the other individuals who are of the same degree of kinship of their intentions and are not aware of any opposition to the final disposition instructions by more than half of the individuals who are of the same degree of kinship.

~~(8)~~ **(9)** If none of the persons described in subdivisions (1) through ~~(7)~~ **(8)** are available, or willing, to act and arrange for the final disposition of the decedent's remains, a stepchild (as defined in IC 6-4.1-1-3(f)) of the decedent. If more than one (1) stepchild survives the decedent, then a majority of the surviving stepchildren. However, less than half of the surviving stepchildren have the rights under this subdivision if they have used reasonable efforts to notify the other stepchildren of their intentions and are not aware of any opposition to the final disposition instructions by more than half of the stepchildren.

~~(9)~~ **(10)** The person appointed to administer the decedent's estate under IC 29-1.

~~(10)~~ **(11)** If none of the persons described in subdivisions (1) through ~~(9)~~ **(10)** are available, any other person willing to act and arrange for the final disposition of the decedent's remains, including a funeral home that:

(A) has a valid prepaid funeral plan executed under IC 30-2-13 that makes arrangements for the disposition of the decedent's remains; and

(B) attests in writing that a good faith effort has been made to contact any living individuals described in subdivisions (1) through ~~(9).~~ **(10).**

SECTION 8. IC 29-3-12-1, AS AMENDED BY P.L.240-2017, SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 1. (a) Except as provided in section 6 or 7 of this chapter, the court shall terminate the guardianship of a minor upon:

(1) the minor's attaining eighteen (18) years of age; or

(2) the minor's death.

The court may terminate the guardianship of a minor upon the minor's adoption or marriage.





(b) The court shall terminate the guardianship of an incapacitated person upon:

(1) adjudication by the court that the protected person is no longer an incapacitated person; or

(2) the death of the protected person.

(c) The court may terminate any guardianship if:

(1) the guardianship property does not exceed the value of three thousand five hundred dollars ($3,500);

(2) the guardianship property is reduced to three thousand five hundred dollars ($3,500);

(3) the domicile or physical presence of the protected person is changed to another state and a guardian has been appointed for the protected person and the protected person's property in that state; or

(4) the guardianship is no longer necessary for any other reason.

(d) When a guardianship terminates otherwise than by the death of the protected person, the powers of the guardian cease, except that the guardian may pay the claims and expenses of administration that are approved by the court and exercise other powers that are necessary to complete the performance of the guardian's trust, including payment and delivery of the remaining property for which the guardian is responsible:

(1) to the protected person;

(2) in the case of an unmarried minor, to a person having care and custody of the minor with whom the minor resides;

(3) to a trust approved by the court, including a trust created by the guardian, in which:

(A) the protected person is the sole beneficiary of the trust; and

(B) the terms of the trust satisfy the requirements of Section 2503(c) of the Internal Revenue Code and the regulations under that Section;

(4) to a custodian under the Uniform Transfers to Minors Act (IC 30-2-8.5); or

(5) to another responsible person as the court orders.

(e) When a guardianship terminates by reason of the death of the protected person, the powers of the guardian cease, except as follows:

(1) The guardian may do the following:

(A) Pay the expenses of administration that are approved by the court. ~~and exercise other powers that are necessary to complete the performance of the guardian's trust.~~

**(B) Exercise all other powers that are necessary to**

**complete the performance of the guardian's trust. Permitted performances under this clause include the following:**

**(i) The power to control the disposition of the deceased protected person's body.**

**(ii) The power to make anatomical gifts.**

**(iii) The power to request an autopsy.**

**(iv) The power to make arrangements for funeral services.**

**(v) The power to make other ceremonial arrangements as provided under IC 29-2-19-17.**

~~(B)~~ **(C)** Deliver the remaining property for which the guardian is responsible to the protected person's personal representative or to a person who presents the guardian with an affidavit under IC 29-1-8-1 or IC 29-2-1-2.

~~(C)~~ **(D)** Request the health records of the protected person under IC 16-39-1-3(c)(4), except as provided in IC 16-39-1-3(d), if the protected person was an incapacitated person. The power of a guardian under this clause terminates sixty (60) days after the date of the protected person's death.

(2) If approved by the court, the guardian may pay directly the following:

(A) Reasonable funeral and burial expenses of the protected person.

(B) Reasonable expenses of the protected person's last illness.

(C) The protected person's federal and state taxes.

(D) Any statutory allowances payable to the protected person's surviving spouse or surviving children.

(E) Any other obligations of the protected person.

First Regular Session of the 122nd General Assembly (2021)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~*this style type*~~ reconciles conflicts between statutes enacted by the 2020 Regular Session of the General Assembly.

# HOUSE ENROLLED ACT No. 1252

AN ACT to amend the Indiana Code concerning probate.

*Be it enacted by the General Assembly of the State of Indiana:*

SECTION 1. IC 29-1-7-15.1, AS AMENDED BY P.L.231-2019, SECTION 8, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 15.1. (a) When it has been determined that a decedent died intestate and letters of administration have been issued upon the decedent's estate, no will shall be probated unless it is presented for probate:

(1) before the court decrees final distribution of the estate; or

(2) in an unsupervised estate, before a closing statement has been filed.

(b) No real ~~estate~~ **property** located in Indiana of which any person may die seized shall be sold by the executor or administrator of the deceased person's estate to pay any debt or obligation of the deceased person, which is not a lien of record in the county in which the real ~~estate~~ **property** is located or to pay any costs of administration of any decedent's estate, unless a petition for administration is filed in court under section 5 of this chapter not later than five (5) months after the decedent's death and the clerk issues letters testamentary or letters of administration not later than seven (7) months after the decedent's death.

(c) If:

(1) a petitioner files a petition for administration filed in an estate to which subsection (b) may apply; and





(2) the clerk of the court does not issue letters testamentary or of administration and publish notice of the estate administration under subsection (a) not later than thirty (30) days after the petition for administration has been filed;

the petitioner shall serve the following notice on each creditor in the manner provided under section 7(d) of this chapter not later than forty-five (45) days after the petition for administration has been filed:

NOTICE OF PETITION FOR ADMINISTRATION

In the _____ Court of _____ County, Indiana.

Notice is hereby given that a petition for administration was filed on the ___ day of ____, 20___, in cause number _____, concerning the estate of _____, deceased, who died on the _____ day of _____, 20___, but the clerk of the court has not issued letters testamentary or of administration.

The estate includes real ~~estate~~ **property** that may be subject to sale restrictions under IC 29-1-7-15.1.

All persons who have claims against this estate, whether or not now due, must file their claims in the office of the clerk of this court not later than seventy-five (75) days after the date on which the petition for administration was filed, or not later than thirty (30) days after the date on which the petitioner serves this notice, to prevent the application of real ~~estate~~ **property** sale restrictions to the claims, whichever is later.

Dated at _____, Indiana this ____ day of _____, 20___.

_____as the Petitioner.

(d) The limitation described in subsection (b) on the sale of real ~~estate~~ **property** does not apply to a claim if:

(1) a petition for administration is filed in court under section 5 of this chapter not later than five (5) months after the decedent's death;

(2) the claimant files the claim in the office of the clerk of the court not later than:

(A) seventy-five (75) days after the date on which the petition for administration was filed; or

(B) thirty (30) days after the date on which the petitioner serves the notice required in subsection (c);

whichever is later; and

(3) the failure of the clerk to issue letters testamentary or letters of administration not later than seven (7) months after the decedent's death is not the result of the petitioner's failure to comply with the requirements of:

(A) this article;

(B) the Indiana Rules of Trial Procedure; or

(C) the local rules of the court.

(e) The court shall order the limitation described in subsection (b) inapplicable to a claimant's claim concerning the sale of real ~~estate~~ **property** if any interested person files a motion for findings under this subsection and the court finds that the following conditions apply:

(1) A petition for administration was filed in court under section 5 of this chapter not later than five (5) months after the decedent's death.

(2) More than thirty (30) days have elapsed since the petition was filed.

(3) The claimant is a reasonably ascertainable creditor under section 7 of this chapter.

(4) The claimant filed a claim in the estate not later than seventy-five (75) days after the date on which the petition for administration was filed, or not later than thirty (30) days after the date on which the petitioner serves the notice required in subsection (c), whichever is later.

(5) The petitioner has not satisfied the provisions of subsection (c).

(f) The title of any real ~~estate~~ **property** or interest therein purchased in good faith and for a valuable consideration from the heirs of any person who died seized of the real ~~estate~~ **property** shall not be affected or impaired by any devise made by the person of the real ~~estate~~ **property** so purchased, unless:

(1) the will containing the devise has been probated and recorded in the office of the clerk of the court having jurisdiction within five (5) months after the death of the testator; or

(2) an action to contest the will's validity is commenced within the time provided by law and, as a result, the will is ultimately probated.

(g) Except as provided in subsection (h), the will of the decedent shall not be admitted to probate unless the will is presented for probate before the latest of the following dates:

(1) Three (3) years after the individual's death.

(2) Sixty (60) days after the entry of an order denying the probate of a will of the decedent previously offered for probate and objected to under section 16 of this chapter.

(3) Sixty (60) days after entry of an order revoking probate of a will of the decedent previously admitted to probate and contested under section 17 of this chapter.

However, in the case of an individual presumed dead under





IC 29-2-5-1, the three (3) year period commences with the date the individual's death has been established by appropriate legal action.

(h) This subsection applies with respect to the will of an individual who dies after June 30, 2011. If:

(1) no estate proceedings have been commenced for a decedent; and

(2) an asset of the decedent remains titled or registered in the name of the decedent;

the will of the decedent may be presented to the court for probate and admitted to probate at any time after the expiration of the deadline determined under subsection (g) for the sole purpose of transferring the asset described in subdivision (2). A will presented for probate under this subsection is subject to all rules governing the admission of wills to probate.

SECTION 2. IC 29-1-7-15.2, AS ADDED BY P.L.163-2018, SECTION 7, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 15.2. (a) This section applies to real ~~estate~~ **property** subject to section 15.1(b) of this chapter, if **the personal representative sells the real property to:**

**(1) satisfy a lien of record in the county in which the real property is located;**

**(2) pay costs of administration; or**

**(3) use the sale proceeds for any other payment or distribution approved by the written consent of a majority in interest of ~~all~~ the** distributees ~~consent to the sale of the real estate~~ under IC 29-1-10-21.

(b) The proceeds of the sale of real ~~estate~~ **property** described in subsection (a) will retain the same protection that section 15.1(b) of this chapter provides to real ~~estate.~~ **property with respect to payment of any debt or obligation of the deceased person not described in subsection (a).** ~~Such proceeds can only be used to satisfy a debt or obligation of the deceased person or costs of administration of the decedent's estate if the distributees consent to the personal representative's use of the proceeds to satisfy the debts, obligations, or costs of administration.~~

SECTION 3. IC 29-1-8-11 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 11. (a) A tenant's representative who accepts appointment under IC 32-31-1-23 may represent the deceased residential lease tenant's distributees for the following purposes:**

**(1) Collecting all or part of the tenant's security deposit from the tenant's landlord.**

**(2) Collecting the tenant's tangible personal property from the tenant's residence.**

**(3) Distributing among the tenant's distributees any portion of the tenant's security deposit that the tenant's representative has collected from the tenant's landlord.**

**(4) Distributing among the tenant's distributees any portion of the tenant's tangible personal property that the tenant's representative has collected from the tenant's residence.**

**(5) Signing and issuing on behalf of the tenant's distributees any affidavit described in IC 29-1-8 that the tenant's landlord may require before releasing the tenant's security deposit or tangible personal property to the tenant's representative.**

**(b) Upon presentation of letters testamentary or letters of administration by the personal representative of the tenant's estate to the tenant's representative, the tenant's representative shall deliver to the personal representative any portion of the tenant's tangible personal property that the tenant's representative has collected from the tenant's landlord.**

**(c) The tenant's representative shall keep complete records of all transactions entered into by the tenant's representative on behalf of the tenant for:**

**(1) nine (9) months after the tenant's death date; or**

**(2) three (3) months after the records are delivered to the tenant's personal representative;**

**whichever occurs first.**

**(d) Except as otherwise required by subsection (e), the tenant's representative is not required to render an accounting.**

**(e) Except as provided in subsection (h), the tenant's representative shall render a written accounting if an accounting is:**

**(1) ordered by a court; or**

**(2) demanded by:**

**(A) a child of the tenant;**

**(B) the personal representative of the tenant's estate; or**

**(C) an heir or legatee of the tenant.**

**(f) Except as provided in subsection (h), a tenant's representative shall deliver an accounting required under subsection (e) to:**

**(1) the court;**

**(2) the personal representative of the tenant's estate;**

**(3) an heir of the tenant;**

**(4) a legatee of the tenant; or**





**(5) a child of the tenant.**

**(g) Except as provided in subsection (h), a tenant's representative shall deliver an accounting ordered or demanded under subsection (e) to the court or the person demanding the accounting not later than sixty (60) days after the date the tenant's representative receives the court order or written demand for an accounting.**

**(h) The court may order an accounting under subsection (e) at any time. In the absence of a court ordered accounting, a tenant's representative is not required to deliver an accounting to a person described in subsection (f)(1) through (f)(4) unless the person demands the accounting not later than nine (9) months after the date of the tenant's death. The delivery deadline provided in subsection (g) applies to a written demand for an accounting that is timely submitted under this subsection.**

**(i) Not more than one (1) accounting is required under this section in each twelve (12) month period unless the court, in its discretion, orders additional accountings.**

**(j) If a tenant's representative fails to deliver an accounting as required under this section, the court or the person demanding the accounting may initiate an action in mandamus to compel the tenant's representative to render the accounting. The court may award the attorney's fees and court costs incurred under this subsection to the person demanding the accounting if the court finds that the tenant's representative failed to render an accounting as required under this section without just cause.**

**(k) A tenant's representative is entitled to judicial review and settlement of an account of all transactions entered into by the tenant's representative, regardless of whether:**

**(1) the tenant's representative's authority has been revoked; or**

**(2) a demand for an accounting is made under subsection (e).**

**(l) Judicial review and settlement of an account is initiated upon the filing of a petition to settle and allow an account. The petition must be filed with the court exercising probate jurisdiction for the county in which the tenant resided. Except as otherwise provided by this section, the procedures in IC 30-4-5-14(b), IC 30-4-5-14(c), IC 30-4-5-14(d), and IC 30-4-5-15 that are applicable to judicial settlement of a trustee's account govern:**

**(1) the filing of objections; and**

**(2) all proceedings;**

**on the petition.**

**(m) A petition to settle and allow an account must be served upon all the following that are applicable:**

**(1) The tenant's personal representative.**

**(2) Any person beneficially interested in the decedent's estate.**

**(3) The tenant's heirs at law.**

**(4) If the tenant's will is probated without administration:**

**(A) the personal representative named in the probated will; and**

**(B) all persons or entities beneficially interested in the probated will.**

**(5) Any other person that the court directs.**

**(n) A tenant's representative is discharged from liability as to the transactions disclosed in the accounting if:**

**(1) the court reviews and approves the accounting; and**

**(2) notice of the court's approval of the accounting is provided to the persons identified in subsection (m).**

**(o) In the absence of fraud, misrepresentation, inadequate disclosure, or failure to provide proper notice related to the power of attorney transactions, the discharge from liability under subsection (n) is lawful and binding upon all interested persons:**

**(1) who would assert an interest on behalf of or through the tenant; and**

**(2) who are:**

**(A) born or unborn;**

**(B) notified or not notified; or**

**(C) represented or not represented.**

**(p) The filing fee for a petition to settle and allow an account filed under this section is a legitimate expense of the tenant's estate.**

SECTION 4. IC 29-1-10-21, AS ADDED BY P.L.99-2013, SECTION 4, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 21. (a) All authority to act with respect to an estate administered under IC 29-1-7 and IC 29-1-7.5 is vested exclusively in the personal representative.

(b) If this article prohibits an action by the personal representative, the prohibition restricts the personal representative, regardless of court order, unless:

(1) a majority in interest of the distributees ~~expressly~~ consent **in writing** to the proposed action; or

(2) the statute imposing the restriction expressly permits a court to approve the prohibited action.

SECTION 5. IC 29-1-15-3 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 3. **Subject to the**





**provisions of IC 29-1-7-15.1 concerning the sale of real property,** any real or personal property belonging to an estate may be sold, mortgaged, leased or exchanged under court order when necessary for any of the following purposes:

(a) For the payment of claims allowed against the estate.

(b) For the payment of any allowances made under IC 29-1-4-1.

(c) For the payment of any legacy given by the will of the decedent.

(d) For the payment of expenses of administration.

(e) For the payment of any gift, estate, inheritance or transfer taxes assessed upon the transfer of the estate or due from the decedent or ~~his~~ **the decedent's** estate.

(f) For making distribution of the estate or any part thereof.

(g) For any other purpose in the best interests of the estate.

SECTION 6. IC 29-1-15-11, AS AMENDED BY P.L.86-2018, SECTION 212, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 11. **(a) This section is subject to the provisions of IC 29-1-7-15.1 concerning the sale of real property.**

**(b)** A personal representative may file a petition to sell, mortgage or lease any real property belonging to the estate. The petition shall set forth the reasons for the application and describe the property involved. The personal representative may apply for different authority as to separate parts of the property; or the personal representative may apply in the alternative for authority to sell, mortgage or lease. Upon the filing of the petition, the court shall fix the time and place for the hearing thereof. Notice of the hearing, unless waived, shall be given to all heirs and lienholders, except holders of liens created by said heirs, whose liens are to be extinguished or transferred to the proceeds of said sale in case of intestacy and to all devisees and lienholders, except holders of liens created by said devisees, whose liens are to be extinguished or transferred to the proceeds of said sale in case of testacy, and the notice shall state briefly the nature of the application and shall be given as provided in IC 29-1-1-12. However, as to any real property valued at not more than one thousand dollars ~~($1000.00)~~ **($1,000)** exclusive of any liens the court may, in its discretion, hear and act upon the petition without notice to heirs or devisees. At the hearing and upon satisfactory proofs, the court may order the sale, mortgage or lease of the property described or any part thereof. When a claim secured by a mortgage on real property is, under the provisions of this probate code, payable at the time of distribution of the estate or prior thereto, the court with the consent of the mortgagee may, nevertheless,

order the sale of the real property subject to the mortgage, but such consent shall release the estate should a deficiency later appear.

SECTION 7. IC 29-3-3-8 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 8. (a) A tenant's representative who accepts appointment under IC 32-31-1-23 may represent the tenant for the following purposes:**

**(1) Collecting all or part of the tenant's security deposit from the tenant's landlord.**

**(2) Collecting the tenant's tangible personal property from the tenant's residence.**

**(3) Distributing among the tenant's distributees any portion of the tenant's security deposit that the tenant's representative has collected from the tenant's landlord.**

**(4) Distributing among the tenant's distributees any portion of the tenant's tangible personal property that the tenant's representative has collected from the tenant's residence.**

**(5) Signing and issuing on behalf of the tenant's distributees any affidavit described in IC 29-1-8 that the tenant's landlord may require before releasing the tenant's security deposit or tangible personal property to the tenant's representative.**

**(b) Upon presentation of letters testamentary or letters of administration by the personal representative of the tenant's estate to the tenant's representative, the tenant's representative will deliver to the personal representative any portion of the tenant's tangible personal property that the tenant's representative has collected from the tenant's landlord.**

**(c) The tenant's representative shall keep complete records of all transactions entered into by the tenant's representative on behalf of the tenant for:**

**(1) nine (9) months after the tenant's death date; or**

**(2) three (3) months after the records are delivered to the tenant's personal representative;**

**whichever occurs first.**

**(d) Except as otherwise required by subsection (e), the tenant's representative is not required to render an accounting.**

**(e) Except as provided in subsection (h), the tenant's representative shall render a written accounting if an accounting is:**

**(1) ordered by a court; or**

**(2) demanded by:**

**(A) a child of the tenant;**





**(B) the personal representative of the tenant's estate; or**

**(C) an heir or legatee of the tenant.**

**(f) Except as provided in subsection (h), a tenant's representative shall deliver an accounting required under subsection (e) to:**

**(1) the court;**

**(2) the personal representative of the tenant's estate;**

**(3) an heir of the tenant;**

**(4) a legatee of the tenant; or**

**(5) a child of the tenant.**

**(g) Except as provided in subsection (h), a tenant's representative shall deliver an accounting ordered or demanded under subsection (e) to the court or the person demanding the accounting not later than sixty (60) days after the date the tenant's representative receives the court order or written demand for an accounting.**

**(h) The court may order an accounting under subsection (e) at any time. In the absence of a court ordered accounting, a tenant's representative is not required to deliver an accounting to a person described in subsection (f)(1) through (f)(4) unless the person demands the accounting not later than nine (9) months after the date of the tenant's death. The delivery deadline set forth in subsection (g) applies to a written demand for an accounting that is timely submitted under this subsection.**

**(i) Not more than one (1) accounting is required under this section in each twelve (12) month period unless the court, in its discretion, orders additional accountings.**

**(j) If a tenant's representative fails to deliver an accounting as required under this section, the court or the person demanding the accounting may initiate an action in mandamus to compel the tenant's representative to render the accounting. The court may award the attorney's fees and court costs incurred under this subsection to the person demanding the accounting if the court finds that the tenant's representative failed to render an accounting as required under this section without just cause.**

**(k) A tenant's representative is entitled to judicial review and settlement of an account of all transactions entered into by the tenant's representative, regardless of whether:**

**(1) the tenant's representative's authority has been revoked; or**

**(2) a demand for an accounting is made under subsection (e).**

**(l) Judicial review and settlement of an account is initiated upon**

**the filing of a petition to settle and allow an account. The petition must be filed with the court exercising probate jurisdiction for the county in which the tenant resided. Except as otherwise provided by this section, the procedures in IC 30-4-5-14(b), IC 30-4-5-14(c), IC 30-4-5-14(d), and IC 30-4-5-15 that are applicable to judicial settlement of a trustee's account govern:**

**(1) the filing of objections; and**

**(2) all proceedings;**

**on the petition.**

**(m) A petition to settle and allow an account must be served upon all the following that are applicable:**

**(1) The tenant's personal representative.**

**(2) Any person beneficially interested in the decedent's estate.**

**(3) The tenant's heirs at law.**

**(4) If the tenant's will is probated without administration:**

**(A) the personal representative named in the probated will; and**

**(B) all persons or entities beneficially interested in the probated will.**

**(5) Any other person that the court directs.**

**(n) A tenant's representative is discharged from liability as to the transactions disclosed in the accounting if:**

**(1) the court reviews and approves the accounting; and**

**(2) notice of the court's approval of the accounting is provided to the persons identified in subsection (m).**

**(o) In the absence of fraud, misrepresentation, inadequate disclosure, or failure to provide proper notice related to the power of attorney transactions, the discharge from liability under subsection (n) is lawful and binding upon all interested persons:**

**(1) who would assert an interest on behalf of or through the tenant; and**

**(2) who are:**

**(A) born or unborn;**

**(B) notified or not notified; or**

**(C) represented or not represented.**

**(p) The filing fee for a petition to settle and allow an account filed under this section is a legitimate expense of the tenant's estate.**

SECTION 8. IC 29-3-12-1, AS AMENDED BY SEA 276-2021, SECTION 8, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 1. (a) Except as provided in section 6 or 7 of this chapter, the court shall terminate the guardianship of a minor upon:

(1) the minor's attaining eighteen (18) years of age; or





(2) the minor's death.

The court may terminate the guardianship of a minor upon the minor's adoption or marriage.

(b) The court shall terminate the guardianship of an incapacitated person upon:

(1) adjudication by the court that the protected person is no longer an incapacitated person; or

(2) the death of the protected person.

(c) The court may terminate any guardianship if:

(1) the guardianship property does not exceed the value of three thousand five hundred dollars ($3,500);

(2) the guardianship property is reduced to three thousand five hundred dollars ($3,500);

(3) the domicile or physical presence of the protected person is changed to another state and a guardian has been appointed for the protected person and the protected person's property in that state; or

(4) the guardianship is no longer necessary for any other reason.

(d) When a guardianship terminates otherwise than by the death of the protected person, the powers of the guardian cease, except that the guardian may pay the claims and expenses of administration that are approved by the court and exercise other powers that are necessary to complete the performance of the guardian's trust, including payment and delivery of the remaining property for which the guardian is responsible:

(1) to the protected person;

(2) in the case of an unmarried minor, to a person having care and custody of the minor with whom the minor resides;

(3) to a trust approved by the court, including a trust created by the guardian, in which:

(A) the protected person is the sole beneficiary of the trust; and

(B) the terms of the trust satisfy the requirements of Section 2503(c) of the Internal Revenue Code and the regulations under that Section;

(4) to a custodian under the Uniform Transfers to Minors Act (IC 30-2-8.5); or

(5) to another responsible person as the court orders.

(e) When a guardianship terminates by reason of the death of the protected person, the powers of the guardian cease, except as follows:

(1) The guardian may do the following:

(A) Pay the expenses of administration that are approved by

the court.

(B) Exercise all other powers that are necessary to complete the performance of the guardian's trust. Permitted performances under this clause include the following:

(i) The power to control the disposition of the deceased protected person's body.

(ii) The power to make anatomical gifts.

(iii) The power to request an autopsy.

(iv) The power to make arrangements for funeral services.

(v) The power to make other ceremonial arrangements as provided under IC 29-2-19-17.

(C) Deliver the remaining property for which the guardian is responsible to the protected person's personal representative or to a person who presents the guardian with an affidavit under IC 29-1-8-1 or IC 29-2-1-2.

(D) Request the health records of the protected person under IC 16-39-1-3(c)(4), except as provided in IC 16-39-1-3(d), if the protected person was an incapacitated person. The power of a guardian under this clause terminates sixty (60) days after the date of the protected person's death.

(2) If ~~approved by~~ the court ~~the guardian may pay directly the following.~~ **approves the payment of expenses and obligations under this subdivision, then before the guardian delivers the remaining property under subdivision (1)(C), the guardian shall pay the following expenses and obligations in the amounts approved by the court and in decreasing order of priority:**

**(A) Final administration expenses of the guardianship as approved by the court under subdivision (1)(A).**

**(B) Unless prepaid by means of a funeral trust or before the protected person's death, the reasonable expenses for:**

**(i) the protected person's funeral;**

**(ii) a tombstone, monument, or other marker; and**

**(iii) the disposition of the protected person's bodily remains;**

**subject to the limitations provided in IC 29-1-14-9(a)(2).**

~~(A) Reasonable funeral and burial expenses of the protected person.~~

~~(B) Reasonable expenses of the protected person's last illness.~~

**(C) Any statutory allowances payable to the protected person's surviving spouse or surviving child under IC 29-1-4-1.**





~~(C)~~ **(D)** The protected person's ~~federal and state taxes.~~ **debts disclosed to the court and which could be filed and allowed as claims under IC 29-1-14, having the priority and preference established under IC 29-1-14-9(a)(4).**

~~(D) Any statutory allowances payable to the protected person's surviving spouse or surviving children.~~

**(E) Reasonable expenses of the protected person's last illness disclosed to the court and which could be filed and allowed as claims under IC 29-1-14, having the priority and preference established under IC 29-1-14-9(a)(5).**

**(F) The protected person's debts disclosed to the court and which could be filed and allowed as claims under IC 29-1-14, having priority and preference established under IC 29-1-14-9(a)(6).**

~~(E)~~ **(G)** Any other obligations of the protected person **disclosed to the court and which could be filed and allowed as claims under IC 29-1-14, having the priority established under IC 29-1-14-9(a)(7).**

SECTION 9. IC 30-5-2-8 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 8. "Principal" means:

(1) an individual:

**(A) who is:**

**(i) at least eighteen (18) years of age;**

**(ii) emancipated; or**

**(iii) currently serving in the United States military; and**

**(B)** ~~including~~ **includes** an individual acting as a:

~~(A)~~ **(i)** trustee;

~~(B)~~ **(ii)** personal representative; or

~~(C)~~ **(iii)** fiduciary;

(2) a corporation;

(3) a limited liability company;

(4) a trust; or

(5) a partnership;

who signs a power of attorney granting powers to an attorney in fact.

SECTION 10. IC 32-31-1-23 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 23. (a) If a landlord knows of the death of a tenant who, at the time of death, was the sole occupant of the dwelling unit under a lease, the landlord:**

**(1) shall notify a tenant's representative of the death;**

**(2) shall give the tenant's representative access to the premises at a reasonable time to remove any personal property from**

**the unit and other personal property of the tenant elsewhere on the premises;**

**(3) may require the tenant's representative to prepare and sign an inventory of the property being removed; and**

**(4) shall pay the tenant's representative the deceased tenant's security deposit and unearned rent to which the tenant would otherwise have been entitled under IC 32-31-3-12.**

**(b) If a landlord believes that a tenant, who is the sole occupant of the dwelling unit under a lease, is incapacitated and absent from the dwelling unit, the landlord:**

**(1) shall notify a tenant's representative of the tenant's possible incapacity;**

**(2) shall give the tenant's representative access to the premises at a reasonable time to remove any personal property from the unit and other personal property of the tenant elsewhere on the premises;**

**(3) may require the tenant's representative to prepare and sign an inventory of the property being removed; and**

**(4) shall pay the tenant's representative the incapacitated tenant's security deposit and unearned rent to which the tenant would otherwise have been entitled under IC 32-31-3-12.**

**(c) Any of the following persons, in decreasing order of priority, may accept an appointment and serve as a tenant's representative under this article:**

**(1) A person designated by the tenant in a written document delivered to the landlord.**

**(2) A person designated, in writing, by the tenant in a written lease between the tenant and the landlord.**

**(3) An attorney in fact named by the tenant in a power of attorney during the tenant's lifetime.**

**(4) A temporary guardian or guardian of the person of a tenant.**

**(5) A tenant's heir.**

**(6) A person selected and appointed by a probate court upon a petition by any interested person under this section.**

**If a dispute exists between two (2) or more persons claiming to be a tenant's representative, the probate court's decision controls after a hearing held upon notice to the interested persons.**

**(d) A person who is authorized to serve as a tenant's representative under subsection (c) accepts appointment by:**

**(1) providing written notice to the tenant's landlord of the**





**tenant representative's acceptance of appointment; and**

**(2) if the tenant is appointed under subsection (c)(6), complying with the conditions stated in the probate court's order.**

**(e) The authority of a deceased tenant's heir, a deceased tenant's attorney in fact, a temporary guardian, or a guardian of the person to act under this article terminates when the heir, the guardian, or the landlord knows that:**

**(1) a personal representative has been appointed for the deceased tenant's estate;**

**(2) a tenant's attorney in fact is acting on the living tenant's behalf; or**

**(3) a guardian has been appointed for the living incapacitated tenant's property.**

**(f) A landlord that complies with this section is not liable:**

**(1) to the tenant, if the tenant is living;**

**(2) to the tenant's estate, if the tenant is deceased; or**

**(3) to any other person that has a claim or interest in the personal property removed from the premises, unearned rent, or security deposit.**

**(g) A landlord that willfully violates subsection (a) or (b) is liable:**

**(1) to the tenant, if the tenant is living; or**

**(2) to the tenant's estate, if the tenant is deceased;**

**for actual damages.**

**(h) In addition to the rights provided in this section, the tenant's representative has the incapacitated or deceased tenant's rights and responsibilities under IC 32-31-4.**



Speaker of the House of Representatives

President of the Senate

President Pro Tempore

Governor of the State of Indiana

Date: _____ Time: _____

First Regular Session of the 122nd General Assembly (2021)



# SENATE ENROLLED ACT No. 204

AN ACT to amend the Indiana Code concerning health.

*Be it enacted by the General Assembly of the State of Indiana:*

SECTION 1. IC 12-10-7-8 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 8. (a) The division shall contract in writing for the provision of the guardianship services required in each region with a nonprofit corporation that is:

(1) qualified to receive tax deductible contributions under Section 170 of the Internal Revenue Code; and

(2) located in the region.

(b) The division shall establish qualifications to determine eligible providers in each region.

(c) Each contract between the division and a provider must specify a method for the following:

(1) The establishment of a guardianship committee within the provider, serving under the provider's board of directors.

(2) The provision of money and services by the provider in an amount equal to at least twenty-five percent (25%) of the total amount of the contract and the provision by the division of the remaining amount of the contract. The division shall establish guidelines to determine the value of services provided under this subdivision.

(3) The establishment of procedures to avoid a conflict of interest for the provider in providing necessary services to each





incapacitated individual.

(4) The identification and evaluation of indigent adults in need of guardianship services.

(5) The adoption of individualized service plans to provide the least restrictive type of guardianship or related services for each incapacitated individual, including the following:

(A) Designation as a representative payee by:

(i) the Social Security Administration;

(ii) the United States Office of Personnel Management;

(iii) the United States Department of Veterans Affairs; or

(iv) the United States Railroad Retirement Board.

(B) Limited guardianship under IC 29-3.

(C) Guardianship of the person or estate under IC 29-3.

(D) The appointment of:

(i) a health care representative under IC 16-36-1-7 **or IC 16-36-7;** or

(ii) a power of attorney under IC 30-5.

(6) The periodic reassessment of each incapacitated individual.

(7) The provision of legal services necessary for the guardianship.

(8) The training and supervision of paid and volunteer staff.

(9) The establishment of other procedures and programs required by the division.

SECTION 2. IC 12-10-13-3.3, AS AMENDED BY P.L.168-2018, SECTION 10, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 3.3. As used in this chapter, "legal representative" means:

(1) a guardian;

(2) a health care representative acting under IC 16-36-1 **or IC 16-36-7;**

(3) an attorney-in-fact for health care appointed under IC 30-5-5-16;

(4) an attorney-in-fact appointed under IC 30-5-5 who does not hold health care powers; or

(5) the personal representative of the estate;

of a resident of a long term care facility.

SECTION 3. IC 12-10-18-1, AS ADDED BY P.L.140-2005, SECTION 3, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 1. (a) A law enforcement agency that receives a notification concerning a missing endangered adult from:

(1) the missing endangered adult's:

(A) guardian;

(B) custodian; or

(C) guardian ad litem; or

(2) an individual who:

(A) provides the missing endangered adult with home health aid services;

(B) possesses a health care power of attorney **that was executed under IC 30-5-5-16** for the missing endangered adult; or

(C) has evidence that the missing endangered adult has a condition that may prevent the missing endangered adult from returning home without assistance;

shall prepare an investigative report on the missing endangered adult, if based on the notification, the law enforcement agency has reason to believe that an endangered adult is missing.

(b) The investigative report described in subsection (a) may include the following:

(1) Relevant information obtained from the notification concerning the missing endangered adult, including the following:

(A) A physical description of the missing endangered adult.

(B) The date, time, and place that the missing endangered adult was last seen.

(C) The missing endangered adult's address.

(2) Information gathered by a preliminary investigation, if one was made.

(3) A statement by the law enforcement officer in charge setting forth that officer's assessment of the case based upon the evidence and information received.

SECTION 4. IC 16-18-2-1.5, AS AMENDED BY P.L.205-2018, SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 1.5. (a) "Abortion clinic", for purposes of IC 16-21-2, IC 16-34-2-4.7, IC 16-34-3, and IC 16-41-16, means a health care provider (as defined in section ~~163(d)(1)~~ **163(e)(1)** of this chapter) that:

(1) performs surgical abortion procedures; or

(2) beginning January 1, 2014, provides an abortion inducing drug for the purpose of inducing an abortion.

(b) The term does not include the following:

(1) A hospital that is licensed as a hospital under IC 16-21-2.

(2) An ambulatory outpatient surgical center that is licensed as an ambulatory outpatient surgical center under IC 16-21-2.

(3) A health care provider that provides, prescribes, administers, or dispenses an abortion inducing drug to fewer than five (5) patients per year for the purposes of inducing an abortion.





SECTION 5. IC 16-18-2-6.1 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 6.1. "Advance directive", for purposes of IC 16-36-7, has the meaning set forth in IC 16-36-7-2.**

SECTION 6. IC 16-18-2-28.8 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 28.8. "Attending", for purposes of IC 16-36-5, has the meaning set forth in IC 16-36-5-1.1.**

SECTION 7. IC 16-18-2-29 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 29. "Attending physician" means the licensed physician who has the primary responsibility for the treatment and care of the patient. ~~For purposes of IC 16-36-5, the term includes a physician licensed in another state.~~

SECTION 8. IC 16-18-2-35.5 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 35.5. "Best interests", for purposes of IC 16-36-7, has the meaning set forth in IC 16-36-7-3.**

SECTION 9. IC 16-18-2-92.4, AS AMENDED BY P.L.164-2013, SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 92.4. (a) "Declarant", for purposes of IC 16-36-5, has the meaning set forth in IC 16-36-5-3.

(b) "Declarant", for purposes of IC 16-36-6, has the meaning set forth in IC 16-36-6-2.

**(c) "Declarant", for purposes of IC 16-36-7, has the meaning set forth in IC 16-36-7-4.**

SECTION 10. IC 16-18-2-92.5 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 92.5. "Declaration", for purposes of IC 16-36-7, has the meaning set forth in IC 16-36-7-5.**

SECTION 11. IC 16-18-2-105.8 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 105.8. "Electronic", for purposes of IC 16-36-7, has the meaning set forth in IC 16-36-7-6.**

SECTION 12. IC 16-18-2-106.2 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 106.2. "Electronic record", for purposes of IC 16-36-7, has the meaning set forth in IC 16-36-7-7.**

SECTION 13. IC 16-18-2-106.3, AS ADDED BY P.L.204-2005, SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 106.3. **(a) "Electronic signature", for purposes of IC 16-36-7, has the meaning set forth in IC 16-36-7-8.**

**(b)** For purposes of IC 16-42-3 and IC 16-42-22, "electronic

signature" means an electronic sound, symbol, or process:

(1) attached to or logically associated with an electronically transmitted prescription or order; and

(2) executed or adopted by a person;

with the intent to sign the electronically transmitted prescription or order.

SECTION 14. IC 16-18-2-160 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 160. **(a)** "Health care", for purposes of IC 16-36-1, has the meaning set forth in IC 16-36-1-1.

**(b) "Health care", for purposes of IC 16-36-7, has the meaning set forth in IC 16-36-7-9.**

SECTION 15. IC 16-18-2-160.3 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 160.3. "Health care decision", for purposes of IC 16-36-7, has the meaning set forth in IC 16-36-7-10.**

SECTION 16. IC 16-18-2-161, AS AMENDED BY P.L.113-2015, SECTION 3, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 161. (a) "Health care facility" includes:

(1) hospitals licensed under IC 16-21-2, private mental health institutions licensed under IC 12-25, and tuberculosis hospitals established under IC 16-11-1 (before its repeal);

(2) health facilities licensed under IC 16-28; and

(3) rehabilitation facilities and kidney disease treatment centers.

(b) "Health care facility", for purposes of IC 16-21-11 and IC 16-34-3, has the meaning set forth in IC 16-21-11-1.

(c) "Health care facility", for purposes of IC 16-28-13, has the meaning set forth in IC 16-28-13-0.5.

**(d) "Health care facility", for purposes of IC 16-36-7, has the meaning set forth in IC 16-36-7-11.**

SECTION 17. IC 16-18-2-163, AS AMENDED BY P.L.112-2020, SECTION 5, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 163. (a) Except as provided in subsection (c), "health care provider", for purposes of IC 16-21 and IC 16-41, means any of the following:

(1) An individual, a partnership, a corporation, a professional corporation, a facility, or an institution licensed or legally authorized by this state to provide health care or professional services as a licensed physician, a psychiatric hospital, a hospital, a health facility, an emergency ambulance service (IC 16-31-3), a dentist, a registered or licensed practical nurse, a midwife, an optometrist, a pharmacist, a podiatrist, a chiropractor, a physical therapist, a respiratory care practitioner, an occupational therapist,





a psychologist, a paramedic, an emergency medical technician, an advanced emergency medical technician, an athletic trainer, or a person who is an officer, employee, or agent of the individual, partnership, corporation, professional corporation, facility, or institution acting in the course and scope of the person's employment.

(2) A college, university, or junior college that provides health care to a student, a faculty member, or an employee, and the governing board or a person who is an officer, employee, or agent of the college, university, or junior college acting in the course and scope of the person's employment.

(3) A blood bank, community mental health center, community intellectual disability center, community health center, or migrant health center.

(4) A home health agency (as defined in IC 16-27-1-2).

(5) A health maintenance organization (as defined in IC 27-13-1-19).

(6) A health care organization whose members, shareholders, or partners are health care providers under subdivision (1).

(7) A corporation, partnership, or professional corporation not otherwise qualified under this subsection that:

(A) provides health care as one (1) of the corporation's, partnership's, or professional corporation's functions;

(B) is organized or registered under state law; and

(C) is determined to be eligible for coverage as a health care provider under IC 34-18 for the corporation's, partnership's, or professional corporation's health care function.

Coverage for a health care provider qualified under this subdivision is limited to the health care provider's health care functions and does not extend to other causes of action.

(b) "Health care provider", for purposes of IC 16-35, has the meaning set forth in subsection (a). However, for purposes of IC 16-35, the term also includes a health facility (as defined in section 167 of this chapter).

(c) "Health care provider", for purposes of IC 16-32-5, IC 16-36-5, IC 16-36-6, and IC 16-41-10 means an individual licensed or authorized by this state to provide health care or professional services as:

(1) a licensed physician;

(2) a registered nurse;

(3) a licensed practical nurse;

(4) an advanced practice registered nurse;

(5) a certified nurse midwife;
(6) a paramedic;
(7) an emergency medical technician;
(8) an advanced emergency medical technician;
(9) an emergency medical responder, as defined by section 109.8 of this chapter;
(10) a licensed dentist;
(11) a home health aide, as defined by section 174 of this chapter; or
(12) a licensed physician assistant.

The term includes an individual who is an employee or agent of a health care provider acting in the course and scope of the individual's employment.

**(d) "Health care provider", for purposes of IC 16-36-7, has the meaning set forth in IC 16-36-7-12.**

~~(d)~~ **(e)** "Health care provider", for purposes of section 1.5 of this chapter and IC 16-40-4, means any of the following:

(1) An individual, a partnership, a corporation, a professional corporation, a facility, or an institution licensed or authorized by the state to provide health care or professional services as a licensed physician, a psychiatric hospital, a hospital, a health facility, an emergency ambulance service (IC 16-31-3), an ambulatory outpatient surgical center, a dentist, an optometrist, a pharmacist, a podiatrist, a chiropractor, a psychologist, or a person who is an officer, employee, or agent of the individual, partnership, corporation, professional corporation, facility, or institution acting in the course and scope of the person's employment.
(2) A blood bank, laboratory, community mental health center, community intellectual disability center, community health center, or migrant health center.
(3) A home health agency (as defined in IC 16-27-1-2).
(4) A health maintenance organization (as defined in IC 27-13-1-19).
(5) A health care organization whose members, shareholders, or partners are health care providers under subdivision (1).
(6) A corporation, partnership, or professional corporation not otherwise specified in this subsection that:
(A) provides health care as one (1) of the corporation's, partnership's, or professional corporation's functions;
(B) is organized or registered under state law; and
(C) is determined to be eligible for coverage as a health care provider under IC 34-18 for the corporation's, partnership's, or professional corporation's health care function.
(7) A person that is designated to maintain the records of a person described in subdivisions (1) through (6).





~~(c)~~ **(f)** "Health care provider", for purposes of IC 16-45-4, has the meaning set forth in 47 CFR 54.601(a).

SECTION 18. IC 16-18-2-163.4, AS ADDED BY P.L.137-2015, SECTION 4, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 163.4. **(a)** "Health care representative", for purposes of IC 16-21-12, has the meaning set forth in IC 16-21-12-4.

**(b) "Health care representative", for purposes of IC 16-36-7, has the meaning set forth in IC 16-36-7-13.**

SECTION 19. IC 16-18-2-167.5 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 167.5. "Health information", for purposes of IC 16-36-7, has the meaning set forth in IC 16-36-7-14.**

SECTION 20. IC 16-18-2-186.5 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 186.5. "Incapacity" and "incapacitated", for purposes of IC 16-36-7, have the meaning set forth in IC 16-36-7-15.**

SECTION 21. IC 16-18-2-190 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 190. **(a) "Informed consent", for purposes of IC 16-36-7, has the meaning set forth in IC 16-36-7-16.**

**(b)** "Informed consent", for purposes of IC 16-41-6, has the meaning set forth in IC 16-41-6-2.

SECTION 22. IC 16-18-2-203, AS AMENDED BY P.L.164-2013, SECTION 4, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 203. (a) "Life prolonging procedure", for purposes of ~~IC 16-36-4, has the meaning set forth in IC 16-36-4-1.~~

~~(b) "Life prolonging procedure", for purposes of IC 16-36-6, has the meaning set forth in IC 16-36-6-3.~~ **IC 16-36, means any medical procedure, treatment, or intervention that does the following:**

**(1) Uses mechanical or other artificial means to sustain, restore, or supplant a vital function.**
**(2) Serves to prolong the dying process.**

**(b) The term does not include the performance or provision of any medical procedure or medication necessary to provide comfort care or to alleviate pain.**

SECTION 23. IC 16-18-2-253.8 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS

[EFFECTIVE JULY 1, 2021]: **Sec. 253.8. "Notarial officer", for purposes of IC 16-36-7, has the meaning set forth in IC 16-36-7-17.**

SECTION 24. IC 16-18-2-254.3 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 254.3. "Observe", for purposes of IC 16-36-7, has the meaning set forth in IC 16-36-7-18.**

SECTION 25. IC 16-18-2-293.3 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 293.3. "Presence", "present", or "to be present", for purposes of IC 16-36-7, has the meaning set forth in IC 16-36-7-19.**

SECTION 26. IC 16-18-2-296.2 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 296.2. "Proxy", for purposes of IC 16-36-7, has the meaning set forth in IC 16-36-7-20.**

SECTION 27. IC 16-18-2-308.2 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 308.2. "Reasonably available", for purposes of IC 16-36-7, has the meaning set forth in IC 16-36-7-21.**

SECTION 28. IC 16-18-2-331.4 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 331.4. "Sign", for purposes of IC 16-36-7, has the meaning set forth in IC 16-36-7-22.**

SECTION 29. IC 16-18-2-331.5 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 331.5. "Signature", for purposes of IC 16-36-7, has the meaning set forth in IC 16-36-7-23.**

SECTION 30. IC 16-18-2-348.7 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 348.7. "Telephonic interaction", for purposes of IC 16-36-7, has the meaning set forth in IC 16-36-7-24.**

SECTION 31. IC 16-18-2-354.8 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 354.8. "Treating physician", for purposes of IC 16-36-7, has the meaning set forth in IC 16-36-7-25.**

SECTION 32. IC 16-18-2-378.5 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 378.5. "Written" and "writing", for purposes of IC 16-36-7, have the meaning set forth in IC 16-36-7-26.**





SECTION 33. IC 16-21-12-4, AS ADDED BY P.L.137-2015, SECTION 6, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 4. As used in this chapter, "health care representative" means an individual:

**(1)** appointed as the patient's health care representative under IC 16-36-1-7;

**(2) appointed as the patient's health care representative under IC 16-36-7;** or ~~an individual~~

**(3)** holding the patient's health care power of attorney under IC 30-5-5-16.

However, if the patient has not appointed a health care representative under IC 16-36-1-7 **or IC 16-36-7** or granted a health care power of attorney to an individual under IC 30-5-5-16, the term means an individual authorized to consent to health care for the patient under ~~IC 16-36-1-5.~~ **IC 16-36-7-42.**

SECTION 34. IC 16-21-12-15, AS ADDED BY P.L.137-2015, SECTION 6, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 15. (a) This chapter may not be construed to interfere with the rights of a health care representative appointed under IC 16-36-1 **or a health care representative appointed under IC 16-36-7.**

(b) This chapter may not be construed to create a private right of action against a hospital, a hospital employee, or an individual with whom a hospital has a contractual relationship.

(c) No cause of action of any type arises against a hospital, a hospital employee, a staff member, or an individual with whom a hospital has a contractual relationship based upon an act or omission of a lay caregiver.

SECTION 35. IC 16-36-1-3, AS AMENDED BY P.L.139-2019, SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 3. (a) Except as provided in subsections (b) through (d), unless incapable of consenting under section 4 of this chapter, an individual may consent to the individual's own health care if the individual is:

(1) an adult; or

(2) a minor and:

(A) is emancipated;

(B) is:

(i) at least fourteen (14) years of age;

(ii) not dependent on a parent **or guardian** for support;

(iii) living apart from the minor's parents or from an individual in loco parentis; and

(iv) managing the minor's own affairs;

(C) is or has been married;

(D) is in the military service of the United States;

(E) meets the requirements of section 3.5 of this chapter; or

(F) is authorized to consent to the health care by any other statute.

(b) A person at least seventeen (17) years of age is eligible to donate blood in a voluntary and noncompensatory blood program without obtaining ~~parental~~ permission **from a parent or guardian.**

(c) A person who is sixteen (16) years of age is eligible to donate blood in a voluntary and noncompensatory blood program if the person has obtained written permission from the person's parent **or guardian.**

(d) An individual who has, suspects that the individual has, or has been exposed to a venereal disease is competent to give consent for medical or hospital care or treatment of the individual.

SECTION 36. IC 16-36-1-4 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 4. (a) An individual described in section 3 of this chapter may consent to health care unless, in the good faith opinion of the attending physician, the individual is incapable of making a decision regarding the proposed health care.

(b) A consent to health care under section 5, 6, or 7 of this chapter is not valid if:

**(1)** the health care provider has knowledge that the individual has indicated contrary instructions in regard to the proposed health care; ~~even if the individual is believed to be incapable of making a decision regarding the proposed health care at the time the individual indicates contrary instructions.~~ **and**

**(2) the individual has not been determined to be incapable of consenting to health care by:**

**(A) an order of a probate court under section 8 of this chapter; or**

**(B) the individual's attending physician under subsection (a).**

SECTION 37. IC 16-36-1-7, AS AMENDED BY P.L.81-2015, SECTION 8, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 7. (a) An individual who may consent to health care under section 3 of this chapter may appoint another representative to act for the appointor in matters affecting the appointor's health care.

(b) An appointment and any amendment must meet the following conditions:

(1) Be in writing.

(2) Be signed by the appointor or by a designee in the appointor's





presence **before January 1, 2023.**

(3) Be witnessed by an adult other than the representative.

(c) The appointor may specify in the appointment appropriate terms and conditions, including an authorization to the representative to delegate the authority to consent to another.

(d) The authority granted becomes effective according to the terms of the appointment.

(e) The appointment does not commence until the appointor becomes incapable of consenting. The authority granted in the appointment is not effective if the appointor regains the capacity to consent.

(f) Unless the appointment provides otherwise, a representative appointed under this section who is reasonably available and willing to act has priority to act in all matters of health care for the appointor, except when the appointor is capable of consenting.

(g) In making all decisions regarding the appointor's health care, a representative appointed under this section shall act as follows:

(1) In the best interest of the appointor consistent with the purpose expressed in the appointment.

(2) In good faith.

(h) A health care representative who resigns or is unwilling to comply with the written appointment may not exercise further power under the appointment and shall so inform the following:

(1) The appointor.

(2) The appointor's legal representative if one is known.

(3) The health care provider if the representative knows there is one.

(i) An individual who is capable of consenting to health care may revoke:

(1) the appointment at any time by notifying the representative orally or in writing; or

(2) the authority granted to the representative by notifying the health care provider orally or in writing.

SECTION 38. IC 16-36-1.5-5 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 5. (a) This section applies to a patient who:

(1) receives mental health services; and

(2) is mentally incompetent.

(b) A patient described in subsection (a) shall provide consent for mental health treatment through the informed consent of one (1) of the following:

(1) The patient's legal guardian or other court appointed

representative.

(2) The patient's health care representative under IC 16-36-1.

(3) An attorney in fact for health care appointed under IC 30-5-5-16.

(4) The patient's health care representative acting in accordance with the patient's psychiatric advance directive as expressed in a psychiatric advance directive executed under IC 16-36-1.7.

**(5) The patient's health care representative conferred under IC 16-36-7.**

SECTION 39. IC 16-36-4-1 IS REPEALED [EFFECTIVE JULY 1, 2021]. ~~Sec. 1. (a) As used in this chapter, "life prolonging procedure" means any medical procedure, treatment, or intervention that does the following:~~

~~(1) Uses mechanical or other artificial means to sustain, restore, or supplant a vital function.~~

~~(2) Serves to prolong the dying process.~~

~~(b) The term does not include the performance or provision of any medical procedure or medication necessary to provide comfort care or to alleviate pain.~~

SECTION 40. IC 16-36-4-10 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 10. The following is the living will declaration form:

LIVING WILL DECLARATION

Declaration made this _____ day of _____ (month, year). I, _____, being at least eighteen (18) years of age and of sound mind, willfully and voluntarily make known my desires that my dying shall not be artificially prolonged under the circumstances set forth below, and I declare:

If at any time my attending physician certifies in writing that: (1) I have an incurable injury, disease, or illness; (2) my death will occur within a short time; and (3) the use of life prolonging procedures would serve only to artificially prolong the dying process, I direct that such procedures be withheld or withdrawn, and that I be permitted to die naturally with only the performance or provision of any medical procedure or medication necessary to provide me with comfort care or to alleviate pain, and, if I have so indicated below, the provision of artificially supplied nutrition and hydration. (Indicate your choice by ~~initialling~~ **initialing** or making your mark before signing this declaration):

_____ I wish to receive artificially supplied nutrition and hydration, even if the effort to sustain life is futile or excessively burdensome to me.





_____ I do not wish to receive artificially supplied nutrition and hydration, if the effort to sustain life is futile or excessively burdensome to me.

_____ I intentionally make no decision concerning artificially supplied nutrition and hydration, leaving the decision to my health care representative appointed under IC 16-36-1-7 or my attorney in fact with health care powers **appointed** under ~~IC 30-5-5.~~ **IC 30-5-5-16.**

In the absence of my ability to give directions regarding the use of life prolonging procedures, it is my intention that this declaration be honored by my family and physician as the final expression of my legal right to refuse medical or surgical treatment and accept the consequences of the refusal.

I understand the full import of this declaration.

Signed _____

_____

City, County, and State of Residence

The declarant has been personally known to me, and I believe (him/her) to be of sound mind. I did not sign the declarant's signature above for or at the direction of the declarant. I am not a parent, spouse, or child of the declarant. I am not entitled to any part of the declarant's estate or directly financially responsible for the declarant's medical care. I am competent and at least eighteen (18) years of age.

Witness _____ Date _____

Witness _____ Date _____

SECTION 41. IC 16-36-5-1.1 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 1.1. As used in this chapter, "attending" means the physician, advanced practice registered nurse, or physician assistant who has the primary responsibility for the treatment and care of the patient.**

SECTION 42. IC 16-36-5-4.3 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 4.3. As used in this chapter, and with respect to a declarant, witness, or other person who signs or participates in the signing of an out of hospital DNR declaration under this chapter, "in the presence of" has the meaning set forth in section 7.7 of this chapter.**

SECTION 43. IC 16-36-5-4.5 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 4.5. As used in this chapter, and with respect to a declarant and witness, "observe" means to**

**perceive another's actions or expression of intent through the senses of eyesight, hearing, or both. The term includes perceptions perceived through the use of technology or learned skills to:**

**(1) assist a person's capability for eyesight, hearing, or both; or**

**(2) compensate for an impairment of a person's capability for eyesight, hearing, or both.**

SECTION 44. IC 16-36-5-7.7 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 7.7 As used in this chapter, and with respect to a declarant, witness, or other person who signs or participates in the signing of an out of hospital DNR declaration under this chapter, "presence" means a process of signing and witnessing a DNR declaration in which:**

**(1) the declarant and witness are:**

**(A) directly present with each other in the same physical space;**

**(B) able to interact with each other in real time through use of any audiovisual communications technology now known or later developed; or**

**(C) are able to speak to and hear each other in real time through telephonic interaction;**

**(2) the:**

**(A) identity of the declarant is personally known to all witnesses;**

**(B) witnesses are able to view a government issued, photographic identification of the declarant; or**

**(C) witnesses are able to ask any question of the declarant that:**

**(i) authenticates the identity of the declarant; and**

**(ii) establishes the capacity and sound mind of the declarant to the satisfaction of the witnesses; and**

**(3) each witness is able to interact with the declarant and each other when observing or hearing in real time, as applicable:**

**(A) the declarant's expression of intent to execute an out of hospital DNR declaration under this chapter;**

**(B) the declarant's actions in executing or directing the execution of the out of hospital DNR declaration under this chapter; and**

**(C) the actions of the declarant and all other witnesses when signing the out of hospital DNR declaration.**

**The term includes the use of technology or learned skills for the**





**purpose of assisting with hearing, eyesight, and speech or for the purpose of compensating for a hearing, eyesight, or speech impairment.**

SECTION 45. IC 16-36-5-7.9 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 7.9. As used in this chapter, and with respect to a declarant, witness, or other person who signs or participates in the signing of an out of hospital DNR declaration under this chapter, "present" has the meaning set forth in section 7.7 of this chapter.**

SECTION 46. IC 16-36-5-9 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 9. As used in this chapter, "representative" means a person's:

(1) legal guardian or other court appointed representative responsible for making health care decisions for the person;

(2) health care representative **appointed** under ~~IC 16-36-1, or~~ **IC 16-36-1-7;**

**(3) health care representative appointed under IC 16-36-7; or**

~~(3)~~ **(4)** attorney in fact for health care appointed under IC 30-5-5-16.

SECTION 47. IC 16-36-5-9.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 9.5 As used in this chapter, "telephonic interaction" means interaction through the use of any technology, now known or later developed, that enables two (2) or more people to speak to and hear each other in real time even if one (1) or more of the persons cannot see each other.**

SECTION 48. IC 16-36-5-10 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 10. An attending physician, **advanced practice registered nurse, or physician assistant** may certify that a patient is a qualified person if the attending physician, **advanced practice registered nurse, or physician assistant** determines, in accordance with reasonable medical standards, that one (1) of the following conditions is met:

(1) The person has a terminal condition (as defined in IC 16-36-4-5).

(2) The person has a medical condition such that, if the person were to suffer cardiac or pulmonary failure, resuscitation would be unsuccessful or within a short period the person would experience repeated cardiac or pulmonary failure resulting in death.

SECTION 49. IC 16-36-5-11 IS AMENDED TO READ AS

FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 11. (a) A person who is of sound mind and at least eighteen (18) years of age may execute an out of hospital DNR declaration.

(b) A person's representative may execute an out of hospital DNR declaration for the person under this chapter only if the person is:

(1) at least eighteen (18) years of age; and

(2) incompetent.

(c) An out of hospital DNR declaration must meet the following conditions:

(1) Be voluntary.

(2) Be in writing.

(3) Be signed by the person making the declaration or by another person in the declarant's presence and at the declarant's express direction.

(4) Be dated.

(5) Be signed in the presence of at least two (2) competent witnesses.

**(d) If the requirements concerning presence are met, a competent declarant and all necessary witnesses may complete and sign an out of hospital DNR declaration in two (2) or more tangible, paper counterparts with the declarant's signature placed on one (1) original counterpart and the signatures of the witnesses placed on one (1) or more different tangible, paper counterparts if the text of the out of hospital DNR declaration states that the declaration is being signed in separate counterparts. If an out of hospital DNR declaration is signed in counterparts under this subsection, one (1) or more of the following persons must combine each of the separately signed tangible, paper counterparts into a single composite document that contains all of the text of the declarant, the signature of the declarant, and the signature of each witness:**

**(1) The declarant.**

**(2) A health care representative who has been appointed by the declarant.**

**(3) A person who supervised the signing of the out of hospital DNR declaration in the person's presence.**

**(4) Any other person who was present during the signing of the out of hospital DNR declaration.**

**The person who combines the separately signed counterparts into a single composite document must do so not later than ten (10) business days after the person receives all of the separately signed tangible, paper counterparts. Any scanned, photocopied, or other**





**accurate copy of the single, composite document shall be treated as validly signed under this subsection if the single, composite document contains the complete text of the out of hospital DNR declaration and all required signatures.**

**(e) If physical impairment, physical isolation, or other factors make it impossible or impractical for a declarant to use audiovisual technology to interact with witnesses or to otherwise comply with the requirements concerning presence as defined in section 7.7 of this chapter, the declarant and the witnesses may use telephonic interaction to witness and sign an out of hospital DNR declaration. A potential witness may not, however, be compelled to only use telephonic interaction when participating in the signing or witnessing of an out of hospital DNR declaration under this subsection. If an out of hospital DNR declaration is signed using telephonic interaction under this subsection:**

**(1) the:**

**(A) identity of the declarant must be personally known to the witness;**

**(B) witness must be able to view a government issued, photographic identification of the declarant; or**

**(C) witness must be able to ask any question of the declarant that:**

**(i) authenticates the identity of the declarant; and**

**(ii) establishes the capacity and sound mind of the declarant to the satisfaction of the witness;**

**(2) the text of the declaration must specify that the declarant and witnesses used telephonic interaction throughout the witnessing and signing process of the out of hospital DNR declaration; and**

**(3) the out of hospital DNR declaration is presumed valid if it specifies that the declarant and the witnesses witnessed and signed the declaration in compliance with Indiana law.**

**A health care provider or person who disputes the validity of an out of hospital DNR declaration described under this subsection has the burden of proving the invalidity of the declaration or noncompliance with this subsection, as applicable, by a preponderance of the evidence.**

~~(d)~~ **(f)** An out of hospital DNR declaration must be issued on the form specified in section 15 of this chapter.

SECTION 50. IC 16-36-5-12 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 12. An out of hospital DNR order:

(1) may be issued only by the declarant's attending physician, **advanced practice registered nurse, or physician assistant;** and

(2) may be issued only if both of the following apply:

(A) The attending physician, **advanced practice registered nurse, or physician assistant** has determined the patient is a qualified person.

(B) The patient has executed an out of hospital DNR declaration under section 11 of this chapter.

SECTION 51. IC 16-36-5-13 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 13. (a) An attending physician, **advanced practice registered nurse, or physician assistant** who does not issue an out of hospital DNR order for a patient who is a qualified person may transfer the patient to another physician, who may issue an out of hospital DNR order, unless:

(1) the attending physician, **advanced practice registered nurse, or physician assistant** has reason to believe the patient's declaration was not validly executed, or there is evidence the patient no longer intends the declaration to be enforced; and

(2) the patient is unable to validate the declaration.

(b) Notwithstanding section 10 of this chapter, if an attending physician, **advanced practice registered nurse, or physician assistant,** after reasonable investigation, does not find any other physician willing to honor the patient's out of hospital DNR declaration and issue an out of hospital DNR order, the attending physician, **advanced practice registered nurse, or physician assistant** may refuse to issue an out of hospital DNR order.

(c) If the attending physician, **advanced practice registered nurse, or physician assistant** does not transfer a patient under subsection (a), the attending physician, **advanced practice registered nurse, or physician assistant** may attempt to ascertain the patient's intent and attempt to determine the validity of the declaration by consulting with any of the following individuals who are reasonably available, willing, and competent to act:

(1) A court appointed guardian of the patient, if one has been appointed. This subdivision does not require the appointment of a guardian so that a treatment decision may be made under this section.

(2) A person designated by the patient in writing to make a treatment decision.

(3) The patient's spouse.

(4) An adult child of the patient or a majority of any adult





children of the patient who are reasonably available for consultation.

(5) An adult sibling of the patient or a majority of any adult siblings of the patient who are reasonably available for consultation.

(6) The patient's clergy.

(7) Another person who has firsthand knowledge of the patient's intent.

(d) The individuals described in subsection (c)(1) through (c)(7) shall act in the best interest of the patient and shall follow the patient's express or implied intent, if known.

(e) The attending physician, **advanced practice registered nurse, or physician assistant** acting under subsection (c) shall list the names of the individuals described in subsection (c) who were consulted and include the information received in the patient's medical file.

(f) If the attending physician, **advanced practice registered nurse, or physician assistant** determines from the information received under subsection (c) that the patient intended to execute a valid out of hospital DNR declaration, the attending physician, **advanced practice registered nurse, or physician assistant** may:

(1) issue an out of hospital DNR order, with the concurrence of at least one (1) physician documented in the patient's medical file; or

(2) request a court to appoint a guardian for the patient to make the consent decision on behalf of the patient.

(g) An out of hospital DNR order must be issued on the form specified in section 15 of this chapter.

SECTION 52. IC 16-36-5-15 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 15. An out of hospital DNR declaration and order must be in substantially the following form:

OUT OF HOSPITAL DO NOT RESUSCITATE DECLARATION AND ORDER

This declaration and order is effective on the date of execution and remains in effect until the death of the declarant or revocation.

OUT OF HOSPITAL DO NOT RESUSCITATE DECLARATION

Declaration made this ____ day of _____. I, _____, being of sound mind and at least eighteen (18) years of age, willfully and voluntarily make known my desires that my dying shall not be artificially prolonged under the circumstances set forth below. I declare:

My attending physician, **advanced practice registered nurse, or physician assistant** has certified that I am a qualified person, meaning

that I have a terminal condition or a medical condition such that, if I suffer cardiac or pulmonary failure, resuscitation would be unsuccessful or within a short period I would experience repeated cardiac or pulmonary failure resulting in death.

I direct that, if I experience cardiac or pulmonary failure in a location other than an acute care hospital or a health facility, cardiopulmonary resuscitation procedures be withheld or withdrawn and that I be permitted to die naturally. My medical care may include any medical procedure necessary to provide me with comfort care or to alleviate pain.

I understand that I may revoke this out of hospital DNR declaration at any time by a signed and dated writing, by destroying or canceling this document, or by communicating to health care providers at the scene the desire to revoke this declaration.

**This declaration was signed by me and by the witnesses in compliance with Indiana law and by: [Initial or check only one (1) of the following spaces]**

**__ Signing on paper or electronically in each other's direct physical presence.**

**__ Signing in separate counterparts on paper using two (2) way, real time audiovisual technology.**

**__ Signing electronically using two (2) way, real time audiovisual technology or telephonic interaction.**

**__ Signing in separate counterparts on paper using telephonic interaction between the me (declarant) and all witnesses.**

I understand the full import of this declaration.

Signed_____

Printed name_____

_____

City and State of Residence_____

The declarant is personally known to me, and I believe the declarant to be of sound mind. I did not sign the declarant's signature above, for, or at the direction of, the declarant. I am not a parent, spouse, or child of the declarant. I am not entitled to any part of the declarant's estate or directly financially responsible for the declarant's medical care. I am competent and at least eighteen (18) years of age.

Witness_____Printed name_____Date_____

Witness_____Printed name_____Date_____

OUT OF HOSPITAL DO NOT RESUSCITATE ORDER

I,_____, the attending physician, **advanced practice registered nurse, or physician assistant** of _____, have certified the declarant as a qualified person





to make an out of hospital DNR declaration, and I order health care providers having actual notice of this out of hospital DNR declaration and order not to initiate or continue cardiopulmonary resuscitation procedures on behalf of the declarant, unless the out of hospital DNR declaration is revoked.

Signed _____Date_____

Printed name_____

Medical license number _____

SECTION 53. IC 16-36-5-16 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 16. Copies of the out of hospital DNR declaration and order must be kept:

(1) by the declarant's attending physician, **advanced practice registered nurse, or physician assistant** in the declarant's medical file; and

(2) by the declarant or the declarant's representative.

SECTION 54. IC 16-36-5-17 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 17. (a) The emergency medical services commission shall develop an out of hospital DNR identification device that must be:

(1) a necklace or bracelet; and

(2) inscribed with:

(A) the declarant's name;

(B) the declarant's date of birth; and

(C) the words "Do Not Resuscitate".

(b) An out of hospital DNR identification device may be created for a declarant only after an out of hospital DNR declaration and order has been executed by a declarant and an attending physician, **advanced practice registered nurse, or physician assistant.**

(c) The device developed under subsection (a) is not a substitute for the out of hospital DNR declaration and order.

SECTION 55. IC 16-36-5-18 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 18. (a) A declarant may at any time revoke an out of hospital DNR declaration and order by any of the following:

(1) A signed, dated writing.

(2) Physical cancellation or destruction of the declaration and order by the declarant or another in the declarant's presence and at the declarant's direction.

(3) An oral expression by the declarant of intent to revoke.

(b) A declarant's representative may revoke an out of hospital DNR declaration and order under this chapter only if the declarant is incompetent.

(c) A revocation is effective upon communication to a health care provider.

(d) A health care provider to whom the revocation of an out of hospital DNR declaration and order is communicated shall immediately notify the declarant's attending physician, **advanced practice registered nurse, or physician assistant,** if known, of the revocation.

(e) An attending physician, **advanced practice registered nurse, or physician assistant** notified of the revocation of an out of hospital DNR declaration and order shall immediately:

(1) add the revocation to the declarant's medical file, noting the time, date, and place of revocation, if known, and the time, date, and place that the physician, **advanced practice registered nurse, or physician assistant** was notified;

(2) cancel the out of hospital DNR declaration and order by entering the word "VOID" on each page of the out of hospital DNR declaration and order in the declarant's medical file; and

(3) notify any health care facility staff responsible for the declarant's care of the revocation.

SECTION 56. IC 16-36-5-19 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 19. (a) A health care provider shall withhold or discontinue CPR to a patient in an out of hospital location if the health care provider has actual knowledge of:

(1) an original or a copy of a signed out of hospital DNR declaration and order executed by the patient; or

(2) an out of hospital DNR identification device worn by the patient or in the patient's possession.

(b) A health care provider shall disregard an out of hospital DNR declaration and order and perform CPR if:

(1) the declarant is conscious and states a desire for resuscitative measures;

(2) the health care provider believes in good faith that the out of hospital DNR declaration and order has been revoked;

(3) the health care provider is ordered by the attending physician, **advanced practice registered nurse, or physician assistant** to disregard the out of hospital DNR declaration and order; or

(4) the health care provider believes in good faith that the out of hospital DNR declaration and order must be disregarded to avoid verbal or physical confrontation at the scene.

(c) A health care provider transporting a declarant shall document on the transport form:

(1) the presence of an out of hospital DNR declaration and order;

(2) the attending physician's, **advanced practice registered**





**nurse's, or physician assistant's** name; and

(3) the date the out of hospital DNR declaration and order was signed.

(d) An out of hospital DNR identification device must accompany a declarant whenever the declarant is transported.

SECTION 57. IC 16-36-5-22 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 22. (a) A person may challenge the validity of an out of hospital DNR declaration and order by filing a petition for review in a court in the county in which the declarant resides.

(b) A petition filed under subsection (a) must include the name and address of the declarant's attending physician, **advanced practice registered nurse, or physician assistant.**

(c) A court in which a petition is filed under subsection (a) may declare an out of hospital DNR declaration and order void if the court finds that the out of hospital DNR declaration and order was executed:

(1) when the declarant was incapacitated due to insanity, mental illness, mental deficiency, duress, undue influence, fraud, excessive use of drugs, confinement, or other disability;

(2) contrary to the declarant's wishes; or

(3) when the declarant was not a qualified person.

(d) If a court finds that the out of hospital DNR declaration and order is void, the court shall cause notice of the finding to be sent to the declarant's attending physician, **advanced practice registered nurse, or physician assistant.**

(e) Upon notice under subsection (d), the declarant's attending physician, **advanced practice registered nurse, or physician assistant** shall follow the procedures under section 18(e) of this chapter.

SECTION 58. IC 16-36-5-26 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 26. The act of withholding or withdrawing CPR, when done under:

(1) an out of hospital DNR declaration and order issued under this chapter;

(2) a court order or decision of a court appointed guardian; or

(3) a good faith medical decision by the attending physician, **advanced practice registered nurse, or physician assistant** that the patient has a terminal illness;

is not an intervening force and does not affect the chain of proximate cause between the conduct of a person that placed the patient in a terminal condition and the patient's death.

SECTION 59. IC 16-36-6-3 IS REPEALED [EFFECTIVE JULY 1,



2021]. ~~Sec. 3. (a) As used in this chapter, "life prolonging procedure" means any medical procedure, treatment, or intervention that does the following:~~

~~(1) Uses mechanical or other artificial means to sustain, restore, or supplant a vital function.~~

~~(2) Serves to prolong the dying process.~~

~~(b) The term does not include the performance or provision of any medical procedure or medication necessary to provide comfort care or to alleviate pain.~~

SECTION 60. IC 16-36-6-7, AS AMENDED BY P.L.139-2019, SECTION 3, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 7. (a) The following individuals may complete a POST form:

(1) A qualified person who is:

(A) either:

(i) at least eighteen (18) years of age; or

(ii) less than eighteen (18) years of age but authorized to consent under IC 16-36-1-3(a)(2) (except under IC 16-36-1-3(a)(2)(E)); and

(B) of sound mind.

(2) A qualified person's representative, if the qualified person:

(A) is less than eighteen (18) years of age and is not authorized to consent under IC 16-36-1-3(a)(2); or

(B) has been determined to be incapable of making decisions about the qualified person's health care by a treating physician, advanced practice registered nurse, or physician assistant acting in good faith and the representative has been:

(i) appointed by the individual under IC 16-36-1-7 to serve as the individual's health care representative;

(ii) authorized to act under IC 30-5-5-16 and IC 30-5-5-17 as the individual's attorney in fact with authority to consent to or refuse health care for the individual;

(iii) appointed by a court as the individual's health care representative under IC 16-36-1-8; ~~or~~

(iv) appointed by a court as the guardian of the person with the authority to make health care decisions under IC 29-3; **or**

**(v) appointed by the individual under IC 16-36-7 to serve as the individual's health care representative.**

(b) In order to complete a POST form, a person described in subsection (a) and the qualified person's treating physician, advanced practice registered nurse, or physician assistant or the physician's,





advanced practice registered nurse's, or physician assistant's designee must do the following:

(1) Discuss the qualified person's goals and treatment options available to the qualified person based on the qualified person's health.

(2) Complete the POST form, to the extent possible, based on the qualified person's preferences determined during the discussion in subdivision (1).

(c) When completing a POST form on behalf of a qualified person, a representative shall act:

(1) in good faith; and

(2) in:

(A) accordance with the qualified person's express or implied intentions, if known; or

(B) the best interest of the qualified person, if the qualified person's express or implied intentions are not known.

(d) A copy of the executed POST form shall be maintained in the qualified person's medical file.

SECTION 61. IC 16-36-6-9, AS AMENDED BY P.L.10-2019, SECTION 74, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 9. (a) The state department shall develop a standardized POST form and distribute the POST form.

(b) The POST form developed under this section must include the following:

(1) A medical order specifying whether cardiopulmonary resuscitation (CPR) should be performed if the qualified person is in cardiopulmonary arrest.

(2) A medical order concerning the level of medical intervention that should be provided to the qualified person, including the following:

(A) Comfort measures.

(B) Limited additional interventions.

(C) Full intervention.

(3) A medical order specifying whether antibiotics should be provided to the qualified person.

(4) A medical order specifying whether artificially administered nutrition should be provided to the qualified person.

(5) A signature line for the treating physician, advanced practice registered nurse, or physician assistant, including the following information:

(A) The physician's, advanced practice registered nurse's, or physician assistant's printed name.

(B) The physician's, advanced practice registered nurse's, or physician assistant's telephone number.

(C) The physician's medical license number, advanced practice registered nurse's nursing license number, or physician assistant's state license number.

(D) The date of the physician's, advanced practice registered nurse's, or physician assistant's signature.

As used in this subdivision, "signature" includes an electronic or physician, advanced practice registered nurse, or physician assistant controlled stamp signature.

(6) A signature line for the qualified person or representative, including the following information:

(A) The qualified person's or representative's printed name.

(B) The relationship of the representative signing the POST form to the qualified person covered by the POST form.

(C) The date of the signature.

As used in this subdivision, "signature" includes an electronic signature.

(7) A section presenting the option to allow a declarant to appoint a representative (as defined in IC 16-36-1-2) under IC 16-36-1-7 **or IC 16-36-7** to serve as the declarant's health care representative.

(c) The state department shall place the POST form on its Internet web site.

(d) The state department is not liable for any use or misuse of the POST form.

SECTION 62. IC 16-36-6-20, AS AMENDED BY P.L.2-2014, SECTION 78, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 20. The execution or revocation of a POST form by or for a qualified person does not revoke or impair the validity of any of the following:

(1) A power of attorney that is executed by a qualified person when the qualified person is competent.

(2) Health care powers that are granted to an attorney in fact under IC 30-5-5-16 or IC 30-5-5-17.

(3) An appointment of a health care representative that is executed by a qualified person, except to the extent that the POST form contains a superseding appointment of a new health care representative under section 9(b)(7) of this chapter.

(4) The authority of a health care representative under ~~IC 16-36-1~~ **IC 16-36-1-7 or IC 16-36-7** to consent to health care on behalf of the qualified person.





(5) The authority of an attorney in fact holding health care powers under IC 30-5-5-16 or IC 30-5-5-17 to issue and enforce instructions under IC 30-5-7 concerning the qualified person's health care.

SECTION 63. IC 16-36-7 IS ADDED TO THE INDIANA CODE AS A **NEW** CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]:

**Chapter 7. Health Care Advance Directives**

**Sec. 1. (a) A death as a result of the withholding or withdrawal of life prolonging procedures in accordance with:**

**(1) a declarant's advance directive; or**

**(2) any provision of this chapter;**

**does not constitute a suicide.**

**(b) This chapter does not authorize euthanasia or any affirmative or deliberate act or omission to end life other than to permit the natural process of dying.**

**(c) This chapter does not establish the only legal means that an individual may use to:**

**(1) communicate or confirm the individual's desires or preferences to receive or refuse life prolonging treatment or other health care; or**

**(2) give one (1) or more other persons authority to consent to health care or make health care decisions on the individual's behalf.**

**(d) This chapter does not affect the consent provisions set forth in:**

**(1) IC 16-34; or**

**(2) IC 16-36-1-3.5.**

**(e) This chapter does not modify any requirements or procedures under IC 33-42 concerning the performance of valid notarial acts.**

**(f) Nothing in this chapter prohibits a health care provider from relying on a document that:**

**(1) is signed by an adult who has not been determined to be incapacitated; and**

**(2) in the context of the relevant circumstances, clearly communicates the individual's intention to give one (1) or more specified persons authority to consent to health care or make health care decisions on the individual's behalf.**

**Sec. 2. As used in this chapter, "advance directive" means a written declaration of a declarant who:**

**(1) gives instructions or expresses preferences or desires**

**concerning any aspect of the declarant's health care or health information, including the designation of a health care representative, a living will declaration made under IC 16-36-4-10, or an anatomical gift made under IC 29-2-16.1; and**

**(2) complies with the requirements of this chapter.**

**Sec. 3. As used in this chapter, "best interests" means the promotion of the individual's welfare, based on consideration of material factors, including relief of suffering, preservation or restoration of function, and quality of life.**

**Sec. 4. As used in this chapter, "declarant" means a competent adult who has executed an advance directive.**

**Sec. 5. As used in this chapter, "declaration" means a written document, voluntarily executed by a declarant for the declarant under section 28 of this chapter.**

**Sec. 6. As used in this chapter, "electronic" has the meaning set forth in IC 26-2-8-102(7).**

**Sec. 7. As used in this chapter, "electronic record" has the meaning set forth in IC 26-2-8-102(9).**

**Sec. 8. As used in this chapter, "electronic signature" has the meaning set forth in IC 26-2-8-102(10).**

**Sec. 9. As used in this chapter, "health care" means any care, treatment, service, supplies, or procedure to maintain, diagnose, or treat an individual's physical or mental condition, including preventive, therapeutic, rehabilitative, maintenance, or palliative care, and counseling.**

**Sec. 10. As used in this chapter, "health care decision" means the following:**

**(1) Informed consent, refusal of consent, or withdrawal of consent to any and all health care, including life prolonging procedures and mental health treatment, unless otherwise stated in the advance directive.**

**(2) The decision to apply for private, public, government, or veterans' benefits to defray the cost of health care.**

**(3) The right of access to health information of the declarant reasonably necessary for a health care representative or proxy to make decisions involving health care and to apply for benefits.**

**(4) The decision to make an anatomical gift under IC 29-2-16.1.**

**Sec. 11. As used in this chapter, "health care facility" includes the following:**





**(1) An ambulatory outpatient surgical center licensed under IC 16-21-2.**

**(2) A health facility licensed under IC 16-28-2 or IC 16-28-3.**

**(3) A home health agency licensed under IC 16-27-1.**

**(4) A hospice program licensed under IC 16-25-3.**

**(5) A hospital licensed under IC 16-21-2.**

**(6) A health maintenance organization (as defined in IC 27-13-1-19).**

**Sec. 12. As used in this chapter, "health care provider" means any person licensed, certified, or authorized by law to administer health care in the ordinary course of business or practice of a profession.**

**Sec. 13. As used in this chapter, "health care representative" means a competent adult designated by a declarant in an advance directive to:**

**(1) make health care decisions; and**

**(2) receive health information;**

**regarding the declarant. The term includes a person who receives and holds validly delegated authority from a designated health care representative.**

**Sec. 14. As used in this chapter, "health information" has the meaning set forth in 45 CFR 160.103.**

**Sec. 15. As used in this chapter, "incapacity" and "incapacitated" mean that an individual is unable to comprehend and weigh relevant information and to make and communicate a reasoned health care decision. For the purposes of making an anatomical gift, the terms include an individual who is deceased.**

**Sec. 16. As used in this chapter, "informed consent" means consent voluntarily given by an individual after a sufficient explanation and disclosure of the subject matter involved to enable that individual to have a general understanding of the treatment or procedure and the medically acceptable alternatives, including the substantial risks and hazards inherent in the proposed treatment or procedure, and to make a knowing health care decision without coercion or undue influence.**

**Sec. 17. As used in this chapter, "notarial officer" means a person who is authorized under IC 33-42-9-7 to perform a notarial act (as defined in IC 33-42-0.5-18). The term includes a notary public.**

**Sec. 18. (a) As used in this chapter and with respect to interactions between a declarant and a witness, "observe" means to perceive another's actions or expressions of intent through the**

**senses of eyesight or hearing, or both. A person is able to observe another's actions or expressions of intent even if the person uses technology or learned skills to:**

**(1) assist the person's capabilities of eyesight or hearing, or both; or**

**(2) compensate for an impairment of the person's capabilities of eyesight or hearing, or both.**

**(b) As used in this chapter and with respect to interactions between a declarant and a notarial officer, "observe" means that the notarial officer is able to see and hear, in real time, the declarant's actions and expressions of intent either in the declarant's physical presence or through audiovisual communication as defined in IC 33-42-0.5-5.**

**Sec. 19. (a) As used in this chapter and with respect to interactions between a declarant and a witness who signs or participates in the signing of an advance directive or other document under this chapter, "presence", "present", and "to be present" means that throughout the process of signing and witnessing the advance directive or other document the following must occur:**

**(1) The declarant and the witness are:**

**(A) directly present with each other in the same physical space;**

**(B) able to interact with each other in real time through the use of any audiovisual technology now known or later developed; or**

**(C) able to speak to and hear each other in real time through telephonic interaction when:**

**(i) the identity of the declarant is personally known to the witness;**

**(ii) the witness is able to view a government issued, photographic identification of the declarant; or**

**(iii) the witness is able to ask any question of the declarant that authenticates the identity of the declarant and establishes the capacity and sound mind of the declarant to the satisfaction of the witness.**

**(2) The witnesses are able to positively identify the declarant by viewing a government issued, photographic identification of the declarant, or by receiving accurate answers from the declarant that authenticate the identity of the declarant and establish the capacity and sound mind of the declarant to the satisfaction of the witness.**





**(3) Each witness is able to interact with the declarant and each other witness, if any, by observing:**

**(A) the declarant's expression of intent to execute an advance directive or other document under this chapter;**

**(B) the declarant's actions in executing or directing the execution of the advance directive or other document under this chapter; and**

**(C) the actions of each other witness in signing the advance directive or other document.**

**The requirements of subdivisions (2) and (3) are satisfied even if the declarant and one (1) or all witnesses use technology to assist with one (1) or more of the capabilities of hearing, eyesight, or speech to compensate for impairments of any one (1) or more of those capabilities.**

**(b) As used in this chapter and with respect to interactions between a declarant and a notarial officer who signs or participates in the signing of an advance directive or other document under this chapter, "presence", "present", and "to be present" means that throughout the process of signing, acknowledging, and notarizing the advance directive or other document the following must occur:**

**(1) The declarant and the notarial officer are:**

**(A) directly present with each other in the same physical space; or**

**(B) able to interact with each other in real time through the use of any audiovisual technology, now known or later developed, whose use complies with IC 33-42.**

**(2) The notarial officer is able to positively identify the declarant by using an identity proofing method permitted under IC 33-42-0.5-16.**

**(3) Each witness or the notarial officer is able to interact with the declarant and each other witness, if any, by observing the declarant's:**

**(A) expression of intent to execute an advance directive or other document under this chapter; and**

**(B) actions in executing or directing the execution of the advance directive or other document under this chapter.**

**If the declarant appears before the notarial officer in a manner that satisfies the definitions of "appear" and "appearance" as defined in IC 33-42-0.5, then the declarant and the notarial officer satisfy the presence requirement described in this chapter. The requirements specified in subdivisions (2) and (3) are satisfied even**



**if the testator and the notarial officer use technology to assist with one (1) or more of the capabilities of hearing, eyesight, or speech to compensate for impairments of any one (1) or more of those capabilities.**

**Sec. 20. As used in this chapter, "proxy" means a competent adult who:**

**(1) has not been expressly designated in a declaration to make health care decisions for a particular incapacitated individual; and**

**(2) is authorized and willing to make health care decisions for the individual under section 42 of this chapter.**

**Sec. 21. As used in this chapter, "reasonably available" means a health care representative or proxy for an individual who is:**

**(1) readily able to be contacted without undue effort; and**

**(2) willing and able to act in a timely manner considering the urgency of that individual's health care needs or health decisions.**

**Sec. 22. As used in this chapter, "sign" includes the valid use of an electronic signature.**

**Sec. 23. As used in this chapter, "signature" means the authorized use of the name or mark of a declarant or other person to authenticate an electronic record or other writing. The term includes an electronic signature and an electronic notarial certificate completed by a notarial officer.**

**Sec. 24. As used in this chapter, "telephonic interaction" means interaction through the use of any technology, now known or later developed, that enables two (2) or more persons to speak to and hear each other in real time, even if one (1) or more persons cannot see each other.**

**Sec. 25. As used in this chapter, "treating physician" means a licensed physician who is overseeing, directing, or performing health care to an individual at the pertinent time.**

**Sec. 26. As used in this chapter, "written" and "writing" include the use of any method to inscribe information in or on a tangible medium or to store the information in an electronic or other medium that can retrieve, view, and print the information in perceivable form.**

**Sec. 27. (a) Except when an individual has been determined to be incapacitated under section 35 of this chapter, an individual may consent to the individual's own health care if the individual is:**

**(1) an adult; or**

**(2) a minor, and:**





**(A) is emancipated;**

**(B) is:**

**(i) at least fourteen (14) years of age;**

**(ii) not dependent on a parent or guardian for support;**

**(iii) living apart from the minor's parents or from an individual in loco parentis; and**

**(iv) managing the minor's own affairs;**

**(C) is or has been married;**

**(D) is in the military service of the United States; or**

**(E) is authorized to consent to health care by another statute.**

**(b) A person at least seventeen (17) years of age is eligible to donate blood in a voluntary and noncompensatory blood program without obtaining permission from a parent or guardian.**

**(c) A person who is sixteen (16) years of age is eligible to donate blood in a voluntary and noncompensatory blood program if the person has obtained written permission from the person's parent.**

**(d) An individual who has, could be expected to have exposure to, or has been exposed to a venereal disease is competent to give consent for medical or hospital care or treatment, including preventive treatment, of the individual.**

**(e) If:**

**(1) an individual:**

**(A) has a signed advance directive that is in effect; and**

**(B) has not been determined to be incapacitated under section 35 of this chapter; and**

**(2) the individual's decisions and the health care representative's decisions present a material conflict;**

**the health care decisions by that individual take precedence over decisions made by a health care representative designated in that individual's advance directive.**

**(f) Nothing in this chapter prohibits or restricts a health care provider's right to follow or rely on a health care decision or the designation of a health care representative on a permanent or temporary basis that is:**

**(1) made by a competent individual described in subsection (a);**

**(2) communicated orally by the individual to a health care provider in the direct physical presence of the individual; and**

**(3) reduced to or confirmed in writing by the health care provider on a reasonably contemporaneous basis and made a part of the health care provider's medical records for the**

**individual.**

**(g) If:**

**(1) an individual later signs an advance directive under section 28 of this chapter; and**

**(2) the advance directive conflicts with the recorded earlier oral instructions of the individual with respect to health care decisions or the designation of a health care representative;**

**the advance directive controls.**

**Sec. 28. (a) An advance directive signed by or for a declarant under this section may accomplish or communicate one (1) or more of the following:**

**(1) Designate one (1) or more competent adult individuals or other persons as a health care representative to make health care decisions for the declarant or receive health information on behalf of the declarant, or both.**

**(2) State specific health care decisions by the declarant.**

**(3) State the declarant's preferences or desires regarding the provision, continuation, termination, or refusal of life prolonging procedures, palliative care, comfort care, or assistance with activities of daily living.**

**(4) Specifically disqualify one (1) or more named individuals from:**

**(A) being appointed as a health care representative for the declarant;**

**(B) acting as a proxy for the declarant under section 42 of this chapter; or**

**(C) receiving and exercising delegated authority from the declarant's health care representative.**

**(b) An advance directive under this section must be signed by or for the declarant using one (1) of the following methods:**

**(1) Signed by the declarant in the presence of two (2) adult witnesses or in the presence of a notarial officer.**

**(2) Signing of the declarant's name by another adult individual at the specific direction of the declarant, in the declarant's presence, and in the presence of the two (2) adult witnesses or a notarial officer. However, an individual who signs the declarant's name on the advance directive may not be a witness, the notarial officer, or a health care representative designated in the advance directive.**

**(c) An advance directive signed under this section must be witnessed or acknowledged in one (1) of the following ways:**

**(1) Signed in the declarant's direct physical presence by two**





**(2) adult witnesses, at least one (1) of whom may not be the spouse or other relative of the declarant.**

**(2) Signed or acknowledged by the declarant in the presence of a notarial officer, who completes and signs a notarial certificate under IC 33-42-9-12 and makes it a part of the advance directive.**

**If the advance directive complies with either subdivision (1) or (2), but contains additional witness signatures or a notarial certificate that is not needed, the advance directive is still validly witnessed and acknowledged. A remote online notarization or electronic notarization of an advance directive that complies with IC 33-42-17 complies with subdivision (2).**

**(d) A competent declarant and the witnesses or a notarial officer may complete and sign an advance directive in two (2) or more counterparts in tangible paper form, with the declarant's signature placed on one (1) original counterpart and with the signatures of the witnesses, if any, or the notarial officer's signature and certificate on one (1) or more different counterparts in tangible paper form, so long as the declarant and the witnesses or notarial officer comply with the presence requirement as described in section 19 of this chapter, and so long as the text of the advance directive states that it is being signed in separate paper counterparts. If an advance directive is signed in counterparts under this subsection:**

**(1) the declarant;**

**(2) a health care representative who is designated in the advance directive;**

**(3) a person who supervised the signing of the advance directive in that person's presence; or**

**(4) any other person who was present during the signing of the advance directive;**

**must combine all of the separately signed paper counterparts of the advance directive into a single composite document that contains the text of the advance directive, the signature of the declarant, and the signatures of the witnesses, if any, or the notarial officer. The person who combines the separately signed counterparts into a single composite document must do so not later than ten (10) business days after the person receives all of the separately signed paper counterparts. Any scanned copy, photocopy, or other accurate copy of the composite document that contains the complete text of the advance directive and all signatures will be treated as validly signed under this section. The person who creates**



**the signed composite document under this subsection may include information about compliance within this subsection in an optional affidavit that is signed under section 41 of this chapter.**

**(e) If facts and circumstances, including physical impairments or physical isolation of a competent declarant, make it impossible or impractical for the declarant to use audiovisual technology to interact with the two (2) witnesses and to satisfy the presence requirement under section 19 of this chapter, the declarant and the witnesses may use telephonic interaction throughout the signing process. A potential witness cannot be compelled to use telephonic interaction alone to accomplish the signing of an advance directive under this section. A declarant and a notarial officer may not use telephonic interaction to accomplish the signing of an advance directive or other document under this chapter.**

**(f) If an advance directive is signed under subsection (e), the witnesses must be able to positively identify the declarant by receiving accurate answers from the declarant that:**

**(1) authenticate the identity of the declarant; and**

**(2) establish the capacity and sound mind of the declarant to the satisfaction of the witness.**

**(g) The text of the advance directive signed under subsection (e) must state that the declarant and the witnesses used telephonic interaction throughout the signing process to satisfy the presence requirement.**

**(h) An advance directive signed under subsection (e) is presumed to be valid if it recites that the declarant and the witnesses signed the advance directive in compliance with Indiana law.**

**(i) A health care provider or other person who disputes the validity of an advance directive signed under subsection (e) has the burden of proving the invalidity of the advance directive or noncompliance with subsection (e) by a reasonable preponderance of the evidence.**

**(j) If a declarant resides in or is located in a jurisdiction other than Indiana at the time when the declarant signs a writing that communicates the information described in subsection (a), the writing must be treated as a validly signed advance directive under this chapter if the declarant was not incapacitated at the time of signing and if the writing was:**

**(1) signed and witnessed or acknowledged in a manner that complies with subsections (b) and (c); or**

**(2) signed in a manner that complies with the applicable law**





**of the jurisdiction in which the declarant was residing or was physically located at the time of signing.**

**Sec. 29. An advance directive signed by a declarant under this section may contain any of the following additional provisions:**

**(1) A provision that delays:**

**(A) the effectiveness of an instruction or decision by the declarant; or**

**(B) the effectiveness of the authority of a designated health care representative;**

**until a stated date or the occurrence of a specifically defined event.**

**(2) If the advance directive explicitly provides that a health care decision or instruction or the authority of one (1) or more health care representatives is to be effective upon the future incapacity, disability, or incompetence of the declarant, a provision that:**

**(A) specifies the person or persons who are authorized to participate in the determination of incapacity, disability, or incompetence and the evidence or information to be used for the determination;**

**(B) is not more stringent than the procedure described in section 35 of this chapter; and**

**(C) does not allow a medical determination by a physician, psychologist, or other health care professional to be superseded by the subjective judgment or veto of another person or by nonmedical evidence regarding the declarant's capacity or incapacity.**

**(3) A provision that terminates the authority of a designated health care representative on:**

**(A) a stated date; or**

**(B) upon the occurrence of a specifically defined event.**

**(4) A provision that designates two (2) or more health care representatives as having authority to act individually to make health care decisions for the declarant in a specified order of priority.**

**(5) A provision that designates two (2) or more health care representatives and permits them to act individually and independently, or that requires them to act jointly, on a majority vote basis, or under a combination of requirements to make all health care decisions or specified health care decisions for the declarant. The advance directive may include a provision for a successor health care representative to act**



**according to different requirements.**

**(6) A provision that states a fee or presumptive reasonable hourly rate for the compensation that a health care representative may collect for acting on behalf of the declarant or providing caregiving services to the declarant.**

**(7) A provision that prohibits a health care representative from collecting compensation for acting under the advance directive.**

**(8) A provision that requires a professional adviser or other additional person to witness, ratify, or approve the declarant's revocation or amendment of a designation of one (1) or more health care representatives within the advance directive.**

**(9) A provision that:**

**(A) prohibits a designated health care representative from consenting to mental health treatment for the declarant; or**

**(B) designates a different health care representative to consent to mental health treatment.**

**(10) A provision that designates an adult individual or another person as an advocate with the authority to:**

**(A) receive:**

**(i) health information about the declarant; and**

**(ii) information and documents from a health care representative about the health care representative's actions on behalf of the declarant;**

**(B) monitor, audit, and evaluate the actions of a health care representative designated by the declarant; and**

**(C) take remedial action in the best interests of the declarant, including revoking or limiting the authority of any health care representative or filing a petition with a court for appropriate relief.**

**(11) Any other provision concerning the:**

**(A) declarant's health care or health information; or**

**(B) implementation of the declarant's advance directive.**

**Sec. 30. (a) The state department shall maintain a list of resources on its Internet web site, including sample advance directive forms that are consistent with this chapter.**

**(b) A declarant is not required to use any official or unofficial form to prepare and sign a valid advance directive.**

**Sec. 31. (a) A complete copy of the signed and witnessed or notarized advance directive must be given to each health care representative who:**

**(1) is specifically designated by name in the advance directive;**





**and**

**(2) has authority to make health care decisions that are immediately effective under the explicit terms of the advance directive or under section 34(1) of this chapter.**

**If the advance directive is signed with electronic signatures, a complete copy that is generated or converted from the original electronic record and that is viewable and printable is valid and may be relied upon as the equivalent to the original.**

**(b) A declarant who has capacity is responsible for giving a complete copy of the declarant's advance directive to a health care provider. If a declarant has signed an advance directive but lacks the capacity to make health care decisions or provide informed consent, any health care representative designated in the advance directive or any other interested person shall give a complete copy of the declarant's advance directive to a health care provider. Upon receipt of the declarant's advance directive, the health care provider shall put a copy of the advance directive in the declarant's medical records.**

**Sec. 32. (a) The declarant who signs an advance directive may revoke that advance directive by any of the following:**

**(1) Signing, in a manner that complies with section 28 of this chapter, another advance directive.**

**(2) Signing, in a manner that complies with section 28 of this chapter, a document that:**

**(A) states in writing that the declarant is revoking the previously signed advance directive; and**

**(B) confirms the declarant's compliance with any explicit additional conditions for valid revocation that are stated in the advance directive.**

**(3) Orally expressing the declarant's present intention, in the direct physical presence of a health care provider, to:**

**(A) revoke the entire advance directive;**

**(B) revoke a designation of one (1) or more health care representatives within the advance directive; or**

**(C) revoke one (1) or more specific health care decisions or one (1) or more desires or treatment preferences within the advance directive.**

**However, if a declarant has not been determined to be incapacitated under section 35 of this chapter, the declarant always has the right to orally revoke a health care decision that is included within an advance directive under section 28(a)(2) of this chapter or a statement of desires or treatment preferences that is included**

**within an advance directive under section 28(a)(3) of this chapter, despite any contrary wording in the advance directive.**

**(b) Until a health care representative or health care provider has actual knowledge of a valid revocation of an advance directive:**

**(1) actions and health care decisions by a health care representative designated in the advance directive are valid and binding on the declarant; and**

**(2) health care providers may continue to rely on health care decisions by the health care representative.**

**(c) A declarant who has signed a valid advance directive may amend or restate that advance directive in a writing that is signed in compliance with section 28 of this chapter and witnessed or acknowledged in compliance with section 28(c), 28(d), or 28(e) of this chapter. The amendment or restatement may take any action that could have been included in the former or original advance directive.**

**Sec. 33. (a) Except when the terms of the advance directive explicitly prohibit or restrict delegation, a health care representative who is designated by name in an advance directive may make a written delegation of some or all of the health care representative's authority to one (1) or more other competent adults or other persons, on a temporary or open ended basis as stated in the written delegation document.**

**(b) A written delegation document under this section must be signed in compliance with section 28 of this chapter and witnessed or acknowledged in compliance with section 28(c), 28(d), or 28(e) of this chapter.**

**(c) A written delegation of authority that does not state an expiration date continues until it is revoked, in a manner complying with section 32 of this chapter, by the competent declarant or by the health care representative who signed the written delegation.**

**(d) If the advance directive explicitly states a date or event that triggers termination of the advance directive or termination of the authority of a health care representative who makes a written delegation under this section, the delegated authority terminates upon the triggering event or expiration date.**

**Sec. 34. An advance directive must be interpreted to carry out the known or demonstrable intent of the declarant. The following presumptions apply to an advance directive unless the terms of the advance directive explicitly prevent a presumption from applying:**

**(1) If the advance directive does not state a delayed effective**





**date or a future triggering event for effectiveness, the advance directive is effective immediately upon signing and witnessing or acknowledgment in compliance with section 28 of this chapter. However, if the declarant has capacity to consent to health care, the declarant has the right to make health care decisions, give consent, or provide instructions that supersede or overturn any decision that is made or could be made by the declarant's health care representative.**

**(2) If the advance directive does not explicitly state an expiration date or a triggering event for termination, the advance directive and the authority of each designated health care representative continues until the death of the declarant or until an earlier valid revocation of the advance directive.**

**(3) If an advance directive designates two (2) or more health care representatives and does not specify that:**

**(A) the health care representative's respective authority to act is subject to an order of priority; or**

**(B) the health care representatives must act jointly or on a majority vote basis;**

**each health care representative has concurrent authority to act individually and independently to make health care decisions for the declarant. If two (2) or more health care representatives who are required to act jointly disagree about a health care decision, or if two (2) or more health care representatives who are authorized to act independently give conflicting instructions to a health care provider, the health care provider may decline to comply with the conflicting instructions, and in an urgent or emergency situation, the health care provider may provide treatment consistent with the instructions of one (1) physician or one (1) advanced practice registered nurse who examines or evaluates the declarant.**

**(4) If:**

**(A) an individual signs more than one (1) advance directive at different times; and**

**(B) the later signed advance directive does not explicitly state that one (1) or more of the previous advance directives by the declarant remain in effect;**

**each previous advance directive is superseded and revoked by the last signed advance directive.**

**(5) Unless the advance directive explicitly provides otherwise, each health care representative who is designated in an**

**advance directive continues to have authority after the death of the declarant to do the following:**

**(A) Make anatomical gifts on the declarant's behalf, subject to any previous written direction by the declarant.**

**(B) Request or authorize an autopsy.**

**(C) Make plans for the disposition of the declarant's body, including executing a funeral planning declaration on behalf of the declarant under IC 29-2-19.**

**(6) Each health care representative who is designated in an advance directive and who has current authority to act is a personal representative of the declarant for purposes of 45 CFR Parts 160 through 164.**

**(7) If an advance directive explicitly provides that the authority of one (1) or more health care representatives is to be effective upon the future incapacity, disability, or incompetence of the declarant but if the advance directive does not specify a method or procedure for determining the incapacity, disability, or incompetence of the declarant:**

**(A) the health care representative's authority to act becomes effective upon a determination that the declarant is incapacitated that is stated in a writing or other record by a physician, licensed psychologist, or judge; and**

**(B) each health care representative who is designated in the advance directive is authorized to act as the declarant's personal representative under 45 CFR 164.502(g) to obtain access to the declarant's information, and to communicate with the declarant's health care providers, for the purpose of gathering information necessary for determinations under this subdivision.**

**(8) Each health care representative who is designated in an advance directive and who has current authority to make health care decisions for the declarant has authority to consent to mental health treatment for the declarant.**

**(9) If the advance directive is silent on the issue of compensation for a health care representative designated in the advance directive, then each health care representative is entitled to receive the following:**

**(A) Reasonable compensation from the declarant's property for services or acts actually performed by the health care representative and for the declarant.**

**(B) Reasonable reimbursement from the declarant's property for out-of-pocket expenses actually incurred and**





**paid by the health care representative from the health care representative's own funds in the course of performing services or acts for the declarant under the advance directive.**

**Any health care representative may waive part or all of the compensation or expense reimbursements that the health care representative would be entitled to receive under the terms of the advance directive or under this subdivision.**

**(10) If an advance directive explicitly provides that the authority of a health care representative is effective only at times when the declarant is incapacitated or unable to consent to health care, then unless the advance directive explicitly states another procedure:**

**(A) the health care representative's authority becomes effective when a determination of the declarant's incapacity is noted in the declarant's medical records under section 35(d) of this chapter; and**

**(B) the health care representative's authority becomes inactive when the declarant regains capacity.**

**(11) If the authority of a health care representative under the advance directive is effective immediately upon signing by the declarant, the health care representative's authority may be rescinded or superseded by the direct decisions of the declarant at all times when the declarant has not been determined to be incapacitated.**

**(12) If:**

**(A) an advance directive designates one (1) or more health care representatives;**

**(B) a health care representative is not reasonably available to act for the declarant; and**

**(C) the declarant is incapacitated or not competent to make personal health care decisions;**

**then subject to any order of priority explicitly stated in the advance directive, each health care representative designated in the advance directive must be given the opportunity to exercise authority for the declarant.**

**(13) If explicitly allowed or required in the advance directive, each person who may act as a proxy for the declarant under sections 42 and 43 of this chapter, if an advance directive had not existed, has the right to make a written demand for and to receive from a health care representative a narrative description or other appropriate accounting of the actions**

**taken and decisions made by a health care representative under the advance directive. Notwithstanding any provision in the advance directive, a health care representative who prepares a narrative description or accounting in response to a written demand is entitled to reasonable compensation for the time and effort spent in doing so.**

**(14) Notwithstanding any provision in the advance directive, if a declarant is not competent to amend or revoke the declarant's advance directive, then a person who may act as a proxy for the declarant under sections 42 and 43 of this chapter has the right to petition a probate court with jurisdiction over the declarant for any of the following relief:**

**(A) An order modifying or terminating the advance directive.**

**(B) An order removing a health care representative or terminating the authority of a person who holds delegated authority under the advance directive, on the grounds that the health care representative or person is not acting or is declining to act in the best interests of the declarant.**

**(C) An order directing a health care representative to make or carry out a specific health care decision for the declarant.**

**(D) An order appointing a new or additional health care representative, on the grounds that all health care representatives designated in the advance directive are not reasonably available to act.**

**Before issuing an order under this subdivision, the court must hold a hearing after notice to the declarant, to each health care representative, and any other person whose rights or authority could be affected by the order, and to any persons who have the highest priority under sections 42 and 43 of this chapter to serve as a proxy for the declarant if an advance directive had not existed. An order issued under this subdivision must be guided by the declarant's best interests and the declarant's known or demonstrable intent.**

**Sec. 35. (a) For purposes of this section, the term "declarant" includes an individual who has not executed an advance directive or who has no unrevoked advance directive in effect.**

**(b) A declarant is presumed to be capable of making health care decisions for the declarant unless the declarant is determined to be incapacitated. The declarant's desires are controlling while a declarant has decision making capacity. Each physician or health**





**care provider must clearly communicate to a declarant who has decision making capacity the treatment plan and any change to the treatment plan before implementation of the plan or a change to the plan. Incapacity may not be inferred from a person's voluntary or involuntary hospitalization for mental illness or from the person's intellectual disability.**

**(c) When a declarant is incapacitated, a health care decision made on the declarant's behalf by a health care representative is effective to the same extent as a decision made by the declarant if the declarant were not incapacitated. However, if:**

**(1) a health care representative makes and communicates a health care decision; and**

**(2) a health care provider concludes that carrying out that health care decision would be medically inappropriate or clearly contrary to the declarant's best interests;**

**then the health care provider has the same right to refuse to carry out that decision as if that decision were made and communicated directly by the declarant at a time when the declarant was not incapacitated.**

**(d) If a declarant's capacity to make health care decisions or provide informed consent is in question, the declarant's treating physician shall evaluate the declarant's capacity and, if the treating physician concludes that the declarant lacks capacity, enter that evaluation in the declarant's medical record.**

**(e) If the treating physician is unable to reach a conclusion under subsection (d) about whether the declarant lacks capacity, the treating physician and other health care providers shall treat the declarant as still having capacity to make health care decisions and provide informed consent, until a later evaluation occurs under this section after the passage of time or after a change in the declarant's condition.**

**(f) This chapter does not limit the authority of a probate court under IC 29-3 to make determinations about an individual's incapacity or recovery from a period of incapacity.**

**(g) A determination made under this section that a declarant lacks capacity to make health care decisions may not be construed as a finding that a declarant lacks capacity for any other purpose.**

**Sec. 36. (a) Except when a health care representative's authority has been expressly limited by the declarant in an advance directive, the health care representative, in accordance with the declarant's instructions made while competent, has the following authority and responsibilities:**

**(1) The authority to act for the declarant and to make all health care decisions for the declarant at all times when the health care representative's authority is in effect, subject to the right of the competent declarant to act directly and personally.**

**(2) The authority and responsibility to be reasonably available to consult with appropriate health care providers to provide informed consent.**

**(3) The authority and responsibility to act in good faith and make only health care decisions for the declarant that the health care representative believes the declarant would have made under the circumstances if the declarant were capable of making the decisions, taking into account the express or implied intentions of the declarant or if the declarant's express or implied intentions are not known, the declarant's best interests.**

**(4) The authority and responsibility to provide written consent using an appropriate form when consent is required, including a physician's order not to resuscitate (IC 16-36-5 or IC 16-36-6).**

**(5) The authority to be provided access to the appropriate health information of the declarant.**

**(6) The authority to apply for public benefits, including Medicaid and the community and home options to institutional care for the elderly and disabled (CHOICE) program, for the declarant and have access to information regarding the declarant's income, assets, and banking and financial records to the extent required to make application.**

**(b) The health care representative may authorize the release of health information to appropriate persons to ensure the continuity of the declarant's health care and may authorize the admission, discharge, or transfer of the declarant to or from a health care facility or other health or residential facility or program licensed or registered by a state agency.**

**(c) If, after a declarant has designated one (1) or more health care representatives in an advance directive, a court appoints a guardian of the declarant's person, the authority of each designated health care representative continues unless the appointing court modifies or revokes the authority of one (1) or more health care representatives after a hearing upon notice under section 34(14) of this chapter. The court may order a health care representative to make appropriate or specified reports to the**





**guardian of the declarant's person or property.**

**Sec. 37. (a) A health care provider furnished with a copy of a declarant's advance directive shall make the declarant's advance directive a part of the declarant's medical records. If a change in or termination of the advance directive becomes known to the health care provider, the change or termination must be noted in the declarant's medical records.**

**(b) If a health care provider believes that an individual may lack the capacity to give informed consent to health care, then, until the individual is determined to have capacity under section 35 of this chapter, the health care provider shall consult with:**

**(1) a health care representative designated by the declarant; or**

**(2) if a health care representative has not been designated or if a health care representative is not reasonably available to act, a proxy under section 42 of this chapter;**

**who has authority and priority to act and who is reasonably available to act.**

**(c) Subject to the right of a competent declarant to directly make and communicate health care decisions for the declarant and to rescind a health care decision by a health care representative who is designated in an advance directive, the following conditions apply:**

**(1) A health care provider may continue to administer treatment for the declarant's comfort, care, or the alleviation of pain in addition to treatment made under the decision of the health care representative.**

**(2) Subject to subdivision (3), a health care provider shall comply with a health care decision made by a health care representative if the decision is communicated to the provider.**

**(3) If a health care provider is unwilling to comply with a health care decision made by a health care representative, the provider shall do the following:**

**(A) Notify the health care representative of the health care provider's unwillingness to comply with the decision.**

**(B) Promptly take all steps necessary to transfer the responsibility for the declarant's health care to another health care provider designated by the health care representative. However, a health care provider who takes steps for a transfer does not have a duty to look for or identify another health care provider who will accept the declarant.**



**However, if a health care provider is unwilling to comply with a health care decision made by a health care representative, and the declarant's health condition would make transfer of the declarant untenable or unadvisable, this subsection does not prohibit the health care provider from following the health care provider's dispute resolution procedure with the objective of reaching a decision in the best interest of the declarant.**

**Sec. 38. If a health care representative designated in an advance directive has authority to:**

**(1) make an anatomical gift on behalf of the declarant;**

**(2) authorize an autopsy of the declarant's remains; or**

**(3) direct the disposition of the declarant's remains;**

**under either the explicit provisions of the advance directive or section 34(5) of this chapter, the anatomical gift, autopsy, or remains disposition is considered the act of the declarant or of the person who has legal authority to make the necessary decisions.**

**Sec. 39. (a) A health care provider shall give a health care representative authorized to receive information under an advance directive the same access as the declarant has to examine and copy the declarant's health information and medical records, including records relating to mental health and other medical conditions held by a physician or other health care provider.**

**(b) The access to records under this section must be given at the declarant's expense and may be subject to reasonable rules of the provider to prevent disruption of the declarant's health care.**

**(c) A health care representative may release information obtained under this section to any person authorized to receive the information under IC 16-39.**

**Sec. 40. (a) A health care provider or other person who acts in good faith reliance on an advance directive or on a health care decision made by a health care representative with apparent authority is immune from liability to the declarant and to the declarant's heirs or other successors in interest to the same extent as if the health care provider or other person had dealt directly with the declarant and if the declarant had been competent and not incapacitated.**

**(b) A health care provider is not responsible for determining the validity of an advance directive.**

**Sec. 41. (a) A health care representative designated in an advance directive or a person who was present during the signing of the advance directive may furnish to a health care provider or**





**other person an affidavit that states, to the best knowledge of the health care representative:**

**(1) that the document attached to and furnished with the affidavit is a true copy of the named declarant's advance directive that is currently in effect;**

**(2) that the declarant is alive;**

**(3) that the advance directive was validly executed;**

**(4) if the effectiveness of the health care representative's authority to act under the advance directive begins upon the occurrence of a certain event, that the event has occurred and the health care representative has authority to act;**

**(5) if the health care representative who furnishes the affidavit does not have the highest priority to act under the explicit terms of the advance directive, an explanation that all health care representatives who are identified in the advance directive as having higher priority are not reasonably available to act; and**

**(6) that the relevant powers granted to the health care representative have not been altered or terminated.**

**An affidavit signed and furnished under this section may include information based on the affiant's personal knowledge about the manner in which the advance directive was signed under subsection (b) and section 28(c), 28(d), or 28(e) of this chapter. An affidavit under this section must be signed, sworn to, and acknowledged by the affiant in the presence of a notarial officer, unless the affiant swears or affirms to the accuracy of the affidavit's contents under the penalties for perjury.**

**(b) A health care provider or other person who:**

**(1) relies on an affidavit described in subsection (a); and**

**(2) acts in good faith;**

**is immune from liability that might otherwise arise from the health care provider's or other person's actions in reliance on the advance directive that is the subject of the affidavit.**

**Sec. 42. (a) For purposes of this section, the term "declarant" includes an individual who has not executed an advance directive or who does not have an advance directive currently in effect.**

**(b) This section applies only if a declarant is not capable of consenting to health care, and:**

**(1) the declarant has not executed an advance directive under this chapter or does not have an advance directive currently in effect; or**

**(2) the declarant has executed an advance directive and the**

**health care representative designated in the advance directive is not willing, able, or reasonably available to make health care decisions for the declarant.**

**(c) Except as provided in section 43 of this chapter, health care decisions may be made for the declarant by any of the following individuals to act as a proxy, in the following decreasing order of priority, if an individual in a prior class is not reasonably available, willing, and competent to act:**

**(1) The judicially appointed guardian of the declarant or a health care representative appointed under IC 16-36-1-8 or section 34(14) of this chapter.**

**(2) A spouse.**

**(3) An adult child.**

**(4) A parent.**

**(5) An adult sibling.**

**(6) A grandparent.**

**(7) An adult grandchild.**

**(8) The nearest other adult relative in the next degree of kinship who is not listed in subdivisions (2) through (7).**

**(9) A friend who:**

**(A) is an adult;**

**(B) has maintained regular contact with the individual; and**

**(C) is familiar with the individual's activities, health, and religious or moral beliefs.**

**(10) The individual's religious superior, if the individual is a member of a religious order.**

**(d) Any health care decision made under subsection (c) must be based on the proxy's informed consent and on the decision the proxy reasonably believes the declarant would have made under the circumstances, taking into account the declarant's express or implied intentions. If there is no reliable indication of what the declarant would have chosen, the proxy shall consider the declarant's best interests in deciding that proposed treatments are to be withheld or that treatments currently in effect are to be withdrawn.**

**(e) Before exercising the incapacitated declarant's rights to select or decline health care, the proxy must attempt to comply in good faith with:**

**(1) the instructions, desires, or preferences, if any, stated by the declarant regarding life prolonging procedures in an advance directive executed under IC 16-36-1, IC 16-36-4, or**





**IC 30-5; and**

**(2) IC 16-36-6, if a valid POST form (as defined by IC 16-36-6-4) executed by the patient is in effect.**

**However, a proxy's decision to withhold or withdraw life prolonging procedures must be supported by evidence that the decision would have been the one the declarant would have chosen had the declarant been competent or, if there is no reliable indication of what the declarant would have chosen, that the decision is in the declarant's best interests.**

**(f) If there are multiple individuals at the same priority level under this section, those individuals shall make a reasonable effort to reach a consensus as to the health care decisions on behalf of the declarant who is unable to provide health care consent. If the individuals at the same priority level disagree as to the health care decisions on behalf of the declarant who is unable to provide health care consent, a majority of the available individuals at the same priority level controls.**

**(g) Nothing in this section shall be construed to preempt the designation of persons who may consent to the medical care or treatment of minors established under IC 16-36-1-5(b).**

**Sec. 43. The following individuals may not serve as a proxy under section 42 of this chapter:**

**(1) An individual specifically disqualified in the declarant's advance directive.**

**(2) A spouse who:**

**(A) is legally separated; or**

**(B) has a petition for dissolution, legal separation, or annulment of marriage that is pending in a court;**

**from the individual.**

**(3) An individual who is subject to a protective order or other court order that directs that individual to avoid contact with the declarant.**

**(4) An individual who is subject to a pending criminal charge in which the declarant was the alleged victim.**

**Sec. 44. If a declarant has become and remains incapacitated and has previously executed a valid advance directive under this chapter and executed:**

**(1) an appointment of a health care representative executed under IC 16-36-1 before January 1, 2023;**

**(2) a durable power of attorney granting health care powers and executed under IC 30-5 before January 1, 2023; or**

**(3) a similar advance directive executed by the declarant**

**under the laws of another state in which the declarant was physically present at the time of signing; and**

**if a material conflict exists between multiple documents described in this section or if a material conflict exists between the health care decisions that different health care representatives or other authorized agents propose to make under the multiple documents, or if there is a material difference between the documents, then the document signed last by the declarant and the authority of the named representatives or agents in that document controls.**

SECTION 64. IC 16-39-2-9 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 9. (a) For the purposes of this chapter, the following persons are entitled to exercise the patient's rights on the patient's behalf:

(1) If the patient is a minor, the parent, guardian, or other court appointed representative of the patient.

(2) If the provider determines that the patient is incapable of giving or withholding consent, the patient's guardian, a court appointed representative of the patient, a person possessing a health care power of attorney **under IC 30-5-5-16** for the patient, or the patient's health care representative **under IC 16-36-1-7 or IC 16-36-7.**

(b) A custodial parent and a noncustodial parent of a child have equal access to the child's mental health records unless:

(1) a court has issued an order that limits the noncustodial parent's access to the child's mental health records; and

(2) the provider has received a copy of the court order or has actual knowledge of the court order.

If the provider incurs an additional expense by allowing a parent equal access to a child's mental health records, the provider may require the parent requesting the equal access to pay a fee under IC 16-39-9 to cover the cost of the additional expense.

SECTION 65. IC 23-14-31-26, AS AMENDED BY P.L.190-2016, SECTION 32, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 26. (a) Except as provided in subsection (c), the following persons, in the priority listed, have the right to serve as an authorizing agent:

(1) A person:

(A) granted the authority to serve in a funeral planning declaration executed by the decedent under IC 29-2-19; or

(B) named in a United States Department of Defense form "Record of Emergency Data" (DD Form 93) or a successor form adopted by the United States Department of Defense, if





the decedent died while serving in any branch of the United States Armed Forces (as defined in 10 U.S.C. 1481) and completed the form.

(2) An individual specifically granted the authority to serve in a power of attorney or a health care power of attorney executed by the decedent under IC 30-5-5-16 **or a health care representative under IC 16-36-7.**

(3) The individual who was the spouse of the decedent at the time of the decedent's death, except when:

(A) a petition to dissolve the marriage or for legal separation of the decedent and spouse is pending with a court at the time of the decedent's death, unless a court finds that the decedent and spouse were reconciled before the decedent's death; or

(B) a court determines the decedent and spouse were physically and emotionally separated at the time of death and the separation was for an extended time that clearly demonstrates an absence of due affection, trust, and regard for the decedent.

(4) The decedent's surviving adult child or, if more than one (1) adult child is surviving, the majority of the adult children. However, less than half of the surviving adult children have the rights under this subdivision if the adult children have used reasonable efforts to notify the other surviving adult children of their intentions and are not aware of any opposition to the final disposition instructions by more than half of the surviving adult children.

(5) The decedent's surviving parent or parents. If one (1) of the parents is absent, the parent who is present has authority under this subdivision if the parent who is present has used reasonable efforts to notify the absent parent.

(6) The decedent's surviving sibling or, if more than one (1) sibling is surviving, the majority of the surviving siblings. However, less than half of the surviving siblings have the rights under this subdivision if the siblings have used reasonable efforts to notify the other surviving siblings of their intentions and are not aware of any opposition to the final disposition instructions by more than half of the surviving siblings.

(7) The individual in the next degree of kinship under IC 29-1-2-1 to inherit the estate of the decedent or, if more than one (1) individual of the same degree is surviving, the majority of those who are of the same degree. However, less than half of the individuals who are of the same degree of kinship have the rights

under this subdivision if they have used reasonable efforts to notify the other individuals who are of the same degree of kinship of their intentions and are not aware of any opposition to the final disposition instructions by more than half of the individuals who are of the same degree of kinship.

(8) If none of the persons described in subdivisions (1) through (7) are available, or willing, to act and arrange for the final disposition of the decedent's remains, a stepchild (as defined in IC 6-4.1-1-3(f)) of the decedent. If more than one (1) stepchild survives the decedent, then a majority of the surviving stepchildren. However, less than half of the surviving stepchildren have the rights under this subdivision if they have used reasonable efforts to notify the other stepchildren of their intentions and are not aware of any opposition to the final disposition instructions by more than half of the stepchildren.

(9) The person appointed to administer the decedent's estate under IC 29-1.

(10) If none of the persons described in subdivisions (1) through (9) are available, any other person willing to act and arrange for the final disposition of the decedent's remains, including a funeral home that:

(A) has a valid prepaid funeral plan executed under IC 30-2-13 that makes arrangements for the disposition of the decedent's remains; and

(B) attests in writing that a good faith effort has been made to contact any living individuals described in subdivisions (1) through (9).

(11) In the case of an indigent or other individual whose final disposition is the responsibility of the state or township, the following may serve as the authorizing agent:

(A) If none of the persons identified in subdivisions (1) through (10) are available:

(i) a public administrator, including a responsible township trustee or the trustee's designee; or

(ii) the coroner.

(B) A state appointed guardian.

However, an indigent decedent may not be cremated if a surviving family member objects to the cremation or if cremation would be contrary to the religious practices of the deceased individual as expressed by the individual or the individual's family.

(12) In the absence of any person under subdivisions (1) through





(11), any person willing to assume the responsibility as the authorizing agent, as specified in this article.

(b) When a body part of a nondeceased individual is to be cremated, a representative of the institution that has arranged with the crematory authority to cremate the body part may serve as the authorizing agent.

(c) If:

(1) the death of the decedent appears to have been the result of:

(A) murder (IC 35-42-1-1);

(B) voluntary manslaughter (IC 35-42-1-3); or

(C) another criminal act, if the death does not result from the operation of a vehicle; and

(2) the coroner, in consultation with the law enforcement agency investigating the death of the decedent, determines that there is a reasonable suspicion that a person described in subsection (a) committed the offense;

the person referred to in subdivision (2) may not serve as the authorizing agent.

(d) The coroner, in consultation with the law enforcement agency investigating the death of the decedent, shall inform the crematory authority of the determination referred to in subsection (c)(2).

(e) If a person vested with a right under subsection (a) does not exercise that right not later than seventy-two (72) hours after the person receives notification of the death of the decedent, the person forfeits the person's right to determine the final disposition of the decedent's remains, and the right to determine final disposition passes to the next person described in subsection (a).

(f) A crematory authority owner has the right to rely, in good faith, on the representations of a person listed in subsection (a) that any other individuals of the same degree of kinship have been notified of the final disposition instructions.

(g) If there is a dispute concerning the disposition of a decedent's remains, a crematory authority is not liable for refusing to accept the remains of the decedent until the crematory authority receives:

(1) a court order; or

(2) a written agreement signed by the disputing parties;

that determines the final disposition of the decedent's remains. If a crematory authority agrees to shelter the remains of the decedent while the parties are in dispute, the crematory authority may collect any applicable fees for storing the remains, including legal fees that are incurred.

(h) Any cause of action filed under this section must be filed in the probate court in the county where the decedent resided, unless the

decedent was not a resident of Indiana.

(i) A spouse seeking a judicial determination under subsection (a)(3)(A) that the decedent and spouse were reconciled before the decedent's death may petition the court having jurisdiction over the dissolution or separation proceeding to make this determination by filing the petition under the same cause number as the dissolution or separation proceeding. A spouse who files a petition under this subsection is not required to pay a filing fee.

SECTION 66. IC 23-14-55-2, AS AMENDED BY P.L.190-2016, SECTION 33, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 2. (a) Except as provided in subsection (c), the owner of a cemetery is authorized to inter, entomb, or inurn the body or cremated remains of a deceased human upon the receipt of a written authorization of an individual who professes either of the following:

(1) To be (in the priority listed) one (1) of the following:

(A) An individual granted the authority to serve in a funeral planning declaration executed by the decedent under IC 29-2-19, or the person named in a United States Department of Defense form "Record of Emergency Data" (DD Form 93) or a successor form adopted by the United States Department of Defense, if the decedent died while serving in any branch of the United States Armed Forces (as defined in 10 U.S.C. 1481) and completed the form.

(B) An individual specifically granted the authority in a power of attorney or a health care power of attorney executed by the decedent under IC 30-5-5-16 **or a health care representative under IC 16-36-7.**

(C) The individual who was the spouse of the decedent at the time of the decedent's death, except when:

(i) a petition to dissolve the marriage or for legal separation of the decedent and spouse is pending with a court at the time of the decedent's death, unless a court finds that the decedent and spouse were reconciled before the decedent's death; or

(ii) a court determines the decedent and spouse were physically and emotionally separated at the time of death and the separation was for an extended time that clearly demonstrates an absence of due affection, trust, and regard for the decedent.

(D) The decedent's surviving adult child or, if more than one (1) adult child is surviving, the majority of the adult children. However, less than half of the surviving adult children have





the rights under this clause if the adult children have used reasonable efforts to notify the other surviving adult children of their intentions and are not aware of any opposition to the final disposition instructions by more than half of the surviving adult children.

(E) The decedent's surviving parent or parents. If one (1) of the parents is absent, the parent who is present has authority under this clause if the parent who is present has used reasonable efforts to notify the absent parent.

(F) The decedent's surviving sibling or, if more than one (1) sibling is surviving, the majority of the surviving siblings. However, less than half of the surviving siblings have the rights under this clause if the siblings have used reasonable efforts to notify the other surviving siblings of their intentions and are not aware of any opposition to the final disposition instructions by more than half of the surviving siblings.

(G) The individual in the next degree of kinship under IC 29-1-2-1 to inherit the estate of the decedent or, if more than one (1) individual of the same degree of kinship is surviving, the majority of those who are of the same degree. However, less than half of the individuals who are of the same degree of kinship have the rights under this clause if they have used reasonable efforts to notify the other individuals who are of the same degree of kinship of their intentions and are not aware of any opposition to the final disposition instructions by more than half of the individuals who are of the same degree of kinship.

(H) If none of the persons described in clauses (A) through (G) are available, or willing, to act and arrange for the final disposition of the decedent's remains, a stepchild (as defined in IC 6-4.1-1-3(f)) of the decedent. If more than one (1) stepchild survives the decedent, then a majority of the surviving stepchildren. However, less than half of the surviving stepchildren have the rights under this subdivision if they have used reasonable efforts to notify the other stepchildren of their intentions and are not aware of any opposition to the final disposition instructions by more than half of the stepchildren.

(I) The person appointed to administer the decedent's estate under IC 29-1.

(J) If none of the persons described in clauses (A) through (I) are available, any other person willing to act and arrange for

the final disposition of the decedent's remains, including a funeral home that:

(i) has a valid prepaid funeral plan executed under IC 30-2-13 that makes arrangements for the disposition of the decedent's remains; and

(ii) attests in writing that a good faith effort has been made to contact any living individuals described in clauses (A) through (I).

(2) To have acquired by court order the right to control the disposition of the deceased human body or cremated remains.

The owner of a cemetery may accept the authorization of an individual only if all other individuals of the same priority or a higher priority (according to the priority listing in this subsection) are deceased, are barred from authorizing the disposition of the deceased human body or cremated remains under subsection (c), or are physically or mentally incapacitated from exercising the authorization, and the incapacity is certified to by a qualified medical doctor.

(b) An action may not be brought against the owner of a cemetery relating to the remains of a human that have been left in the possession of the cemetery owner without permanent interment, entombment, or inurnment for a period of three (3) years, unless the cemetery owner has entered into a written contract for the care of the remains.

(c) If:

(1) the death of the decedent appears to have been the result of:

(A) murder (IC 35-42-1-1);

(B) voluntary manslaughter (IC 35-42-1-3); or

(C) another criminal act, if the death does not result from the operation of a vehicle; and

(2) the coroner, in consultation with the law enforcement agency investigating the death of the decedent, determines that there is a reasonable suspicion that a person described in subsection (a) committed the offense;

the person referred to in subdivision (2) may not authorize the disposition of the decedent's body or cremated remains.

(d) The coroner, in consultation with the law enforcement agency investigating the death of the decedent, shall inform the cemetery owner of the determination referred to in subsection (c)(2).

(e) If a person vested with a right under subsection (a) does not exercise that right not less than seventy-two (72) hours after the person receives notification of the death of the decedent, the person forfeits the person's right to determine the final disposition of the decedent's remains and the right to determine final disposition passes to the next





person described in subsection (a).

(f) A cemetery owner has the right to rely, in good faith, on the representations of a person listed in subsection (a) that any other individuals of the same degree of kinship have been notified of the final disposition instructions.

(g) If there is a dispute concerning the disposition of a decedent's remains, a cemetery owner is not liable for refusing to accept the remains of the decedent until the cemetery owner receives:

(1) a court order; or

(2) a written agreement signed by the disputing parties;

that determines the final disposition of the decedent's remains. If a cemetery agrees to shelter the remains of the decedent while the parties are in dispute, the cemetery may collect any applicable fees for storing the remains, including legal fees that are incurred.

(h) Any cause of action filed under this section must be filed in the probate court in the county where the decedent resided, unless the decedent was not a resident of Indiana.

(i) A spouse seeking a judicial determination under subsection (a)(1)(C)(i) that the decedent and spouse were reconciled before the decedent's death may petition the court having jurisdiction over the dissolution or separation proceeding to make this determination by filing the petition under the same cause number as the dissolution or separation proceeding. A spouse who files a petition under this subsection is not required to pay a filing fee.

SECTION 67. IC 25-15-9-18, AS AMENDED BY P.L.190-2016, SECTION 34, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 18. (a) Except as provided in subsection (b), the following persons, in the order of priority indicated, have the authority to designate the manner, type, and selection of the final disposition of human remains, to make arrangements for funeral services, and to make other ceremonial arrangements after an individual's death:

(1) A person:

(A) granted the authority to serve in a funeral planning declaration executed by the decedent under IC 29-2-19; or

(B) named in a United States Department of Defense form "Record of Emergency Data" (DD Form 93) or a successor form adopted by the United States Department of Defense, if the decedent died while serving in any branch of the United States Armed Forces (as defined in 10 U.S.C. 1481) and completed the form.

(2) An individual specifically granted the authority in a power of attorney or a health care power of attorney executed by the

decedent under IC 30-5-5-16 **or a health care representative under IC 16-36-7.**

(3) The individual who was the spouse of the decedent at the time of the decedent's death, except when:

(A) a petition to dissolve the marriage or for legal separation of the decedent and spouse is pending with a court at the time of the decedent's death, unless a court finds that the decedent and spouse were reconciled before the decedent's death; or

(B) a court determines the decedent and spouse were physically and emotionally separated at the time of death and the separation was for an extended time that clearly demonstrates an absence of due affection, trust, and regard for the decedent.

(4) The decedent's surviving adult child or, if more than one (1) adult child is surviving, the majority of the adult children. However, less than half of the surviving adult children have the rights under this subdivision if the adult children have used reasonable efforts to notify the other surviving adult children of their intentions and are not aware of any opposition to the final disposition instructions by more than half of the surviving adult children.

(5) The decedent's surviving parent or parents. If one (1) of the parents is absent, the parent who is present has the rights under this subdivision if the parent who is present has used reasonable efforts to notify the absent parent.

(6) The decedent's surviving sibling or, if more than one (1) sibling is surviving, the majority of the surviving siblings. However, less than half of the surviving siblings have the rights under this subdivision if the siblings have used reasonable efforts to notify the other surviving siblings of their intentions and are not aware of any opposition to the final disposition instructions by more than half of the surviving siblings.

(7) The individual in the next degree of kinship under IC 29-1-2-1 to inherit the estate of the decedent or, if more than one (1) individual of the same degree survives, the majority of those who are of the same degree of kinship. However, less than half of the individuals who are of the same degree of kinship have the rights under this subdivision if they have used reasonable efforts to notify the other individuals who are of the same degree of kinship of their intentions and are not aware of any opposition to the final disposition instructions by more than half of the individuals who are of the same degree of kinship.





(8) If none of the persons described in subdivisions (1) through (7) are available, or willing, to act and arrange for the final disposition of the decedent's remains, a stepchild (as defined in IC 6-4.1-1-3(f)) of the decedent. If more than one (1) stepchild survives the decedent, then a majority of the surviving stepchildren. However, less than half of the surviving stepchildren have the rights under this subdivision if they have used reasonable efforts to notify the other stepchildren of their intentions and are not aware of any opposition to the final disposition instructions by more than half of the stepchildren.

(9) The person appointed to administer the decedent's estate under IC 29-1.

(10) If none of the persons identified in subdivisions (1) through (9) are available, any other person willing to act and arrange for the final disposition of the decedent's remains, including a funeral home that:

(A) has a valid prepaid funeral plan executed under IC 30-2-13 that makes arrangements for the disposition of the decedent's remains; and

(B) attests in writing that a good faith effort has been made to contact any living individuals described in subdivisions (1) through (9).

(11) In the case of an indigent or other individual whose final disposition is the responsibility of the state or township, the following:

(A) If none of the persons identified in subdivisions (1) through (10) is available:

(i) a public administrator, including a responsible township trustee or the trustee's designee; or

(ii) the coroner.

(B) A state appointed guardian.

(b) If:

(1) the death of the decedent appears to have been the result of:

(A) murder (IC 35-42-1-1);

(B) voluntary manslaughter (IC 35-42-1-3); or

(C) another criminal act, if the death does not result from the operation of a vehicle; and

(2) the coroner, in consultation with the law enforcement agency investigating the death of the decedent, determines that there is a reasonable suspicion that a person described in subsection (a) committed the offense;

the person referred to in subdivision (2) may not authorize or designate

the manner, type, or selection of the final disposition of human remains.

(c) The coroner, in consultation with the law enforcement agency investigating the death of the decedent, shall inform the cemetery owner or crematory authority of the determination under subsection (b)(2).

(d) If the decedent had filed a protection order against a person described in subsection (a) and the protection order is currently in effect, the person described in subsection (a) may not authorize or designate the manner, type, or selection of the final disposition of human remains.

(e) A law enforcement agency shall determine if the protection order is in effect. If the law enforcement agency cannot determine the existence of a protection order that is in effect, the law enforcement agency shall consult the protective order registry established under IC 5-2-9-5.5.

(f) If a person vested with a right under subsection (a) does not exercise that right not later than seventy-two (72) hours after the person receives notification of the death of the decedent, the person forfeits the person's right to determine the final disposition of the decedent's remains and the right to determine final disposition passes to the next person described in subsection (a).

(g) A funeral home has the right to rely, in good faith, on the representations of a person listed in subsection (a) that any other individuals of the same degree of kinship have been notified of the final disposition instructions.

(h) If there is a dispute concerning the disposition of a decedent's remains, a funeral home is not liable for refusing to accept the remains of the decedent until the funeral home receives:

(1) a court order; or

(2) a written agreement signed by the disputing parties;

that determines the final disposition of the decedent's remains. If a funeral home agrees to shelter the remains of the decedent while the parties are in dispute, the funeral home may collect any applicable fees for storing the remains, including legal fees that are incurred.

(i) Any cause of action filed under this section must be filed in the probate court in the county where the decedent resided, unless the decedent was not a resident of Indiana.

(j) A spouse seeking a judicial determination under subsection (a)(3)(A) that the decedent and spouse were reconciled before the decedent's death may petition the court having jurisdiction over the dissolution or separation proceeding to make this determination by





filing the petition under the same cause number as the dissolution or separation proceeding. A spouse who files a petition under this subsection is not required to pay a filing fee.

SECTION 68. IC 29-2-16.1-1, AS AMENDED BY P.L.11-2020, SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 1. The following definitions apply throughout this chapter:

(1) "Adult" means an individual at least eighteen (18) years of age.

(2) "Agent" means an individual who is:

(A) authorized to make health care decisions on behalf of another person by a health care power of attorney **under IC 30-5-5-16 or a health care representative under IC 16-36-7;** or

(B) expressly authorized to make an anatomical gift on behalf of another person by a document signed by the person.

(3) "Anatomical gift" means a donation of all or part of a human body to take effect after the donor's death for the purpose of transplantation, therapy, research, or education.

(4) "Bank" or "storage facility" means a facility licensed, accredited, or approved under the laws of any state for storage of human bodies or parts of human bodies.

(5) "Decedent":

(A) means a deceased individual whose body or body part is or may be the source of an anatomical gift; and

(B) includes:

(i) a stillborn infant; and

(ii) except as restricted by any other law, a fetus.

(6) "Disinterested witness" means an individual other than a spouse, child, sibling, grandchild, grandparent, or guardian of the individual who makes, amends, revokes, or refuses to make an anatomical gift or another adult who exhibited special care and concern for the individual. This term does not include a person to whom an anatomical gift could pass under section 10 of this chapter.

(7) "Document of gift" means a donor card or other record used to make an anatomical gift, including a statement or symbol on:

(A) a driver's license;

(B) an identification card;

(C) a resident license to hunt, fish, or trap; or

(D) a donor registry.

(8) "Donor" means an individual whose body or body part is the

subject of an anatomical gift.

(9) "Donor registry" means:

(A) a data base maintained by:

(i) the bureau of motor vehicles; or

(ii) the equivalent agency in another state;

(B) the Donate Life Indiana Registry maintained by the Indiana Donation Alliance Foundation; or

(C) a donor registry maintained in another state;

that contains records of anatomical gifts and amendments to or revocations of anatomical gifts.

(10) "Driver's license" means a license or permit issued by the bureau of motor vehicles to operate a vehicle.

(11) "Eye bank" means a person that is licensed, accredited, or regulated under federal or state law to engage in the recovery, screening, testing, processing, storage, or distribution of human eyes or portions of human eyes.

(12) "Guardian" means an individual appointed by a court to make decisions regarding the support, care, education, health, or welfare of an individual. The term does not include a guardian ad litem.

(13) "Hospital" means a facility licensed as a hospital under the laws of any state or a facility operated as a hospital by the United States, a state, or a subdivision of a state.

(14) "Identification card" means an identification card issued by the bureau of motor vehicles.

(15) "Minor" means an individual under eighteen (18) years of age.

(16) "Organ procurement organization" means a person designated by the Secretary of the United States Department of Health and Human Services as an organ procurement organization.

(17) "Parent" means an individual whose parental rights have not been terminated.

(18) "Part" means an organ, an eye, or tissue of a human being. The term does not mean a whole body.

(19) "Pathologist" means a physician:

(A) certified by the American Board of Pathology; or

(B) holding an unlimited license to practice medicine in Indiana and acting under the direction of a physician certified by the American Board of Pathology.

(20) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association,





joint venture, public corporation, government or governmental subdivision, agency, instrumentality, or any other legal or commercial entity.

(21) "Physician" or "surgeon" means an individual authorized to practice medicine or osteopathy under the laws of any state.

(22) "Procurement organization" means an eye bank, organ procurement organization, or tissue bank.

(23) "Prospective donor" means an individual who is dead or near death and has been determined by a procurement organization to have a part that could be medically suitable for transplantation, therapy, research, or education. The term does not include an individual who has made an appropriate refusal.

(24) "Reasonably available" means:

(A) able to be contacted by a procurement organization without undue effort; and

(B) willing and able to act in a timely manner consistent with existing medical criteria necessary for the making of an anatomical gift.

(25) "Recipient" means an individual into whose body a decedent's part has been or is intended to be transplanted.

(26) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(27) "Refusal" means a record created under section 6 of this chapter that expressly states the intent to bar another person from making an anatomical gift of an individual's body or part.

(28) "Sign" means, with the present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(29) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(30) "Technician" means an individual determined to be qualified to remove or process parts by an appropriate organization that is licensed, accredited, or regulated under federal or state law. The term includes an eye enucleator.

(31) "Tissue" means a part of the human body other than an organ or an eye. The term does not include blood or other bodily fluids unless the blood or bodily fluids are donated for the purpose of



research or education.

(32) "Tissue bank" means a person that is licensed, accredited, or regulated under federal or state law to engage in the recovery, screening, testing, processing, storage, or distribution of tissue.

(33) "Transplant hospital" means a hospital that furnishes organ transplants and other medical and surgical specialty services required for the care of organ transplant patients.

SECTION 69. IC 29-2-16.1-3, AS ADDED BY P.L.147-2007, SECTION 12, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 3. Subject to section 7 of this chapter, an anatomical gift of a donor's body or part may be made during the life of the donor for the purpose of transplantation, therapy, research, or education in the manner provided in section 4 of this chapter by:

(1) the donor, if the donor is an adult or if the donor is a minor and is:

(A) emancipated; or

(B) authorized under state law to apply for a driver's license because the donor is at least sixteen (16) years of age;

(2) an agent, **a health care representative, or a proxy (as defined by IC 16-36-7-20)** of the donor, unless the health care power of attorney, **advance directive,** or other record prohibits the agent from making an anatomical gift;

(3) a parent of the donor, if the donor is not emancipated; or

(4) the donor's guardian.

SECTION 70. IC 29-2-19-10, AS ADDED BY P.L.143-2009, SECTION 14, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 10. The provisions of a declarant's most recent declaration prevail over any other document executed by the declarant concerning any preferences described in section 9 of this chapter. However, this section may not be construed to invalidate a power of attorney executed under IC 30-5-5 or an appointment of a health care representative under IC 16-36-1 **or IC 16-36-7** with respect to any power or duty belonging to the attorney in fact or health care representative that is not related to a preference described in section 9 of this chapter.

SECTION 71. IC 29-2-19-17, AS AMENDED BY P.L.190-2016, SECTION 38, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 17. The right to control the disposition of a decedent's body, to make arrangements for funeral services, and to make other ceremonial arrangements after an individual's death devolves on the following, in the priority listed:

(1) A person:





(A) granted the authority to serve in a funeral planning declaration executed by the decedent under this chapter; or

(B) named in a United States Department of Defense form "Record of Emergency Data" (DD Form 93) or a successor form adopted by the United States Department of Defense, if the decedent died while serving in any branch of the United States Armed Forces (as defined in 10 U.S.C. 1481) and completed the form.

(2) An individual specifically granted the authority in a power of attorney or a health care power of attorney executed by the decedent under IC 30-5-5-16 **or a health care representative under IC 16-36-7.**

(3) The decedent's surviving spouse.

(4) A surviving adult child of the decedent or, if more than one (1) adult child is surviving, the majority of the other adult children. However, less than half of the surviving adult children have the rights under this subdivision if the adult children have used reasonable efforts to notify the other surviving adult children of their intentions and are not aware of any opposition to the final disposition instructions by more than half of the surviving adult children.

(5) The surviving parent or parents of the decedent. If one (1) of the parents is absent, the parent who is present has the rights under this subdivision if the parent who is present has used reasonable efforts to notify the absent parent.

(6) The decedent's surviving sibling or, if more than one (1) sibling is surviving, the majority of the surviving siblings. However, less than half of the surviving siblings have the rights under this subdivision if the siblings have used reasonable efforts to notify the other surviving siblings of their intentions and are not aware of any opposition to the final disposition instructions by more than half of the surviving siblings.

(7) An individual in the next degree of kinship under IC 29-1-2-1 to inherit the estate of the decedent or, if more than one (1) individual of the same degree survives, the majority of those who are of the same degree of kinship. However, less than half of the individuals who are of the same degree of kinship have the rights under this subdivision if they have used reasonable efforts to notify the other individuals who are of the same degree of kinship of their intentions and are not aware of any opposition to the final disposition instructions by more than half of the individuals who are of the same degree of kinship.



(8) If none of the persons described in subdivisions (1) through (7) are available, or willing, to act and arrange for the final disposition of the decedent's remains, a stepchild (as defined in IC 6-4.1-1-3(f)) of the decedent. If more than one (1) stepchild survives the decedent, then a majority of the surviving stepchildren. However, less than half of the surviving stepchildren have the rights under this subdivision if they have used reasonable efforts to notify the other stepchildren of their intentions and are not aware of any opposition to the final disposition instructions by more than half of the stepchildren.

(9) The person appointed to administer the decedent's estate under IC 29-1.

(10) If none of the persons described in subdivisions (1) through (9) are available, any other person willing to act and arrange for the final disposition of the decedent's remains, including a funeral home that:

(A) has a valid prepaid funeral plan executed under IC 30-2-13 that makes arrangements for the disposition of the decedent's remains; and

(B) attests in writing that a good faith effort has been made to contact any living individuals described in subdivisions (1) through (9).

SECTION 72. IC 29-3-9-1, AS AMENDED BY P.L.74-2016, SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 1. (a) As used in this section, "department" means the department of child services established by IC 31-25-1-1.

(b) As used in this section and except as otherwise provided in this section, "foster care" has the meaning set forth in IC 31-9-2-46.7.

(c) Except as provided in subsections (d) and (h), by a properly executed power of attorney, a parent of a minor or a guardian (other than a temporary guardian) of a protected person may delegate to another person for:

(1) any period during which the care and custody of the minor or protected person is entrusted to an institution furnishing care, custody, education, or training; or

(2) a period not exceeding twelve (12) months;

any powers regarding health care, support, custody, or property of the minor or protected person. A delegation described in this subsection is effective immediately unless otherwise stated in the power of attorney.

(d) A parent of a minor or a guardian of a protected person may not delegate under subsection (c) the power to:

(1) consent to the marriage or adoption of a protected person who





is a minor; or

(2) petition the court to request the authority to petition for dissolution of marriage, legal separation, or annulment of marriage on behalf of a protected person as provided under section 12.2 of this chapter.

(e) **Subject to IC 30-5-5-16,** a person having a power of attorney executed under subsection (c) has and shall exercise, for the period during which the power is effective, all other authority of the parent or guardian respecting the health care, support, custody, or property of the minor or protected person except any authority expressly excluded in the written instrument delegating the power. The parent or guardian remains responsible for any act or omission of the person having the power of attorney with respect to the affairs, property, and person of the minor or protected person as though the power of attorney had never been executed.

(f) A delegation of powers executed under subsection (c) does not, as a result of the execution of the power of attorney, subject any of the parties to any laws, rules, or regulations concerning the licensing or regulation of foster family homes, child placing agencies, or child caring institutions under IC 31-27.

(g) Any child who is the subject of a power of attorney executed under subsection (c) is not considered to be placed in foster care. The parties to a power of attorney executed under subsection (c), including a child, a protected person, a parent or guardian of a child or protected person, or an attorney-in-fact, are not, as a result of the execution of the power of attorney, subject to any foster care requirements or foster care licensing regulations.

(h) A foster family home licensed under IC 31-27-4 may not provide overnight or regular and continuous care and supervision to a child who is the subject of a power of attorney executed under subsection (c) while providing care to a child placed in the home by the department or under a juvenile court order under a foster family home license. Upon request, the department may grant an exception to this subsection.

(i) A parent who:

(1) is a member in the:

(A) active or reserve component of the armed forces of the United States, including the Army, Navy, Air Force, Marine Corps, National Guard, or Coast Guard; or

(B) commissioned corps of the:

(i) National Oceanic and Atmospheric Administration; or

(ii) Public Health Service of the United States Department



of Health and Human Services;

detailed by proper authority for duty with the Army or Navy of the United States; or

(2) is required to:

(A) enter or serve in the active military service of the United States under a call or order of the President of the United States; or

(B) serve on state active duty;

may delegate the powers designated in subsection (c) for a period longer than twelve (12) months if the parent is on active duty service. However, the term of delegation may not exceed the term of active duty service plus thirty (30) days. The power of attorney must indicate that the parent is required to enter or serve in the active military service of the United States and include the estimated beginning and ending dates of the active duty service.

(j) Except as otherwise stated in the power of attorney delegating powers under this section, a delegation of powers under this section may be revoked at any time by a written instrument of revocation that:

(1) identifies the power of attorney revoked; and

(2) is signed by the:

(A) parent of a minor; or

(B) guardian of a protected person;

who executed the power of attorney.

SECTION 73. IC 29-3-9-4.5, AS ADDED BY P.L.6-2010, SECTION 12, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 4.5. (a) After notice to interested persons and upon authorization of the court, a guardian may, if the protected person has been found by the court to lack testamentary capacity, do any of the following:

(1) Make gifts.

(2) Exercise any power with respect to transfer on death or payable on death transfers that is described in IC 30-5-5-7.5.

(3) Convey, release, or disclaim contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entireties.

(4) Exercise or release a power of appointment.

(5) Create a revocable or irrevocable trust of all or part of the property of the estate, including a trust that extends beyond the duration of the guardianship.

(6) Revoke or amend a trust that is revocable by the protected person.





(7) Exercise rights to elect options and change beneficiaries under insurance policies, retirement plans, and annuities.

(8) Surrender an insurance policy or annuity for its cash value.

(9) Exercise any right to an elective share in the estate of the protected person's deceased spouse.

(10) Renounce or disclaim any interest by testate or intestate succession or by transfer inter vivos.

(b) Before approving a guardian's exercise of a power listed in subsection (a), the court shall consider primarily the decision that the protected person would have made, to the extent that the decision of the protected person can be ascertained. If the protected person has a will, the protected person's distribution of assets under the will is prima facie evidence of the protected person's intent. The court shall also consider:

(1) the financial needs of the protected person and the needs of individuals who are dependent on the protected person for support;

(2) the interests of creditors;

(3) the possible reduction of income taxes, estate taxes, inheritance taxes, or other federal, state, or local tax liabilities;

(4) the eligibility of the protected person for governmental assistance;

(5) the protected person's previous pattern of giving or level of support;

(6) the protected person's existing estate plan, if any;

(7) the protected person's life expectancy and the probability that the guardianship will terminate before the protected person's death; and

(8) any other factor the court considers relevant.

(c) A guardian may examine and receive, at the expense of the guardian, copies of the following documents of the protected person:

(1) A will.

(2) A trust.

(3) A power of attorney.

(4) A health care appointment.

**(5) An advance directive.**

~~(5)~~ **(6)** Any other estate planning document.

SECTION 74. IC 30-5-5-16, AS AMENDED BY P.L.81-2015, SECTION 20, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 16. (a) This section does not prohibit an individual capable of consenting to the individual's own health care or to the health care of another from consenting to health care administered in

good faith under the religious tenets and practices of the individual requiring health care.

(b) Language conferring general authority with respect to health care powers means the principal authorizes the attorney in fact to do the following:

(1) Employ or contract with servants, companions, or health care providers to care for the principal.

(2) Consent to or refuse health care for the principal who is an individual in accordance with IC 16-36-4 and IC 16-36-1 by properly executing and attaching to the power of attorney a declaration or appointment, or both.

(3) Admit or release the principal from a hospital or health care facility.

(4) Have access to records, including medical records, concerning the principal's condition.

(5) Make anatomical gifts on the principal's behalf.

(6) Request an autopsy.

(7) Make plans for the disposition of the principal's body, including executing a funeral planning declaration on behalf of the principal in accordance with IC 29-2-19.

**(c) Notwithstanding any other law, a document granting health care powers to an attorney in fact for health care may not be executed under this chapter after December 31, 2022. However, if a power of attorney that is executed after December 31, 2022, is written to grant both:**

**(1) health care powers; and**

**(2) nonhealth care powers under this chapter;**

**to an attorney in fact, the health care powers are void, but all other powers granted by the power of attorney will remain effective and enforceable under this article.**

SECTION 75. IC 30-5-5-17, AS AMENDED BY THE TECHNICAL CORRECTIONS BILL OF THE 2021 GENERAL ASSEMBLY, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 17. (a) If the attorney in fact has the authority to consent to or refuse health care under section ~~16(2)~~ **16(b)(2)** of this chapter, the attorney in fact may be empowered to ask in the name of the principal for health care to be withdrawn or withheld when it is not beneficial or when any benefit is outweighed by the demands of the treatment and death may result. To empower the attorney in fact to act under this section, the following language must be included in an appointment under IC 16-36-1 **or IC 16-36-7** in substantially the same form set forth below:





I authorize my health care representative to make decisions in my best interest concerning withdrawal or withholding of health care. If at any time based on my previously expressed preferences and the diagnosis and prognosis my health care representative is satisfied that certain health care is not or would not be beneficial or that such health care is or would be excessively burdensome, then my health care representative may express my will that such health care be withheld or withdrawn and may consent on my behalf that any or all health care be discontinued or not instituted, even if death may result.

My health care representative must try to discuss this decision with me. However, if I am unable to communicate, my health care representative may make such a decision for me, after consultation with my physician or physicians and other relevant health care givers. To the extent appropriate, my health care representative may also discuss this decision with my family and others to the extent they are available.

(b) Nothing in this section may be construed to authorize euthanasia.

SECTION 76. IC 30-5-7-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 2. (a) A health care provider furnished with a copy of a declaration under IC 16-36-4 or an appointment under IC 16-36-1 **or IC 16-36-7** shall make the documents a part of the principal's medical records.

(b) If a change in or termination of a power of attorney becomes known to the health care provider, the change or termination shall be noted in the principal's medical records.

SECTION 77. IC 30-5-7-3 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 3. Whenever a health care provider believes a patient may lack the capacity to give informed consent to health care the provider considers necessary, the provider shall consult with the attorney in fact who has power to act for the patient under IC 16-36-4, IC 16-36-1, **IC 16-36-7,** or this article.

SECTION 78. IC 30-5-8-6 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 6. **Subject to IC 16-36-7,** appointments made under this article, IC 16-36-4, ~~and~~ IC 16-36-1, **and IC 16-36-7** can be made concurrently and will be given full effect under the law. However, the appointments may be executed independently and remain valid in their own right.

SECTION 79. IC 34-30-2-75.6 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 75.6. IC 16-36-7-40 (Concerning**

**a health care provider's or other person's reliance on an advance directive).**

SECTION 80. IC 34-30-2-75.7 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: **Sec. 75.7. IC 16-36-7-41 (Concerning a health care provider's or other person's reliance on an affidavit regarding an advance directive or decision of a health care representative).**

SECTION 81. IC 35-42-1-2.5, AS AMENDED BY P.L.158-2013, SECTION 412, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 2.5. (a) This section does not apply to the following:

(1) A licensed health care provider who administers, prescribes, or dispenses medications or procedures to relieve a person's pain or discomfort, even if the medication or procedure may hasten or increase the risk of death, unless such medications or procedures are intended to cause death.

(2) The withholding or withdrawing of medical treatment or life-prolonging procedures by a licensed health care provider, including pursuant to IC 16-36-4 (living wills and life-prolonging procedures), IC 16-36-1 (health care consent), **IC 16-36-7 (advance directive),** or IC 30-5 ~~(power~~ **(health care power** of attorney).

(b) A person who has knowledge that another person intends to commit or attempt to commit suicide and who intentionally does either of the following commits assisting suicide, a Level 5 felony:

(1) Provides the physical means by which the other person attempts or commits suicide.

(2) Participates in a physical act by which the other person attempts or commits suicide.



President of the Senate

President Pro Tempore

Speaker of the House of Representatives

Governor of the State of Indiana

Date: _____ Time: _____

SEA 204

# Section Three

# Elder Law

**Robert W. Fechtman**
Fechtman Law Office
Indianapolis, Indiana

## Section Three

## Elder Law……..Robert W. Fechtman

*DISCLAIMER*

*Although every effort has been made to obtain the best information available for presentation herein, the reader must recognize that many of the issues in this area, particularly as they relate to public benefits, are part of a rapidly changing body of law and administrative interpretation.*

*The author makes no warranties about the legal conclusions stated herein and this is not intended as legal advice to any individual. Application of the principals discussed in this paper to specific cases should only be taken upon the advice of knowledgeable counsel.*

# Elder Law

by Robert W. Fechtman

## I. Indiana Medicaid's Response to COVID-19

Numerous temporary changes were made to all state Medicaid programs under the Families First Coronavirus Response Act (FFCRA), Pub. L. No. 116-127 (2020). Over the time since that law was passed, the Centers for Medicare and Medicaid Services (CMS) has provided additional guidance, and Indiana Medicaid (the Indiana Family and Social Services Administration – FSSA) has adjusted its interpretation of the law.

### A. Increase in Federal Medical Assistance Percentage (FMAP)

Medicaid is a program that is run jointly by the federal government and the individual states. Federal law provides a formula based on each state's per capita income to establish the share of the Medicaid costs that is borne by the federal government. The federal share of these costs is known as the Federal Medical Assistance Percentage (FMAP). For October 1, 2020, through September 30, 2021, the FMAP for Indiana was set at 65.83%. 84 Fed. Reg. 66204, 66205 (Dec. 3, 2019). According to § 6008 of the Families First Coronavirus Response Act (FFCRA), Pub. L. No. 116-127 (2020), all states, including Indiana, are receiving a temporary increase in the FMAP of 6.2%. This increase will continue until the end of the calendar quarter in which the public health emergency ends, as determined by the Secretary of the Department of Health and Human Services (HHS). With the 6.2% increase, Indiana's current FMAP is 72.03%, which is a significant increase given the large cost of the state Medicaid program.

### B. Medicaid Benefits May Not Be Terminated or Decreased

In exchange for the increased FMAP as described above, under § 6008(b)(3) of the Families First Coronavirus Response Act (FFCRA), Pub. L. No. 116-127 (2020), state Medicaid programs are forbidden to terminate or reduce a recipient's Medicaid benefits until the end of the month when the Secretary of HHS has determined that the public health emergency has ended. At first, Indiana Medicaid interpreted this to mean that they could only terminate a recipient's Medicaid benefits if they died, voluntarily withdrew from the program, or moved to another state, and that they could not increase nursing home and waiver liability payments (think of this like a monthly health insurance deductible), even if the recipient's monthly income increased. Then, on November 6, 2020, CMS published an interim final rule with comments at 85 Red. Reg. 71142 adopting 42 CFR 433.400. Finally, Indiana Medicaid resumed its standard rules for calculating nursing home and waiver liability payments on March 1, 2021.

With the resumption of the standard rules, when a nursing home resident or a waiver recipient receives their January cost of living (COLA) income increase, or if their income increases for any other reason, the Division of Family Resources (DFR) will increase their liability payment according. Also, if a waiver recipient who had a $0.00 liability due to the much larger Personal Needs Allowance (PNA) available to waiver recipients now enters a nursing home, the DFR will begin assessing a monthly liability payment. Finally, when a nursing home resident or a waiver recipient has been under a transfer of assets penalty and that penalty comes to an end, the DFR will begin assessing a monthly liability payment.

Even with the resumption of the standard rules as described above, there is still an outlier, which is that the DFR will not assess a transfer penalty when a transfer is made by a Medicaid recipient after Medicaid eligibility is established.

### C. Case Processing During and After the Public Health Emergency

There is an annual redetermination process with Indiana Medicaid where recipients must verify compliance with Medicaid eligibility rules such as reporting increases in income, balances of financial accounts, etc. Last year, the Indiana FSSA decided to auto-renew all of these redeterminations for 12 months. Meanwhile, CMS established a six-month time frame for states to complete pending verifications, redeterminations based on changes in circumstances, and renewals for Medicaid after the public health emergency ends. Now, according to a CMS transmittal issued on Friday, August 13, 2021, this time frame is extended to 12 months after the public health emergency ends. This expanded time frame will relieve the immense administrative burden on states trying to catch up after the pandemic amid record enrollment in Medicaid during the crisis.

### D. States May Not Adopt More Restrictive Rules During the Pandemic

According to According to § 6008(b)(1) of the Families First Coronavirus Response Act (FFCRA), Pub. L. No. 116-127 (2020), eligibility rules and procedures may not be more restrictive than they were on January 1, 2020.

### E. Stimulus Payments Are Exempt for Medicaid Purposes

Federal economic stimulus payments issued under the various coronavirus response laws that have been passed are not counted as income when they are received, and they are not counted as available resources for Medicaid purposes for a year after they are received. The reason for this is that the stimulus payments are considered to be federal tax refunds, which are protected under the provisions of 26 U.S.C. § 6409.

### F. New COVID-19 Liability Protections for Indiana Nursing Homes

On April 29, 2021, Governor Holcombe signed House Bill 1002, which protects health care providers against any claims "arising from COVID-19." This includes reallocation of staff, delaying or modifying non-emergency medical services, and reasonable nonperformance of medical services due to COVID-19.

There is concern among advocates for nursing home residents that the new law allows nursing home neglect and could lead to an increase in cases of nursing home neglect and abuse.

### G. New Essential Family Caregiver Program

Many nursing home residents have family members or other outside caregivers who play an important role in providing care and support (physical and emotional) to these residents on a daily basis. The activities of these family members and other outside caregivers were completely halted for many months during the current public health emergency, and only after the coronavirus vaccines were rolled out were these caregivers able slowly to resume their caregiving.

During the 2021 legislative session, Senate Enrolled Act 202 was passed to require nursing facilities and assisted living facilities to implement an Essential Family Caregiver (EFC) program. EFCs will now be allowed to continue to provide care and support to residents, even during a public health emergency. In order to qualify as an EFC, individuals must be at least 18 years of age and they must have provided care and support to the resident on a routine basis (about twice a week, on average) prior to the public health emergency.

## II. Other Changes to the Indiana Medicaid Rules

Some of these other changes to the Indiana Medicaid Rules, or the FSSA's interpretation of existing federal Medicaid laws, are at least peripherally related to the current public health emergency.

### A. A Miller Trust May Be Used By Individuals With Monthly Income Lower Than the Special Income Level

A Miller Trust (or Qualified Income Trust) is necessary for nursing home and waiver Medicaid recipients with gross monthly income over the Special Income Level (SIL) of three times the maximum monthly Supplemental Security Income (SSI) payment amount. Since SSI pays a maximum of $794.00 per month in 2021, this means that Medicaid recipients with gross monthly income above $2,382.00 (3 X $794.00 = $2,382.00) must have a Miller Trust and fund it each month with at least as much as the gross monthly income that exceeds the $2,382.00. The Miller Trust, which is defined in 42 U.S.C. § 1396p(d)(4)(B), may only hold income, and therefore it may not be used to shelter resources that exceed the usual Medicaid resource limits.

During the current public health emergency, when the FSSA was not implementing liability payments or increasing liability payments for nursing home and waiver Medicaid recipients, some practitioners wondered whether Medicaid recipients with gross monthly income less than the SIL could place excess income in a Miller Trust in order to avoid future resource eligibility problems when the public health emergency is over. The FSSA has confirmed that its interpretation of the federal Medicaid law is that such a strategy is permissible, although the FSSA concurrently emphasized that one is not allowed to deposit resources into the Miller Trust.

### B. The Indiana Partnership Program Has Been Modified to Come Into Compliance With the Deficit Reduction Act

Since 1993, Indiana Medicaid has had a partnership with the long-term care insurance industry. This is called the Indiana Long Term Care Insurance Program. According to the rules of this program, if a Medicaid applicant purchases a long-term care insurance policy approved by the Indiana Department of Insurance, that Medicaid applicant will receive a dollar increase in his or her Medicaid resource limit for every dollar paid out by his or her insurance policy. Starting in 1998, the partnership program began offering total asset protection for Medicaid eligibility purposes in cases where the insurance policy had maximum benefits of at least $140,000.00, with an annual increase in the daily benefit of at least 5%, provided that the total asset protection would only be achieved once the policy had paid out its maximum benefits. The maximum benefit amount required for the total asset protection increased by 5% each year, compounded annually, so a policy purchased in 2021 must have a maximum benefit amount of $430,014.00. I.C. 12-15-39.6-10.

The Deficit Reduction Act of 2005 (DRA) allowed all of the states to adopt partnership programs. 42 U.S.C. §1396p(b)(1) and (5). However, the DRA 2005 only provided for dollar-for-dollar asset protection. Now, Indiana House Enrolled Act 1405 of 2021 has instituted a new partnership program following the terms of the DRA. The new partnership program does not allow total asset protection for future policies, but it does honor total asset protection associated with policies purchased under the old partnership program. It is worth noting that one will only receive total asset protection if one is applying for Indiana Medicaid, which might require individuals who have moved to other states to move back to Indiana at the point when their insurance policies have paid out their maximum benefit and it is time to apply for Medicaid.

### C. Indiana Medicaid Has Implemented a New Asset Verification System

The federal Medicaid law requires states to develop Asset Verification Systems (AVS) to search for assets that an applicant or recipient might have "forgotten" to reveal. 42 U.S.C. § 1396w. Indiana has now implemented such an asset verification system, and it reportedly uses information from Experian, the BMV, and real property searches to verify assets. This new system is described in the Indiana Health Coverage Program Policy Manual (IHCPPM) § 2612.00.00. Highlights from this section of the IHCPPM include:

1. Matches are made using name and social security number;

2. The AVS will check financial institutions located within 65 miles of the recipient's address;

3. For new applications, there is a five-year look-back, for redeterminations 90 days, and for reapplications four months;

4. For new applications, the AVS will verify assets within 13 days of the caseworker completing his or her part of the application process, so it appears that this will add at least 13 days to overall application process;

5. If the AVS provides information that causes the applicant to fail the eligibility test, then a discrepancy notice will be issued listing the resources reported by the applicant and the alternate information discovered through the system, and the applicant will have 13 days to provide documentation to rebut the findings of the AVS; and,

6. The AVS will provide first-of-the-month balances, but that won't change the existing policies that exempt from the real first-of-the-month balances things like monthly income payments that are deposited early and outstanding checks written on the account.

### D. The Indiana Medicaid Rule Regarding Pre-Paid Funerals Has Changed

Under the case of Indiana FSSA v. Culley, 769 N.E.2d 680 (Ind. App. 2002), it used to be that pre-paid funerals (and burial plots) purchased for members of the Medicaid applicant's immediate family, which included the applicant's minor and adult children, brothers, sisters, parents, and the spouses of those individuals, without regard to whether those persons lived in the same home with the applicant or were the applicant's dependents were exempt from the usual Medicaid transfer rules. In other words, one could purchase pre-paid funerals and burial plots for all of these family members with no resulting period of ineligibility for Medicaid.

However, 405 IAC 2-3-15 has now been amended, effective July 11, 2021, to limit this exemption from the Medicaid transfer rules only to the purchase of "burial spaces," which includes burial plots, grave sites, crypts, mausoleums, urns, niches, and other customary and traditional repositories for the deceased's bodily remains. The concept of burial spaces also includes the headstone and the opening and closing of the grave.

# Section Four

# Juvenile Law Update
# 2021

**Hon. Vicki L. Carmichael**
Clark Circuit Court #4
Jeffersonville, Indiana

## Section Four

**Juvenile Law Update 2021…….... Hon. Vicki L. Carmichael**

PowerPoint Presentation

# Juvenile Law Update
# 2021

Judge Vicki L. Carmichael
Clark Circuit Court No. 4

# Jail Removal Act

- I.C. 31-30-3-12
- A juvenile arrestee who is being charged as an adult or who has been waived to adult court:
  - cannot be held in an adult facility within sight and sound of adult inmates for more than 6 hours without a hearing

# I.C. 31-30-3-12

- At that hearing, the Court must make findings that it is in the best interests of the juvenile that they be held in the adult facility
- If the Court finds that it is in the juvenile's best interest to be held in the adult facility, the Court MUST have a hearing every 30 days to renew those findings

# I.C. 31-30-3-12

- If the Court finds that the juvenile should be held in a juvenile detention facility, no further hearing is required
- Then there is the difficulty of finding a detention center to hold the youth with your county incurring the expenses

# Suggested Procedure

- If juvenile arrested as a direct file:
  - Juvenile taken to the jail for book in then immediately taken to detention center
  - Court schedules initial hearing with jail removal hearing
  - If placed in adult jail, review hearing every 30 days

# Suggested Procedure

- If juvenile placed in secure detention, no review hearing. BUT, set bond!

- Discussions ongoing with DOC to house these juveniles pretrial through safekeeping statute

# Juvenile vs. Adult Jurisdiction

- D.P. v. State, 151 N.E.3d 1210 (Ind. 2020)
- Delinquency petition
  - Filed against 23 year old
  - For sex offenses that occurred when under 18
- State asked for waiver to adult court

# Jurisdiction

- "Child" means:
  - Under 18 or
  - 18, 19 or 20 charged with act committed when under 18
- DP now 23, so not a "child"
  - No juvenile court jurisdiction
  - Cannot waive jurisdiction that does not exist

# Jurisdiction

- What about direct file into adult court?
- State v. Neukam, 2021 Ind.App. LEXIS 226
- In 2017:
  - Defendant is 20 years old
  - Charged in adult court
  - 9 sex offenses against same victim

# Neukam cont’d

- In 2019
  - Defendant is now 22 years old
  - Delinquency petition filed in juvenile court
    - Alleges 8 sex offenses when defendant was between 14-17 years of age
    - Same victim as in adult case
  - Juvenile court dismisses pursuant to DP case

# Neukam cont’d

- State tries to amend delinquency allegations into existing adult case
- Trial court denies amendment
- State appeals

# Neukam cont’d

- Court of Appeals decision:
  - Adult court does not have subject matter jurisdiction over the juvenile charges when brought after age of 21

# Firearms

- K.C.G. v. State, 156 N.E.3d 1281 (Ind. 2020)
- I.C. 35-47-10-5 – Dangerous Possession of a Firearm
- A child who knowingly, intentionally, or recklessly possess a firearm

# Firearms

- Juvenile court lacked subject matter jurisdiction
- Act would not be an offense if committed by an adult

# House Enrolled Act 1256

- Juvenile jurisdictional statute modified:
  - A child commits a delinquent act if, before becoming 18 years of age, the child commits an act:
    - That would be an offense if committed by an adult;
    - In violation of 35-45-4-6 (digital child pornography by a minor); or
    - In violation of 35-47-10-5 (dangerous possession of firearm)

# Child Victim Depositions

- I.C. 35-40-5-11.5 (eff. March 2020)
- Defendant charged with sex offenses against child less than 16 may not take deposition of child victim unless prosecutor is contacted and:

# Depositions

- Prosecutor agrees to deposition
- Court authorizes deposition after finding reasonable likelihood that child victim will be unavailable for trial or
- Court authorizes deposition after finding it is necessary
  - Due to existence of extraordinary circumstances and
  - In the interest of justice

# Depositions

- Sawyer v. State, 2021 Ind. App. LEXIS 160
- Defendant charged with child molest
- State uses statute to refuse victims' depositions
- Trial court denies depositions after hearing
- Interlocutory appeal by defendant

# Sawyer cont'd

- Court of Appeals finds:
- Statute and Trial Rules incompatible
  - Statute sets limits
  - Trial Rule provides nearly unlimited discovery
- Procedural rule adopted by Supreme Court trumps procedural statute

# Sawyer cont'd

- Trial court's order denying depositions reversed
- Similar holdings:
  - Church v. State (June 28, 2021)
  - State v. Riggs (July 29, 2021)
  - Pate v. State (August 9, 2021)

# Separation of Witnesses

- Rule 615 – Excluding Witnesses
- At a party's request, court must order separation of witnesses.
- Rule does not exclude:

  (a) a party …

  (c) a person whose presence a party shows to be essential to presenting the party's claim or defense

# Separation of Witnesses

- Brown v. State, 160 N.E.3d 205 (Ind. App. 2020)
- 16 year old charged with Murder and Dangerous Possession of a Firearm
- Motion for separation of witnesses filed by both parties

# Brown cont’d

- Mother on witness list
- Mother present for jury selection and then excluded from courtroom
- If juvenile case, mother would be a party and not excluded under Rule 615(a)

# Brown cont’d

- Brown waived any error because:
- No request for exception for mother in motion
- Rule 615(c) – a person whose presence a party shows is essential for defense
- No objection to exclusion of mother at trial

# Similar Result

- Harris v. State, 165 N.E.3d 91 (Ind. 2021)
- 15 year old waived into adult court on attempted murder charge
- Rule 615(c) can be used to establish that a parent is “essential” to the presentation of the defense and thus excluded from a witness separation order

# Harris cont’d

- State listed Harris’s mother as a potential witness
- State requested separation order
- Harris objected asking that separation occur after jury selection b/c he wanted his mother in the trial as much as possible

# Harris cont’d

- Harris did not mention any right to have a parent present
- Court overruled objection and ordered mother to leave the courtroom
- State never called her to testify

# Harris cont’d

- Harris argued even a waived or direct-filed juvenile should have the right to have a parent present under “essential” exception in 615(c) or based on a due process right for a child to have a parent present

# Harris cont’d

- Rule 615’s essential witness exception may allow a juvenile defendant’s parent to remain in the courtroom despite a separation order
- Parents may possess intimate knowledge of child’s case or may help child with any anxiety

# Harris cont’d

- Harris failed to show his mother was “essential”
- Harris did not raise issue before the trial court and thus waived argument on appeal

# Harris cont’d

- Juvenile offenders have the right to meaningful consultation with their parents
- Indiana law makes a parent a “party” to juvenile delinquency cases
- Separation order cannot exclude a parent from juvenile proceedings

# Harris cont’d

- Adult defendants – even if they are children – have no right to meaningful consultation and their parents are not considered parties to the proceedings
- Harris waived the issue by failing to adequately argue it at the trial court
- Court declined to address this complex due process question

*Thank you!*

# Section Four

CROSS | GLAZIER | REED | BURROUGHS, PC.

# Indiana Family Law Update

**September 21, 2021**

By:
James A. Reed
Cross Glazier Reed & Burroughs

With Written Materials By:
Michael R. Kohlhaas
Cross Glazier Reed & Burroughs

*Anyone interested in subscribing to the free, E-mail based Indiana Family Law Case Update that provides the enclosed case law digests in real time can subscribe by sending an email to* familylawcases@cgrblaw.com *with "subscribe" in the subject line. Thank you!*

## Section Four

## Indiana Family Law Update.....James A. Reed
## Michael R. Kohlhaas

RECENT FAMILY LAW CASES:

## RECENT FAMILY LAW CASES:

### A. Child Support

***Hill v. Cox*, 153 N.E.3d 283 (Ind. Ct. App. 2020), decided July 30, 2020 (Child Support)**

HELD: Trial court erred when it failed to credit Father for payments Daughter received related to Father's social security disability.

FACTS AND PROCEDURAL HISTORY:

Father was ordered to pay child support to Mother, for the benefit of Daughter, incident to their 2002 divorce.

In 2015, Father applied for social security disability benefits. In 2018, the Social Security Administration ("SSA") determined that Father was disabled, and it disbursed funds to cover benefits that accrued while Father's application was pending. Daughter's share of those benefits, received by Mother as representative payee, totaled $14,306. Thereafter, Daughter received over $500/mo until she turned 18 in 2019.

During this time, Father fell into arrears both on his regular child support, and to cover his share of Daughter's uninsured medical expenses. A nuanced complexity was that, as of May 2018, Father had an arrearage of $3,174 on his share of medical expenses that Daughter incurred in 2015; however, in 2018, Daughter had additional surgeries that resulted in Father owing another $1,904. Importantly, it was unclear when those 2018 surgeries occurred relative the SSA lump sum payments.

At a hearing addressing Father's arrearage, Father argued that his total arrearage—of about $14,000—was more than offset by the funds Daughter received from SSA. The trial court determined that the SSA benefits should be credited against Father's regular child support arrearage of $9,225 and his medical arrearage from 2015 of $3,174, but that the additional SSA benefits received by Daughter above and beyond constituted a gift from Father.

The trial court then analyzed the $500 monthly payments that Daughter received since 2018. Those payments exceed Father's weekly child support obligation by a total of $2,660. The trial court determined that it had the discretion whether to credit that overpayment against the $1,904 of medical debt that Daughter incurred from the 2018 surgeries, and the trial court declined to do so. Father appealed.

Reviewing the Indiana Child Support Guidelines, much of the crediting determination relates to timing. Under the Guidelines, if a lump sum SSA payment is received, it must be applied as a credit to any existing child support arrearage, whether for weekly support, medical, or otherwise. In this case, it was unclear whether the 2018 surgeries occurred before the lump sum payment, or after. If before, credit was mandatory; if after, credit was discretionary. The Court of Appeals remanded the matter for that determination.

The next issue was, if Daughter's 2018 surgeries occurred after the SSA lump sum payment, could Daughter's $500/mo SSA payments be applied to the extent they exceeded Father's

weekly support obligation. Construing the Guidelines, its commentary, and prior case law, the Court of Appeals concluded that an SSA overpayment of child support cannot be credited to a medical arrearage only if: (1) the overpayment occurred before the medical debt was incurred; or (2) the overpayment occurs after the medical debt arrearage had been paid.

The case was remanded for the trial court to determine the dates of Daughter's 2018 surgeries, and issue an order consistent with the Court of Appeals' opinion.

***Wierks v. Mazellan*, 2021 WL 1940856 (Ind. Ct. App. 2021), decided May 14, 2021 (Child Support)**

HELD: It is potential error for a trial court calculating child support not to consider differences in the cost of living, where one parent lives in a location where the cost of living is significantly different than in Indiana. Here, Father was a high-earner working and living in New Jersey, and the trial court erred by not accounting for Father's higher cost of living in rendering its child support calculation.

HELD: In a deep dive on a child support recalculation:

- The trial court erred when it failed to adjust for Father's self-employment FICA rate.
- The trial court did not err when it added back depreciation to Father's adjusted gross income.
- The Court of Appeals remanded the support calculation for consideration of the fact that Father's effective tax rate was much higher than the 21.88% tax rate presumed by the Guidelines.
- The trial court did not abuse its discretion when it included Father's voluntary retirement contributions as part of Father's income for support purposes.
- The trial court's decision not to adjust for cost-of-living differences related to Father living in New Jersey was reversed.

FACTS AND PROCEDURAL HISTORY:

Father and Mother had Child together in 2007. Father has lived in New Jersey most of his life, other than while attending Ball State, shortly after which Child was born. A 2010 child support order established that Father pay child support of $94 per week.

Father went on to become a successful commercial real estate broker in New Jersey. In 2020, the Grant County Prosecutor's Office initiated a Title IV-D child support modification on Mother's behalf. There was no dispute between the parties that Father's support obligation should be increased, but the specifics of the modification were contested. After a hearing, the trial court increased Father's child support to $672/wk based in part upon a finding that Father's income for child support purposes was approximately $568,412/yr. Father appealed.

*FICA Tax Payment*

Father is self-employed. Mother conceded that the trial court erred when it did not deduct from Father's income one-half of the 15.30% FICA tax that would usually be paid by an employer, as

provided for by Indiana Child Support Guideline 3(A)(2). This issue was remanded for adjustment.

*Depreciation*

Father's adjusted gross income on his recent tax returns included substantial depreciation deductions of about $49,000 and $89,000, respectively, related to commercial rental properties that Father owns. Mother successfully argued to the trial court that these amounts should be added back to Father's income for support calculation purposes.

Concluding that Father did not develop his depreciation argument sufficiently at the trial court level, the trial court's add-back of the deprecation was not clearly erroneous.

*Average Tax Factor*

The Guidelines assume that a parent's income is taxed at 21.88%, and where a parent's actual tax rate varies considerably from that, the trial court has discretion to make an adjustment.

Father presented evidence that his tax rate was approximately 38%. Mother did not dispute this evidence, but stressed that the trial court had the discretion—not a mandate—to make an adjustment, even if the evidence clearly established a significant difference in actual tax rate.

The Court of Appeals elected to remand the issue for a closer review by the trial court to determine and then articulate what, if any, adjustment is appropriate.

*Retirement Contributions*

In calculating Father's income for child support purposes, the trial court added back substantial, voluntary retirement contributions that Father made ($54,000 in 2017, and $55,000 in 2018). The Court of Appeals accepted at face value that Father did not make those contributions in any effort to reduce his income for child support purposes, and that Father's retirement contributions were made in good faith.

Nevertheless, it is not clear error for a trial court to include voluntary retirement contributions as part of a parent's income for support calculation purposes.

*Cost of Living*

Father presented evidence that his cost of living in New Jersey was about 20% higher than Indiana, and Father requested a deviation in the child support calculation to reflect that. The trial court rejected the argument, stating that the evidence was speculative, and that Father's circumstances reflected a choice made by Father.

The Court of Appeals pointed out that New Jersey's higher cost of living than Indiana's was uncontroverted, and that Father was a lifelong resident of New Jersey. Relying on the Guidelines high-level language that trial courts should not adhere to its formulas blindly, and that it should consider each unique situation carefully, the Court of Appeals held that it was clearly erroneous to deny an adjustment here. The issue was remanded for the trial court to determine and apply an appropriate adjustment.

The trial court's support modification was affirmed in part, reversed in part, and remanded.

## B. Property Division / Maintenance

### *Padilla v. Watts*, 157 N.E.3d 532 (Ind. Ct. App. 2020), decided September 10, 2020 (Property Division)

HELD: Trial court did not abuse its discretion when it ordered a former marital residence sold, seven years after divorce, as a result of Wife's failure to refinance the property into her own name, as provided for in the 2012 Decree.

FACTS AND PROCEDURAL HISTORY:

Husband and Wife divorced in 2012. The agreed Decree awarded the parties' marital residence to Wife and also included standard language that: "Wife shall refinance the mortgage debt on said real estate [into] her sole name at her earliest possible opportunity [.]"

In the years that followed, Husband filed numerous petitions seeking enforcement of the refinancing clause. Wife was repeatedly ordered by the trial court to refinance, which never occurred.

After Husband filed a third contempt petition in 2018, the parties agreed that the property would be sold instead of refinanced. The trial court ordered the house sold within 90 days.

In 2019, Husband requested an additional hearing, arguing that Wife was listing the house at an unrealistically high price as part of an effort to stall its sale. Numerous additional pleadings followed, after which the trial court ordered the house sold at auction and appointed an auctioneer. Wife appealed.

On appeal, Wife argued that the trial court's order to sell the house constituted an "improper modification" of the 2012 Decree. The Court of Appeals rejected this argument, noting that, in 2018, the trial court ordered the house sold as a result of an agreement of the parties. Thus, Wife ultimately consented to any modification of the disposition of the house.

The Court also rejected Wife's argument that, even if a sale was permissible, an auction is a very different disposition to which Wife never agreed. The Court reasoned that an auction is simply one type of sale, reasonable under the circumstances given the extended delay in effectuating the Decree.

The trial court's order was affirmed.

### *Rotert v. Stiles*, 159 N.E.3d 46 (Ind. Ct. App. 2020), decided October 26, 2020 (Property Division)

HELD: A trust provision that places a beneficiary's distribution in trust if the beneficiary is married is void as a restraint on marriage and against public policy.

FACTS AND PROCEDURAL HISTORY:

Rotert was one of two adult children of Marcille, who passed away in 2016. Prior to Marcille's death, she executed a revocable trust. Operative to Rotert's share of the trust property was this:

> In the event that [Rotert] is unmarried at the time of my death, I give, devise, and bequeath his share of my estate to him outright and the provisions of this trust shall have no effect. However, in the event that he is married at the time of my death, this trust shall become effective, as set out below. . . .

At the time of Marcille's death, Rotert was, in fact, married. Rotert later petitioned to docket the trust, and requested summary judgment that the above provision was void as a restraint on marriage and against public policy. That summary judgment motion was denied, from which Rotert appealed.

The Court of Appeals reviewed an extended history of Indiana case law expressing skepticism towards restraints on marriage. Applying that history to *Rotert*, the Court concluded that "the marriage provision simply cannot be interpreted as anything other than an encouragement for Rotert to divorce his wife of almost twenty years upon the opening of the estate . . ." Thus, the Court concluded, the provision was void as a restraint on marriage and against public policy.

The trial court's order was reversed and remanded.

Judge May dissented. The dissent focused on the operative language of the trust provision, which focused on Rotert's marital status "at the time of my death." Thus, nothing about that provision would cause Rotert to seek a divorce after Marcille's death, as doing so would be too late. Therefore, the provision does not encourage or discourage any particular behavior by Rotert. Judge May would have upheld the trust provision and affirmed the trial court.

[Interestingly, the majority opinion noted that there was an "absence of any evidence establishing a support[ing] reason or economic basis" for the marriage provision of the trust. Presumably, one economic basis for such a provision would be an effort to shield Rotert's inheritance in the event Rotert later divorced. That basis for the trust's marriage provision, and whether it would save the provision from being void, was not developed in the opinion. -MK]

***Maxwell v. Maxwell*, 163 N.E.3d 337 (Ind. Ct. App. 2021), decided January 26, 2021 (Property Division)**

HELD: Trial court's division of the marital estate was remanded to consider the tax consequences of its division, where Husband was awarded substantially more tax-sensitive assets than was Wife.

FACTS AND PROCEDURAL HISTORY:

In Husband and Wife's dissolution proceedings, the trial court divided the marital estate in a manner that awarded Husband his various pension interests. The trial court further required Husband to pay a property settlement payment to Wife as a counterbalance to Husband keeping his pensions. Husband appealed.

Husband argued on appeal that the trial court had a stated goal of dividing the marital estate 60/40 in favor of Wife, due to Husband's significantly greater income. However, Husband argued that the framework for the trial court's division created a more lopsided division of the marital estate than the 60/40 intended by the trial court, because so much of Husband's assets were tax-sensitive (e.g., his pensions), while the property settlement payment and other assets received by Wife were not.

The Court of Appeals agreed with Husband. The Court noted that Indiana Code § 31-15-7-7- requires that a divorce court "in determining what is just and reasonable in dividing property . . . shall consider the tax consequences of the property disposition with respect to the present and future economic circumstances of each party." Analyzing the current case, the Court of Appeals concluded that "remand is appropriate for the trial court to consider the tax consequences of its disposition and to redetermine the amount of the equalization payment [to Wife.]"

Reversed and remanded.

Judge Vaidik dissented on the tax issue, relying upon the 1990 *Harlan* case and other precedent for the proposition that only tax consequences necessarily arising from the Court's distribution of property should be considered, not speculative future taxes. Specifically, "[a] taxable event must occur as a direct result of a court-ordered disposition of the marital estate" for tax consequences to be considered. In this case, because the tax consequences of Husband's pension interests are so far off in time, and speculative, Judge Vaidik would have affirmed the trial court's property division as to the tax consideration issue.

***Kakollu v. Vadlamudi*, 2021 WL 3137204 (Ind. Ct. App. 2021), decided July 26, 2021 (Custody / Property Division)**

HELD: The trial court did not err when it ordered that Mother have sole legal custody of Child, even though the parties agreed to joint legal custody, and the custody evaluation expert recommended joint legal custody.

HELD: The trial court did not abuse its discretion in valuing Husband's business, or in its characterization of a preliminary advance of attorneys' fees from Husband to Wife.

FACTS AND PROCEDURAL HISTORY:

Husband and Wife married in 2010, had Child together, and then, in 2018, Wife filed her petition for dissolution of marriage. The parties entered into a preliminary agreement that provided for joint legal custody, with primary physical custody to Wife subject to Husband's parenting time. The agreed entry also provided for Husband to advance $50,000 for Wife's attorneys' fees and litigation expenses, the precise characterization of which would be deferred for future determination.

In a separate proceeding, Wife sought and secured an order of protection against Husband.

Following a final hearing, the trial court noted that the parties agreed to joint legal custody, and that their evaluator, Dr. Michael Jenuwine, recommended joint legal custody; however, the trial court awarded sole legal custody to Wife. The trial court made its order based, in part, upon findings that the parties could not communicate and cooperate effectively, and that there was "an established pattern of domestic violence."

The trial court also determined that the $50,000 transferred from Husband to Wife for preliminary attorneys' fees would not be counted as an advance to Wife of her share of the marital estate.

Finally, after hearing from Husband's valuation expert that Husband's dental business was worth $1,560,000, and from Wife's valuation expert that the business was worth $2,712,000, the trial court essentially adopted the value conclusion of Wife's expert.

Husband appealed.

On the issue of legal custody, the Court of Appeals noted the great discretion afforded to a trial court in making custody determinations. The Court noted that the trial court's order had "carefully and thoroughly analyzed the evidence relevant to [the statutory custody determination factors] and found that joint legal custody was not in Child's best interests." The Court viewed Husband's appeal as an invitation to reweigh the custody evidence, which it declined to do.

On Husband's preliminary payment of $50,000 towards Wife's attorneys' fees, the Court of Appeals noted that the preliminary agreement stated that characterization of the payment would be deferred to final hearing whether any of the $50,0000 should be "deemed an advance of [Wife's] property settlement . . . spousal maintenance, or some combination thereof." The Court of Appeals concluded the trial court's decision not to count this as an advance upon Wife's property settlement was no erroneous, including because Husband did not present any evidence that the source of the payment was marital assets.

Finally, the Court of Appeals rejected Husband's appeal as to the trial court's valuation of his business, primarily because the trial court's determination of value was within the range of valuations presented by expert testimony.

The trial court's order was affirmed.

***Roetter v. Roetter*, _____ WL _____ (Ind. Ct. App. 2021), decided August 20, 2021 (Maintenance / Property Division)**

HELD: Trial court acted within its discretion when it awarded Wife spousal maintenance for 18 months rather than the three years she requested.

HELD: Trial court erred in its approach to ascertaining and dividing the marital estate when it "set off" certain property to each party before making its division.

FACTS AND PROCEDURAL HISTORY:

Husband and Wife married in 2014, at which time Husband had considerably more assets than Wife. There were two children born of the marriage. Wife became a full-time mother and homemaker, while Husband earned over $100,000/yr at his job. One of the parties' children is on the autism spectrum and requires considerable supervision and care.

Wife filed for dissolution in late 2019. The parties resolved custody, parenting time, and child support by agreement. Property division and spousal maintenance remained contested. At the final hearing, Wife requested spousal maintenance of $100/wk for three years, citing her demanding childcare responsibilities. She also requested 55% of the marital estate.

Husband objected to Wife's spousal maintenance request. On property division, Husband asked that he be credited for his IRA and 401(k) balances as they existed on the date of marriage, but that appreciation thereafter and all other property be divided 50/50.

The trial court's subsequent Decree awarded Husband the values of his IRA, 401(k), and two life insurance policies at their respective date of marriage values. The Decree also assigned Wife the student loan debt she brought into the marriage. The trial court then calculated the value of all other assets of the marriage and divided them 55/45% in favor of Wife.

On Wife's maintenance claim, the trial court ordered Husband to pay Wife $100/wk for 18 months, rather than the three years Wife had requested. The trial court's rationale was that $12,000 had been advanced to Wife during the pendency of the case, which Wife could retain in lieu of a longer maintenance stream. Wife appealed.

Wife argued that her obligation to provide a high level of care for the children will last longer than three years, so a full, three-year maintenance award was warranted. But the Court of Appeals observed that maintenance determinations are highly discretionary and, moreover, the trial court's decision to let Wife keep the $12,000 advance left her better off than had it awarded Wife three years of maintenance, but applied the $12,000 advance towards Wife's property settlement.

On the property division, the Court of Appeals recited the two-step process for dividing property: account for all property of the marriage, and then determine whether a deviation from the presumed 50/50 division is warranted. Here, the Court of Appeals erred when it effectively "set off" to Husband his significant premarital assets, and then "set off" to Wife her premarital debt. Had that property been included in the trial court's overall division analysis, it would have made for a 75/25% division of the marital estate in Husband's favor.

The trial court's division of property was reversed. The Court of Appeals instructed on remand that the trial court "fashion a remedy closer to the fifty-five, forty-five split Wife requested."

## C. Relocation

### *Lynn v. Freeman*, 157 N.E.3d 17 (Ind. Ct. App. 2020), decided September 22, 2020 (Relocation)

HELD: Trial court acted within its discretion when it denied Mother's intended relocation to 80 miles away, filed just four months after the Decree was issued.

FACTS AND PROCEDURAL HISTORY:

Mother and Father divorced in the South Bend area in 2017, with Child having been born in 2012. At the time the divorce was finalized, Mother was pregnant with the child of Boyfriend. The parties' Decree provided for joint legal custody of Child, with Mother having primary physical custody, subject to Father's parenting time which was an expanded schedule from the Guidelines: the Decree provided that Father would have midweek overnights and his weekends extended until school on Monday morning. The Decree also specified what schools Child would attend through high school.

Months later, Wife and Boyfriend married. Boyfriend worked as a CPA at a large accounting firm with an office in South Bend, but that job disappeared when his practice group moved to Florida. Efforts to find other employment in South Bend were apparently unsuccessful, requiring Boyfriend to accept a position in Chicago.

Mother then filed a notice of intent to relocate to the Munster area as a result of Boyfriend's employment in Chicago. Father promptly filed an objection to the proposed relocation. An evaluation by Dr. Michael Jenuwine, Ph.D., J.D., concluded that a move to Munster would not be in Child's best interests. In response, Mother had two professionals render critiques of the Jenuwine evaluation.

Following a four-day hearing, the trial court denied Mother's requested relocation, from which Mother appeals.

The Court of Appeals recited the burden-shifting operation of the relocation statute found at

I.C. § 31-17-2.2-5: the relocating parent has the initial burden to establish that "the proposed relocation is made in good faith and for a legitimate reason." If that burden is met, the burden shifts to the nonrelocating parent to show that the proposed relocation is not in the best interests of the child.

Here, the trial court had concluded both that Mother had failed to meet her burden of a good faith move and, in any event, the proposed relocation was also not in the best interests of Child. The trial court made detailed findings that, prior to seeking to relocate, Mother made numerous efforts to limit Father's parenting time, with the implication being that Mother's proposed relocation was, in part, another effort to limited Father's parenting time.

Reviewing the record closely, the Court of Appeals concluded that the trial court's determination that Mother was not proposing relocation in good faith was unsupported. Nevertheless, because the trial court acted within its discretion in also concluding that the relocation would not be in Child's best interests, the trial court's denial of relocation was affirmed.

***In re: the Paternity of B.R.H.*, 166 N.E.3d 915 (Ind. Ct. App. 2021), decided March 26, 2021 (Relocation)**

HELD: Trial court's order denying Mother's request to relocate with Child to New Mexico was affirmed. While Mother's proposed relocation was made in good faith, the relocation was not in Child's best interests.

FACTS AND PROCEDURAL HISTORY:

Mother and Father had a relationship in 2015 that resulted in the birth of Child in 2016. Father filed a petition to establish paternity that resulted in an agreed entry that did so, as well as provided for the parties to share joint legal custody of Child, with Mother's primary physical custody subject to Father's IPTG parenting time.

In 2018, Mother filed a petition to relocate to Texas with Child. In support, Mother asserted that she was offered employment there with a hospital as a registered dietician, and that the Texas job was her only offer of employment after a job search. Father responded with a petition to modify custody to him.

Following a hearing in 2018, the trial court granted Mother's petition to relocate and denied Father's petition to modify custody. However, Mother's job opportunity in Texas did fell through, and she did not move.

Mother subsequently met and married a man living in Clovis, New Mexico, and she filed a petition to relocate there. That petition and Father's response to it were heard by the trial court over several days. While the trial court concluded that Mother's desire to relocate was in good faith (to be with her husband), it was not in Child's best interests to be relocated from Dubois County to New Mexico. Mother's petition to relocate with Child was denied. Mother appealed.

The Court of Appeals noted the deference that is afforded trial courts, particularly in family law matters. Reviewing the record, the Court concluded that the evidence supported the trial court's findings that, while Mother's proposed relocation was made in good faith, it was not in Child's best interests to do so, particularly due to the impact a move of that great distance would have on Child's relationship with Father, as well as all of the bonded relationships Child had established in Indiana.

The trial court's order denying Mother's proposed relocation was affirmed.

***In re: the Paternity of K.C.*, 2021 WL 2100419 (Ind. Ct. App. 2021), decided May 25, 2021 (Relocation)**

HELD: Though not addressed by Indiana's relocation statute, the analysis for the modification of an existing relocation order is whether there has been a substantial change in one or more of the § 31-17-2.2-1(c) relocation factors, and whether modification is in the best interests of the child.

FACTS AND PROCEDURAL HISTORY:

Child was born to unmarried Mother and Father in 2014. The parents' relationship ended, and paternity was formally established in 2018, providing for joint legal custody, Mother with primary physical custody, and a child support order for Father.

Mother remarried Stepfather in 2018. Mother and Stepfather, who was in the US Air Force, had a child together in early 2019. Stepfather learned he would be stationed in Virginia, after which Mother filed a petition to relocate, which the trial court denied, based largely upon an offer Mother made at the hearing to remain in Indiana and raise the children while Stepfather would be stationed in Virginia.

However, Mother subsequently relocated to Virginia, anyway, and filed a second petition to relocate. Father filed a petition to modify custody of Child to him. After a hearing, the trial court denied Mother's second petition to relocate, and modified custody of Child to Father. Mother appealed.

The Court of Appeals agreed with the trial court's finding that Mother failed to establish any change in circumstances from her first requested relocation to her second. "[B]ecause Mother had never planned to stay in Indiana with her three children and had always intended to relocate to Virginia with Stepfather, Mother has failed to meet her burden to demonstrate that her relocation to Virginia was a substantial change in one or more of the relocation factors."

Further, the trial court did not abuse its discretion in modifying custody of Child to Father. Mother's move to Virginia represented a substantial change in circumstances, and Mother's appeal of whether the modification was in Child's best interests was merely an invitation to reweigh the evidence.

The trial court's order was affirmed.

## D. Adoption

### *M.M. v. A.C.*, 160 N.E.3d (Ind. Ct. App. 2020), decided December 9, 2020 (Adoption)

HELD: Trial court's granting of an adoption by Stepmother, over Mother's objection, was affirmed where the evidence supported the trial court's finding that Mother had been able to communicate with the children, but failed to do so.

FACTS AND PROCEDURAL HISTORY:

Father and Mother divorced in 2015 with two Children. Father was awarded sole legal and primary physical custody, subject to Mother's parenting time. Mother has struggled with substance abuse and mental health issues.

Father remarried in 2017. In 2019, Stepmother filed a petition to adopt Children, to which Mother objected. Following a hearing, at which Mother's counsel appeared but Mother did not attend, the trial court granted the adoptions based, in part, upon evidence that Mother had not communicated with Children since Easter 2016 despite being able to do so. Mother appealed.

Indiana statute permits for the adoption of a child, over a parent's objection, if it can be shown that the parent unjustifiably failed to communicate with the child for a period of at least one year. Mother's appeal relied heavily on the 2018 *In re the Adoption of E.B.F.* case. In that case, the Indiana Supreme Court found that the mother pulling back from her child's life in order to seek drug treatment and otherwise get her life back together made her extended period of noncommunication with child to be justified. The Court of Appeals was unpersuaded, noting that Mother failed to attend the adoption hearing (the mother in *E.B.F.* attended all relevant hearings) and that, unlike the mother in *E.B.F.*, Mother never had sole legal and primary custody of the children.

Agreeing that Mother failed to communicate with the Children for the relevant period, without justifiable cause, the trial court's adoption order was affirmed.

***In. re: Adoption of E.B.*, 163 N.E.3d 931 (Ind. Ct. App. 2021), decided February 15, 2021 (Adoption)**

HELD: Mother's consent to the adoption of Child was not required where there was a two-year period in which Mother was capable of providing financial support for Child, but chose not to do so.

FACTS AND PROCEDURAL HISTORY:

Child was born in 2008. Five years later, after Mother's arrest for conversion, Uncle and Aunt were appointed permanent co-guardians of Child. The guardianship order included visitation provisions for Mother, but no formal child support order.

For the next five years, visitation between Mother and Child was sporadic, including a two-year stretch with no visitation.

The co-guardians filed an adoption petition in October 2018, which alleged Mother's consent was not needed due to her lack of contact with, and support of, Child.

At the hearing, Mother testified as to her work history, which demonstrated frequent if sporadic employment, but without paying any money for the benefit of Child. The trial court concluded that, based upon this fact, Mother's consent to the adoption was not required and later granted the adoption. Mother appealed.

By statute, one factor that dispenses for a parent's consent to an adoption is if, "for a period of at least one (1) year the parent . . . knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree." Ind. Code 31-19-9-8(a)(2). Importantly, the year of non-support does not need to be the year immediately preceding the filing of the adoption petition. In addition, the Court suggested that, because of the common law duty to support a child, the fact that there was no formal child support order imposed upon Mother was immaterial.

The Court of Appeals was unpersuaded by Mother's argument that, in the absence of evidence as to Mother's total income, the trial court was unable to make a finding that Mother was capable of

supporting Child. The Court was also not moved by Mother's argument that she provided gifts to the Child during this period, thereby demonstrating a level of support, because these were gifts that the trial court found to be token in nature.

The Court of Appeals concluded that the trial court's finding that Mother's consent to the adoption was unnecessary was not clearly erroneous and, thus, was affirmed.

### *Matter of Adoption of E.M.M.*, 164 N.E.3d 779 (Ind. Ct. App. 2021), decided February 17, 2021 (Adoption)

HELD: Trial court's denial of Grandparents' adoption petition was affirmed, as the Court of Appeals declined to reweigh the best interests evidence that led the trial court to deny the adoption.

FACTS AND PROCEDURAL HISTORY:

Mother and Father had Child together in 2010, but never married. The three lived together in Arizona for an extended period after Child's birth. Father established paternity in 2012.

In 2017, Mother and Child moved to Indiana, and Mother remarried Stepfather. In 2018, Mother and Stepfather were convicted of domestic battery arising from injuries to Child's sibling, which resulted in Child and Mother's two other children being placed with Grandparents. DCS was unable to contact Father.

In 2019, while a CHINS case was proceeding, DCS located Father in Arizona, causing DCS to elect a placement of Child with Father. However, Grandparents then filed a petition to adopt Child. The trial court heard Grandparents' adoption petition on its merits, and denied it based upon an analysis of Child's best interests. Grandparents appealed.

On appeal, Grandparents argued that the evidence established the adoption would be in Child's best interests, as they had provided a stable home for Child for many years. However, the Court of Appeals considered this a request to reweigh the evidence, which it declined to do. The Court noted that the CASA testified to the trial court that adoption was unequivocally not in Child's best interests, and that Child had been flourishing in Arizona since reunification with Father.

Finding that the trial court did not abuse its discretion, its denial of Grandparents' adoption petition was affirmed.

### *In the Matter of Adoption of I.B.*, 163 N.E.3d 270 (Ind. 2021), decided March 2, 2021 (Adoption)

HELD: In an adoption case, the Indiana Supreme Court affirmed the trial court's determination that the biological Mother's consent was not required for the adoption because, for a period of one year, Mother failed to communicate significantly with her child and failed to support her child when able and required to do so.

FACTS AND PROCEDURAL HISTORY:

Please see the detailed factual digest, below, from the 2020 Court of Appeals case.

In its review, the Indiana Supreme Court recited that the petitioner seeking an adoption carries the burden of proving the natural parent's consent is unnecessary, and must do so by clear and convincing evidence. Various circumstances can dispense with the need for a natural parent's consent, three of which were at issue in this case:

- The child is adjudged to have been abandoned or deserted for six months or more immediately preceding the date of the filing of the petition for adoption;
- For at least one year, the natural parent fails without justifiable cause to communicate significantly with the child when able to do so; or
- The natural parent knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree.

The Supreme Court reviewed three recent cases that addressed determinations of these conditions, which the Court summarized as follows:

"A parent who meets society's expectations by maintaining a connection with her child and by financially supporting her child cannot have her legal relationship with the child severed without her consent. Conversely, when a parent fails to maintain a meaningful relationship with, or fails to financially support, that child, she loses her right as a natural parent to withhold consent to adoption."

Applying these standards to the facts of the instant case, the Supreme Court found sufficient evidence that Mother failed to communicate significantly with Child without justifiable cause for at least one year, and that Mother failed to support Child when able and required to do so. The Court did not address the issue of abandonment, since the trial court's order was properly based on these other grounds.

Clearly, the challenge of these cases is the highly fact-sensitive determination of what constitutes "significant" communication with the child, and/or whether a natural parent has the ability to support the child, but fails to do so.

The trial court's order that Mother's consent was not required for the adoption was affirmed.

**Digest of the now-vacated Court of Appeals opinion in 2020:**

***J.P. v. V.B. (In re: I.B.)*, 2020 Ind. App. LEXIS 306 (Ind. Ct. App. 2020), decided July 20, 2020 (Adoption)**

HELD: Trial court erred when it issued a stepparent adoption order without Mother's consent. Stepmother failed to establish, by clear and convincing evidence, that Mother had either failed to communicate with Child significantly, or that Mother was able to pay support but did not, in the period prior to the filing of the adoption petition.

FACTS AND PROCEDURAL HISTORY:

Mother and Father were married and had Child together in 2010. They divorced in 2014, pursuant to which Mother was awarded legal and primary physical custody of Child. In 2017, Father petitioned to modify custody based upon Mother's substance abuse and instability, as a result of which the trial court granted legal and physical custody to Father, subject to Mother's supervised parenting time.

In 2019, Father's new wife ("Stepmother") filed a petition for stepparent adoption. It was alleged that Mother's consent was not needed because, per statute, Mother had abandoned Child, and failed to communicate with Child or pay support for at least one year. Mother filed a letter with the trial court contesting the adoption.

Following a hearing, the trial court concluded that Mother's consent was not required, and issued its adoption order in favor of Stepmother. Mother appealed.

On appeal, it was uncontroverted that there had been some measure of communication between Mother and Child in the period prior to the petition being filed. At issue was whether the level of communication was token or significant. The Court of Appeals underscored that the burden was on Stepmother to prove the facts that would dispense with the need for Mother's consent by clear and convincing evidence.

The trial court's order relied largely upon a review of phone records between Mother and Child. In the 6 months prior to the petition, the records showed 11 calls totaling 83 minutes. The Court of Appeals referenced Indiana Supreme Court precedent that a single significant communication within one year is sufficient to preserve the parent's right to consent. Stepmother failed to present evidence that none of the subject phone calls were significant. (The Court also noted that the phone records were offered into evidence, but never formally admitted.) Thus, Stepmother failed to carry her burden.

As to child support, it was also uncontroverted that Mother had not paid child support, despite being ordered to do so, for more than one year prior to the filing of the petition. Critically, the burden was on Stepmother to further prove that Mother had the ability to pay child support during this period. Uncovering no evidence in the record to support a finding that Mother had the ability to pay support during the relevant period, the trial court's related finding was unsupported and erroneous.

The trial court erred when it concluded that Mother's consent was not required for the adoption, and the resulting adoption order was reversed.

***In re: the Adoption of W.K., IV, and I.K.*, 163 N.E.3d 370 (Ind. Ct. App. 2021), decided March 4, 2021 (Adoption)**

HELD: Trial court's determination that Father's consent was not required for adoption—where Father apparently had long ago gone the extended, statutory periods without communicating with the children or supporting them, but then subsequently resumed doing so well before the adoption was initiated—was reversed.

FACTS AND PROCEDURAL HISTORY:

Indiana statute permits an adoption to proceed, without the consent of a parent, under various circumstances, including when, for a period of at least one year:

> (A) the parent fails without justifiable cause to communicate significantly with the child when able to do so; or
>
> (B) knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree.

At issue in the instant case, as well as other recent cases is this: what if the parent's lapse of one year of communication or support occurred many years ago, and, since then, the parent has consistently communicated with and supported the child? Is consent for adoption still not required?

Father and Mother married in 2008, and had two children together. Both parents were in the military, so they lived in various locations.

Father left the military in 2011, and moved on his own from Japan to Texas. In 2013, Mother also left the military, but moved, with the children, from Japan to California. Apparently, during this period Father—who was stilled married to Mother—did not provide financial support for the children, nor did he communicate with them significantly.

Mother filed for divorce in California in 2013, which was finalized in 2014. Due to distance, the Decree awarded Father parenting time during summers and other extended breaks in the school calendar. No child support was ordered, but Father began paying support to Mother informally. After 2013, the children continued spending summers in Texas with Father.

In 2014, Mother moved to Indiana to be with Stepfather, whom she would marry in 2016. Mother gave birth to a child with Stepfather in 2019, but then Mother died weeks later.

Stepfather filed a petition to adopt Children, reciting that Father's consent was not needed based upon Father's failure to communicate with or provide support for the children back in 2013-2014. Following a hearing, the trial court agreed with Stepfather, issuing an order in July 2020 that dispensed with the need for Father's consent to the adoption. Father appealed.

While the Court of Appeals acknowledged the plain language of the adoption statute, in concluded: "It would defy logic to allow Father's alleged one-year period of no communication in 2013 to overcome his more recent regular exercise of parenting time with the children, including from 2014 to 2019." The Court concluded likewise as to the assertions that Father failed to support the children 6 years prior, but then did so consistently thereafter.

The trial court's order, that Father's consent was not necessary for the adoption based upon a lapse in communication and support, was reversed.

***B.S. v. J.N.S.*, 170 N.E.3d 257 (Ind. Ct. App. 2021), decided May 12, 2021 (Adoption)**

HELD: In adoption case, trial court erred when it found that biological Mother's failure to communicate with her children was justified.

FACTS AND PROCEDURAL HISTORY:

Mother and Father had two children out of wedlock. Mother had recurring drug problems that resulted in a CHINS investigation. Father became incarcerated.

After Father's release in 2015, he married Stepmother, established paternity of the Children, and was awarded custody of the Children, subject to Mother's supervised parenting time.

Mother spent much of 2017 attempting to "get clean." In September 2018, Stepmother filed a petition to adopt Children, reciting that Mother's consent was not necessary because for a period of at least one year, Mother failed without justifiable cause to communicate significantly with the Children when able to do so.

Following hearings, the trial court concluded that Mother's lack of significant communication with the Children was justified by her efforts to end her drug addiction. Stepmother appealed.

This is the latest in a string of Indiana appellate cases that grapple with the issue of adoption consent involving drug addicted parents who are in recovery. In reviewing this case, the Court of Appeals analyzed the previous *E.B.F* and *D.H.* cases. The records in those cases included significant evidence about the rehabilitative efforts undertaken by the mothers. "But here, we don't know much about Mother's rehabilitative steps other than she spent four months in Florida 'get[ting] clean.'"

Also in *E.B.F.* and *D.H.*, the mothers' lack of communication with their children overlapped with their recovery. In the instant case, Mother was absent from the Children's lives for two years, much of which was unaccounted for.

"Key to the *E.B.F* and *D.H.* cases was that both mothers 'demonstrated that [they] made a good-faith effort at recovery, with significant progress within a reasonable amount of time.' Here, Mother did not present such evidence."

The trial court's order requiring Mother's consent for the adoption to proceed was reversed, and the case remanded to determine whether the proposed adoption would be in the best interests of the Children.

***In re: Adoption of K.T.*, 2021 WL 2199109 (Ind. Ct. App. 2021), decided June 1, 2021 (Adoption)**

HELD: Trial court did not err as a matter of law when it considered whether Mother's and Father's consents to adoption were required, despite an ongoing CHINS proceeding with Child. The CHINS proceeding had a stated primary goal of reunification, but a second goal of adoption if reunification was unsuccessful.

FACTS AND PROCEDURAL HISTORY:

Mother gave birth to Child in 2018. Mother and Father were not married. Child was born addicted to heroin, and was immediately placed with Foster Parents. A CHINS matter was initiated, and the State established Father's paternity in a separate proceeding.

Foster Parents filed a petition to adopt Child in Hamilton County. The adoption matter was transferred to Fulton County, where the CHINS matter was pending.

In the adoption case, based upon a long history of criminal matters, substance abuse, instability, and lifestyle issues, the trial court concluded that each of Mother and Father were "by clear and convincing evidence . . . too unfit to parent Child and it would be in the best interests of Child if the Court dispensed with Father's consent to the pending adoption."

Having concluded that Mother's and Father's consent were not needed for the adoption, the trial court concluded that the concurrent CHINS proceeding "does not in any way divest" the court of jurisdiction to proceed with the adoption, and set the adoption for a final hearing. Mother and Father sought interlocutory appeal, which the Court of Appeals accepted.

Mother argued that the adoption proceeding was prohibited from dispensing with Mother's and Father's consents due to the ongoing CHINS proceeding. The Court of Appeals rejected Mother's argument on the basis that, in this case, both the CHINS proceeding and the adoption proceeding were in alignment in that, while the primary goal of the CHINS proceeding was unification, its stated backup goal was an adoption. Thus, the trial court's determination of whether Mother's and Father's consents to adoption were needed was not inconsistent with the CHINS case.

The Court of Appeals also rejected Father's argument that the trial court erred in its determination that his consent was not needed; the record supported the trial court's findings and the findings supported the trial court's judgment dispensing with Father's consent.

The trial court's order was affirmed.

***In re: Adoption of S.P., J.P., K.P., and E.P.*, 2021 WL 2280969 (Ind. Ct. App. 2021), decided June 4, 2021 (Adoption)**

HELD: Trial court did not err when it denied parents' effort to withdraw previously executed adoption consents. While the parents sought to withdraw their consents timely, they failed to meet their burden of proving that the withdrawal would be in the best interests of their children.

FACTS AND PROCEDURAL HISTORY:

Mother and Father are the parents of fourteen children. DCS has a history of being involved with the family due to domestic disputes between Mother and Father and substance abuse. As part of a 2017 CHINS case, DCS moved to terminate parental rights of nine of the children, including the four Siblings that are the subject of this appeal.

In 2018, Mother and Father, each represented by separate counsel, executed Consent to Adoption forms for the Siblings; however, several weeks later, they sent a letter to the trial court expressing a desire to "reverse the consents to adopt."

In 2019, Adoptive Parents filed petitions to adopt the Siblings, which attached Mother's and Father's adoption consents. Mother and Father objected, refuting the validity of the consents. The trial court granted summary judgment to Adoptive Parents that Mother and Father had signed their consents voluntarily, but held a hearing on whether allowing the consents to be withdrawn would be in the best interests of the Siblings. Afterwards, the trial court ruled that "[Mother and Father] bear the burden of proving, by clear and convincing evidence, withdrawal of their consents is in the best interests of their children. [They] have failed to meet their burden."

Mother and Father appealed. By statute, an adoption consent may be withdrawn not later than 30 days after it is signed, if: (1) the court finds the person seeking the withdrawal is acting in the best interests of the person sought to be adopted; and (2) the court orders the withdrawal. The person seeking withdrawal is subject to a "clear and convincing evidence" standard.

The Court of Appeals concluded the trial court did not err in denying Mother's and Father's efforts to withdraw consent. Importantly, the record supported a conclusion that granting the withdrawal would not lead to any stability for the Siblings, as DCS had expressed an intention of filing another parental rights termination petition if the consents were withdrawn.

The trial court's order was affirmed.

## E. Custody

### *Matter of Paternity of B.Y.*, 159 N.E.3d (Ind. 2020), decided December 18, 2020, *reh'g denied* (Custody)

HELD: Trial court's modification of custody was reversed, where Mother's contempt of the trial court's orders appeared to serve as a catalyst for its decision to award custody of Child to Father, rather than focusing on changes in statutory factors and the best interests of the child.

FACTS AND PROCEDURAL HISTORY:

Mother and Father were in a long-time, on-again off-again relationship that resulted in the birth of Child in 2018. Father filed a petition to establish paternity.

Mother worked as a flight attendant and ostensibly maintained a residence in Miami. After a preliminary hearing, it was ordered that Mother have legal custody of Child, subject to shared physical custody, and that Child should not be relocated out of Indiana pending further hearing.

Father filed a contempt petition, reciting that Mother had relocated Child out of Indiana, and asking for a change of custody in Father's favor. After a hearing, the trial court found Mother in contempt for relocating Child to Florida. The trial court also awarded sole legal and primary physical custody of Child to Father, subject to Mother's "distance is a factor" parenting time.

Mother appealed. In a memorandum decision, the Indiana Court of Appeals affirmed the trial court's order. Mother sought, and was granted, transfer by the Indiana Supreme Court.

The Indiana Supreme Court concluded that the trial court had conflated the issues of contempt and custody, and was concerned that contempt may have served as a catalyst for the custody change, rather than evaluating the custody question independently in terms of the best interests of Child.

The Supreme Court reversed the trial court's change of custody, returning to the original custody order of the case, pending hearing on remand. On remand, "we urge the trial court to decouple its findings of contempt from the best interest of the child and determine whether a modification of custody is warranted with these principles in mind."

The case was reversed and remanded for further proceedings.

***M.G. v. S.K.*, 162 N.E.3d 544 (Ind. Ct. App. 2020), decided December 31, 2020 (Custody)**

HELD: Modification of custody reversed because Mother requested findings, and the resulting order modifying custody in favor of Father contained inadequate findings of fact to comply with Trial Rule 52(A).

FACTS AND PROCEDURAL HISTORY:

Mother and Father divorced in 2015 with Child, who was then 18-months-old. By agreement, the parties shared legal custody, with Mother having primary physical custody. Father's parenting time began as supervised, and then was phased to unsupervised.

In 2019, Father filed for custody modification, seeking joint physical custody of Child. Mother responded with a petition seeking sole legal custody of Child, and appointment of a GAL. Importantly, Mother also filed a TR 52(A) motion for findings and conclusions.

The trial court held a hearing. Among other testimony and evidence, the GAL testified that Child was thriving and recommended no changes to the custody arrangement. At the conclusion of testimony, the trial court indicated it would take the matter under advisement, but indicated it was disinclined to modify.

Nevertheless, approximately 3 months later, the trial court issued an order modifying physical custody to an equal time, alternating 7-day schedule. Mother appealed.

The Court of Appeals emphasized that Mother had timely filed a motion for findings. The Court also noted that the trial court had signed Father's proposed order, after making some deletions. The factual findings in the order were "sparse."

"[T]he purpose of Rule 52(A) is to provide the parties and the reviewing court with the theory upon which the trial judge decided the case in order that the right of review for error may be effectively preserved." While the finding in the order praised Father's parenting ability and criticized Mother's lack of flexibility, the statutory bases for modification—a substantial change in the statutory factors—were not addressed in a meaningful way.

"The trial court did not enter an order in compliance with Indiana Trial Rule 52(A) adequate to permit meaningful appellate review." The trial court's order was reversed.

## F. Premarital Agreement

### *Thompson v. Wolfram*, 162 N.E.3d 498 (Ind. Ct. App. 2020), decided December 22, 2020 (Premarital Agreement)

HELD: A premarital agreement that makes premarital property separate property, but does not include a clause addressing appreciation thereon during the marriage, is interpreted as meaning that appreciation during the marriage is marital property subject to division.

FACTS AND PROCEDURAL HISTORY:

Husband and Wife married in 1996. Prior to their wedding, they executed a premarital agreement. Financial disclosures for each party were attached to the premarital agreement.

The relevant operative language of the premarital agreement provided:

> All assets owned by each party and in the name of that party, all at the time of marriage, and which are maintained separately by that party after the marriage, and which are not commingled with the other party's assets, or which are not listed under the joint names of the parties, shall remain the separate assets of that party and shall not be subject to division upon divorce.

Wife filed for divorce in 2016. Much of the parties' premarital assets had been liquidated and commingled during the marriage. However, Husband's IRA and 401(k) had been maintained separately, but had increased from $97,477 at marriage to $994,523 at divorce. At the trial court, Wife took the position that Husband's premarital balance should be set aside to Husband, but the increase in value during the marriage should be subject to division; Husband maintained that his entire retirement account balance was his separate property.

The trial court agreed with Wife, finding that, under the terms of the premarital agreement, marital contributions, earnings, and appreciation of premarital property was not defined as separate property and, thus, was subject to division. Husband appealed.

On appeal, Husband acknowledged that the premarital agreement "is silent as to how future contributions, earnings, or appreciation should be handled." The Court observed that "[h]ad the parties intended to exclude from the marital pot any increase above the specific values listed in the [premarital agreement's] exhibits, the Agreement could have provided that the property outlined in the financial statement *including any increase in value through whatever means* (or some similar language) would remain a party's separate property."

Thus, the Court of Appeals affirmed the trial court's order interpretating the premarital agreement that growth and appreciation on premarital property was not protected as separate property due to the agreement's silence.

Judge May dissented. Judge May interpreted the plain and ordinary meaning of the premarital agreement as intending to exclude from the marital estate the assets listed on the premarital financial disclosure, regardless of change in value in the future from the values nominally recited in the disclosure. "Ruling otherwise vitiates the intent behind signing a prenuptial agreement."

***Haggarty v. Haggarty*, 2021 WL 3627268 (Ind. Ct. App. 2021), decided August 17, 2021 (Premarital Agreement)**

HELD: Trial court did not err when it determined that Husband breached a provision of the parties' Premarital Agreement by not maintaining a joint account with funds for paying monthly ordinary living expenses, and ordering that Husband pay Wife approximately $206,000 arising from that breach.

HELD: Trial court also acted within its discretion when it denied Wife's effort to set aside Releases of Judgment that Wife had previously filed and, further, ordered Wife to pay Husband's attorney's fees related to those motions, even though the Premarital Agreement included an attorney fee waiver by Husband.

FACTS AND PROCEDURAL HISTORY:

Prior to the parties' marriage in 2000, they entered into a Premarital Agreement. The Premarital Agreement generally provided that, in the event of a divorce, property would be divided between the parties based upon how it was titled, with only jointly-titled property divided between them, equally. The Premarital Agreement also provided: "[Husband] further agrees to maintain a checking account titled jointly with [Wife] with an average balance sufficient to pay ordinary living expenses for a month."

In 2018, Wife filed a petition for dissolution of marriage, as well as a motion for partial summary judgment that Husband had breached the Premarital Agreement's joint bank account provision. Following a hearing, the trial court issued findings that the parties did not open the joint account until 2014, which Husband then funded with an initial deposit of $2,700 that he never replenished. Husband then closed the joint account in 2019. The trial court further determined that, during that period, Wife paid over $206,000 of ordinary living expenses, from Wife's separate funds, that should have been payable under the Premarital Agreement from a joint account funded by Husband. The trial court ordered Husband to pay this amount to Wife as part of its Decree.

Altogether from the various obligations of the Premarital Agreement, the trial court ordered Husband to pay to Wife $498,997, plus $1,183 for tax refunds, and an attorney fee contribution to Wife of $10,000. After that was ordered, Husband tendered three checks in those respective amounts, through counsel, after which Wife filed three Releases of Judgement. Each Release identified one of the three payment obligations and recited it to be "paid and satisfied."

However, weeks later, Wife sought to have the three Releases set aside on the basis that Husband failed to pay interest on the judgments. Husband countered that each release clearly recited that each judgement was "paid and satisfied" and, thus, Wife was estopped from pursuing them

further. The trial court denied Wife relief on the Releases, and instead ordered Wife to pay $2,610 of Husband's attorney's fees related to the Release litigation.

Wife appealed and Husband cross-appealed.

Neither party was satisfied with the trial court's resolution of the joint account issue. Wife objected to the trial court's conclusion that Husband's obligation to establish and maintain the joint account began in 2014, when the parties opened the account, rather than back in 2000 when they married. The Court of Appeals concluded that asking it to determine who was at blame for why the joint account was not established prior to 2014 was an invitation to reweigh the evidence and witness credibility, which it declined to do.

On cross-appeal, Husband argued that the trial court misconstrued the meaning of "ordinary living expenses." The trial court determined that, since the term was undefined in the Premarital Agreement and ambiguous, it accepted parol evidence to determine its meaning, and, further, the trial court's resulting construction of the term was not erroneous.

As to the Releases, Wife advanced an argument, rejected by the Court of Appeals, that Husband's underlying judgments were distinct from accrued interest on those judgments and, thus, the Releases should not apply to accrued interest. "[Wife's] claim for post-judgment interest was not a claim that arose separate from the trial court's initial judgment; it was part of the very judgment that [Wife] released."

Finally, Wife appealed the attorney fee award of $2,610 related to the fees Husband incurred in responding to Wife's motions to set aside the Releases. The Premarital Agreement included a term that generally precluded Husband from receiving an attorney fee award from Wife. But the Court of Appeals interpreted that provision as applying only to attorney's fees that would be incurred as part of the divorce and property division, not Wife's post-decree efforts to set aside Releases of Judgment.

The trial court's order was affirmed.

Judge Robb wrote separately to dissent on the attorney fee award issue. While she agreed with the majority that the Premarital Agreement's attorney fee waiver did not apply to these circumstances, she did not believe the fee award was warranted on its merits. She concluded that Wife's effort to set aside the Releases was not meritless, and that Husband was in a position of significantly superior financial circumstances. She would have reversed the attorney fee award against Wife.

## G. Grandparent Visitation

### *Welbourne v. Mays*, 165 N.E.3d 117 (Ind. Ct. App., 2021), decided February 18, 2021 (Grandparent Visitation)

HELD: Trial court's granting of grandparent visitation rights to Paternal Grandmother was remanded based upon the order's absence of particularized findings.

FACTS AND PROCEDURAL HISTORY:

Child was born to Mother and Father in 2017. After Child's birth, Child lived with Mother and Father at the residence of Maternal Grandparents. Mother and Father struggled with drug abuse, which resulted in Maternal Grandparents establishing a guardianship over Child.

For a period, Maternal Grandparents informally arranged for Child's visitation with Paternal Grandmother. However, disputes over visitation soon arose.

In 2019, Maternal Grandparents filed a petition to adopt Child. Paternal Grandmother intervened, requesting a statutory grandparent visitation order. Following a hearing, the trial court issued an order granting Paternal Grandmother visitation for six weekends per year, one week in the summer, and time during special days, like Christmas and Child's birthday. Maternal Grandparents appealed the visitation order.

The Court of Appeals noted that Indiana's grandparent visitation statute requires that any grandparent visitation order be accompanied by findings and conclusions. Because the trial court's order did not include those, "we remand for more particularized findings relative to this child and this particular relationship."

The case was remanded.

***Romero v. McVey*, 167 N.E.3d 361 (Ind. Ct. App. 2021), decided April 8, 2021 (Grandparent Visitation)**

HELD: Trial court erred when it denied grandparents request for visitation rights, apparently based upon an optimism that such visitation could be arranged informally and without a court order.

FACTS AND PROCEDURAL HISTORY:

Child was born to parents who had complicated legal and substance abuse problems, and Child was immediately placed in the care of Child's maternal aunt ("Aunt"). Aunt began the process of initiating an adoption of Child.

A week after Child's birth, DCS initiated a CHINS matter, citing Mother's substance abuse. Mother was out of the picture thereafter, and Father was incarcerated.

Father's mother and stepfather ("Grandparents") filed a petition for grandparent visitation. While Grandparents were seeing Child regularly based upon an informal understanding they had with Aunt, Grandparents expressed concerned the opportunities to see Child might stop after the Aunt's adoption of Child was finalized.

At a hearing of the matter, Aunt testified that she was supportive of Child's relationship with Grandparents, and that she wished for it to continue. However, the trial court denied the petition for grandparent visitation, writing, in part, that "[n]o evidence has been presented suggesting that [Aunt] will restrict appropriate conduct with [Child's] relatives post adoption." Grandparents appealed.

The Court of Appeals noted the deference afforded to trial courts hearing family law matters. The Court noted that the Grandparents met the statutory criteria for seeking a grandparent visitation order and, importantly, that such an order must be established prior to an adoption for a grandparent to have guaranteed contact with the child post-adoption.

Evaluating the circumstances, the Court of Appeals concluded it was in Child's best interests to have a grandparent visitation order, and that the trial court's denial of same was clearly erroneous.

The denial of the Grandparents' visitation petition was reversed and remanded for further proceedings to fashion a specific grandparent visitation order.

***In re: Grandparent Visitation of B.A.A.*, 2021 WL 2643641 (Ind. Ct. App. 2021), decided June 28, 2021 (Grandparent Visitation)**

HELD: Trial court's grandparent visitation order was remanded to develop specific findings as required by the Indiana Supreme Court's 2009 *In re: K.I.* case.

FACTS AND PROCEDURAL HISTORY:

Paternal Grandparents sought a visitation order with Grandchild after the death of their son, Grandchild's father. Following a hearing, the trial court issued a grandparent visitation order allowing Paternal Grandparents to have Grandchild: (1) one day per week in their home while Mother was at work; and (2) a Saturday overnight in their home every third weekend. Mother appealed.

The Court of Appeals noted the important constitutional considerations of a grandparent visitation order per *Troxel* and related caselaw. Under Indiana's cases of *McCune*, *M.L.B.* and *K.I.*, a trial court sitting in a grandparent visitation case is required to address these four factors:

1. A presumption that a fit parent's decision about grandparent visitation is in the child's best interests, thus placing the *burden of proof* on the petitioning grandparents;

2. The "special weight" that must therefore be given to a fit parent's decision regarding nonparental visitation, thus establishing a *heightened standard of proof* by which a grandparent must rebut the presumption;

3. "Some weight" given to whether a parent has agreed to some visitation or denied it entirely, since a complete denial of visitation threatens the very existed of the relationship between the grandparent and grandchild); and

4. Whether the petitioning grandparent has established that visitation is in the child's best interests.

"Because the trial court in this case has failed to issue the required specific findings, we remand this case to the trial court for the entry of new findings and conclusions revealing its consideration of all four relevant factors . . . ."

The case was remanded with instructions.

## H. Birth Certificate Change

***In the Matter of the Change of Gender Identification of A.B., O.S., and V.V.*, 164 N.E.3d 167 (Ind. Ct. App. 2021), decided February 24, 2021 (Birth Certificate Change)**

HELD: A divided panel of the Court of Appeals held that parents have the legal authority to seek a change of the gender marker on their children's birth certificates.

HELD: While the established standard for granting an adult's change of his/her own gender marker is whether the petition is made in good faith, the appropriate standard for evaluating an adult's petition on behalf of a child is whether the change of the child's gender marker is in the child's best interests.

FACTS AND PROCEDURAL HISTORY:

The case was a consolidated appeal of three similar cases involving parents who had filed petitions to change the gender marker on their respective children's birth certificates. The children were aged 14, 7, and 16. Two cases resulted in the trial court denying the petition without explanation. In the third case, after an evidentiary hearing, the trial court concluded that the petition had been filed in good faith, but, under Indiana law, a parent lacks the authority to seek a gender marker change on behalf of a child.

All three parents appealed, and the cases were consolidated.

The Court of Appeals noted that, under 2014 case law, a trial court has the authority to order a change of gender marker on an adult's birth certificate. The Court reviewed many of the important life decisions for a child, over which a parent is vested with authority to make on the child's behalf. "The changing of a child's gender marker is commensurate with these other life-changing alterations to a birth certificate."

Having determined the parents had the authority to seek this relief, the next question is whether it should have been granted on the merits. The parents claimed the appropriate standard of relief is whether the request was made in good faith. The Court acknowledged "good faith" was the standard for evaluating an adult's request to change gender marker. However, when a parent requests a change of gender marker on behalf of a child, the appropriate standard is whether the change is the child's best interests.

All three cases were reversed and remanded for further proceedings to evaluate the petitions under the best interests of the child standard.

Judge Pyle dissented, writing that the majority's opinion extended rights to parents that should be determined by the General Assembly, rather than by the courts. He also disagreed that existing statute and case law could be construed in a way that extended the prerequisite authority

needed for the majority to reach its conclusion. He would have affirmed all three orders of the trial courts.

## I. Child Name Change

***Faulk v. Faulk*, 166 N.E.3d 939 (Ind. Ct. App. 2021), decided March 29, 2021 (Child Name Change)**

HELD: Trial court in divorce proceedings erred when its Decree ordered Child's last name changed from "Faulk," which was Father's last name, to "Bissell-Faulk," a hyphenated combination of the parents' last names; however, the legal error was that the trial court lacked the statutory authority to order any change of Child's name.

HELD: Trial court erred in its child support calculation when it declined to impute income to Mother due to her ability to live rent-free with her parents.

FACTS AND PROCEDURAL HISTORY:

Mother and Father married in 2017, at which time Mother changed her last name from Bissell to Father's last name, Faulk. Mother became pregnant but filed a petition for dissolution of marriage prior to giving birth to Child. When Mother gave birth to Child, she signed a birth certificate that listed Child's name as J.L. Bissell, rather than C.J. Faulk, as the parties had agreed previously.

At the final hearing of the divorce, Father asked that Child's last name be changed to Faulk, whereas Mother requested that it either be left Bissell, or changed to Bissell-Faulk. The trial court ordered Child's name changed to Bissell-Faulk. Also, in its child support calculation, the trial court declined to impute income to Mother based upon her living rent-free with her parents, instead basing Mother's income for support purposes solely on her earned income as a school teacher.

Father appealed.

The Court of Appeals concluded that the trial court had no statutory authority to change Child's name. The only marriage dissolution statute that authorizes a name change is that of a wife's name being restored to her maiden name. The Court noted that there is an Indiana statute that permits parents or guardians to change the name of a child, but none of that statute's provisions or requirements had been followed in this case. Therefore, the trial court's name change was reversed.

On the issue of Mother's income imputation, evidence was presented that Mother lives rent-free with her parents. Mother estimated that an apartment would cost her about $1,000 per month. Noting the Indiana Supreme Court's 1999 *Glass v. Oeder* case, which affirmed an imputation to a father for his rent-free residence, the Court of Appeals reversed the trial court's child support calculation, remanding the issue for inclusion of the value of Mother's living arrangements to be included in Mother's income for the child support calculation.

Two other appellate issues raised by Father were rejected by the Court. The trial court's Decree included an annual child support true-up to address Father's potential for irregular income as set forth in the Guidelines. The Court of Appeals affirmed the true-up provision.

Second, the trial court's Decree awarded Mother primary physical custody, subject to Father's IPTG parenting time. However, as to the "opportunity for additional parenting time," the Decree added some terms and conditions regarding notice and logistical considerations that do not appear in the IPTG. The Court of Appeals did not consider these additional terms to be an abuse of discretion.

The Court ordered the provision of the Decree that changed Child's name reversed and remanded with instructions to vacate the name change order.

Judge Riley dissented on the name change issue. She believed that the name change was presented to the trial court as part of the miscellaneous incidents of resolving the dissolution of the marriage, and Mother did not object to proceeding in that manner. Judge Riley would have then applied a "best interests of the child" standard to a prospective name change, under which she expressed concerns that a hyphenated name would leave child with a different last name than either of her parents, or any of Child's siblings. She concluded the trial court had authority to change Child's name under the circumstances of the case, but that changing it to a hyphenated name was an abuse of discretion.

## J. Protective Order

### *K.B. v. B.B.*, 168 N.E.3d 1048 (Ind. Ct. App. 2021), decided May 7, 2021 (Protective Order)

HELD: Trial court erred when it dismissed a petition for an order of protection without holding an evidentiary hearing, where the petitioner had stated a minimally sufficient claim of harassment.

FACTS AND PROCEDURAL HISTORY:

K.B. filed a petition for an order for protection against her neighbor, B.B., which recited that various incidents of alleged harassment that K.B. contended caused her to feel "terrorized, frightened, intimidated, and threatened."

In response, the trial court dismissed K.B.'s petition *sua sponte* and without holding a hearing. K.B. filed a motion to correct error, which the trial court denied on the basis that, even if all of the factual assertions in K.B.'s petition were assumed to be true, the behavior alleged did not "rise to the level of harassment." K.B. appealed.

Reviewing Indiana's Civil Protection Order Act that governs the matter, the Court of Appeals noted that, under the statute, whether the trial court was required to hold a hearing hinged on whether K.B. stated a claim of harassment.

K.B.'s petition recited that, over a 19-month period, B.B. had become "visibly angry and aggressive" toward K.B.; that B.B. had entered K.B.'s property without permission; that B.B.

had yelled sarcastic remarks at K.B.; and that B.B. had "intentionally blocked" K.B.'s access to her driveway. "We conclude that these allegations stated a claim for harassment, which entitled K.B. to a hearing."

The trial court's dismissal of K.B.'s petition was reversed, and remanded for the trial court to hold a hearing on it.

## K. Cohabitation

### *Fox. v. Barker*, 170 N.E.3d 662 (Ind. Ct. App. 2021), decided May 17, 2021 (Cohabitation)

HELD: One party to a long-term cohabitation relationship was entitled to the partition of a farm, which the parties acquired as tenants in common during the relationship.

FACTS AND PROCEDURAL HISTORY:

Fox and Barker lived together for 10 years. Several years into the relationship, Fox purchased a 99-acre farm and, as part of the transaction, the farm was deed to Fox and Barker as tenants in common.

Fourteen years later—and eight years after the parties had split up—Barker sued to partition the property. Barker was granted partial summary judgment that Barker and Fox were tenants in common, and that Barker is entitled to an equal share of the farm, less any appropriate equitable adjustment by a jury. Fox appealed.

Fox made various arguments on appeal, including that the deed represented an incomplete gift, that there was a previous settlement agreement between the parties—the Fox says he has since lost—that resolved the matter, and that Barker was equitably estopped from the partition.

The Court of Appeals rejected each of these arguments by Fox. The trial court's grant of partial summary judgment for partition in Barker's favor was affirmed.

## L. Attorney Fees

### *Bousum v. Bousum*, 2021 WL 2426624 (Ind. Ct. App. 2021), decided June 15, 2021 (Attorney Fee)

HELD: A Court of Appeals denial of a request for an attorney fee award made pursuant to Appellate Rule 65(E) does not serve as *res judicata* or other bar to the same party seeking a request for appellate attorney's fees from the trial court pursuant to Indiana Code § 31-15-10-1 (family law matters) or § 31-16-11-1 (child support matters).

FACTS AND PROCEDURAL HISTORY:

Father and Mother divorced in 2012 with one child. Litigation of custody, parenting time, and child support ensued thereafter. After an adverse decision in 2018, Father appealed. During the appeal, Mother sought appellate attorney's fees per Appellate Rule 65(E), and she concurrently

filed a request with the trial court for appellate fees per Indiana Code § 31-15-10-1 and § 31-16-11-1.

The Court of Appeals declined Mother's request to award appellate fees per Appellate Rule 65(E), but after the matter returned to the trial court, the trial court awarded Mother appellate fees of $15,000. Father appealed.

Father argued that the doctrines of "res judicata" and "law of the case" prevented the trial court from issuing its appellate attorney fee order after the Court of Appeals had denied Mother's similar request.

The Court of Appeals noted the differences in the bases for an awarded of fees under Appellate Rule 65(E) (e.g., meritlessness, bad faith, vexatiousness, etc.) By contrast, the two statutes permit fee awards generally in family law proceedings and in child support controversies. As such, nothing about the Court of Appeals' determination that Mother was not entitled to appellate fees per Appellate Rule 65(E) foreclosed the trial court from making a determination that appellate fees were appropriate under the statutes.

The trial court's appellate attorney fee award was affirmed.

## M. Mediation

***Berg v. Berg*, 170 N.E.3d 224 (Ind. 2021), decided June 29, 2021 (Mediation)**

HELD: Documents produced not during mediation, but in anticipation of mediation, fall under the confidential settlement communication provisions that preclude them from later being admitted into evidence at a final hearing.

HELD: A disclosure warranty provision of a property settlement agreement can be used to pursue a breach of contract claim if one spouse later determines assets were not disclosed.

FACTS AND PROCEDURAL HISTORY:

In 2017, after limited discovery, Husband and Wife participated in a divorce mediation that resulted in a signed property settlement Agreement that provided, in relevant part, that each party would keep their respective stock accounts, and Husband would retain the jointly-titled stock accounts. The Agreement also included a provision by which each party warranted full asset disclosure.

The following year, Wife filed a Trial Rule 60(B) motion seeking to set aside the Agreement on the basis that Husband had failed to disclose a stock account. The 60(B) litigation that followed focused on what financial information had been exchanged between the parties leading up to mediation. Wife successfully introduced some of those materials into evidence, after which the trial court granted Wife's relief and awarded Wife one-half of the stock account in question.

On an appeal, the Court of Appeals had split 2-1, with the majority concluding that the documents exchanged in advance of mediation were inadmissible. Judge Crone dissented based upon Husband citing no authority that evidence prepared in anticipation of mediation—rather

than during mediation—is inadmissible under Evid. R. 408. Importantly, the Court of Appeals, after making this evidentiary determination, concluded that Wife was estopped from relying upon the disclosure warranty provision of the Agreement because Wife had also warranted that the Agreement fairly reflected all assets of the marriage.

Wife sought transfer, which was granted.

Relying significantly on policy reasons, the Indiana Supreme Court concluded that marital balance sheets exchanged in advance of mediation are not later admissible evidence under Rule 408. And, while Rule 408 includes an exception for the admission of evidence for another purpose, Wife's effort to challenge the validity of the Agreement did not fall under the exception.

The Court of Appeals had further concluded that the warranty language of the Agreement estopped Wife from obtaining relief under it because Wife also warranted that all assets and debts had been correctly reflected in the Agreement. On this point, the Indiana Supreme Court disagreed. Such a construction would render a disclosure warranty clause meaningless.

Thus, the Supreme Court reasoned that Rule 408 prevented Wife from attacking the validity of the parties' Agreement. However, the evidence was admissible in a collateral breach of contract claim. The evidence established that: (1) each party warranted all assets and debts were reflected in the Agreement (the contract); (2) Husband's assets were not correctly reflected in the Agreement (the breach); and (3) Wife's portion of a 50/50 division of the marital estate would have been larger without the breach (the damage).

The trial court did not abuse its discretion in determining that Husband breached the Agreement, and awarding Wife half of the omitted account to rectify the breach.

The trial court's order was affirmed on the basis that Husband had breached the warranty clause of the Agreement, setting aside the trial court's finding of fraud that was based upon inadmissible evidence.

## N. Paternity

### *In re: the Paternity of B.G.H.*, 2021 WL 3044267 (Ind. Ct. App. 2021), decided July 20, 2021 (Paternity)

HELD: In a paternity case, the trial court did not abuse its discretion when it determined that Indiana was a more convenient forum than Michigan, and awarded the parties joint legal custody of Child.

FACTS AND PROCEDURAL HISTORY:

Mother became pregnant shortly after the parties met in the Virgin Islands. Father, who worked for FEMA, made his residence in Indiana, where Mother moved to live with him. Child was born in November 2018, after which a paternity affidavit was executed by Father. The parties continued living and working in Indiana, while raising infant Child together.

In late 2019, Mother and Child began spending more time with Mother's family in Michigan, eventually moving there permanently in January 2020. Father was involved in an accident that resulted in a death, and he was charged with murder in February 2020. The conditions of Father's pre-trial release did not permit him to leave Indiana.

In the spring of 2020, Father filed, in Indiana, a petition to establish paternity, custody, and support. Shortly thereafter, Mother filed similar proceedings in Michigan.

After a hearing, the Indiana trial court determined that Indiana was the proper forum for the case. While the matter was pending, Mother took Child to Indiana one weekend per month for Father to have parenting time.

When Father's petition as heard, both counsel stipulated that joint legal custody had been agreed upon, and at no time did Mother request sole legal custody. In terms of parenting time, Father requested more than one weekend per month: Father offered to meet Mother in Indiana, halfway between their homes, for exchanges two weekends per month. Mother was agreeable with two weekends per month, but proposed that one of them occur by Father travelling to Michigan and exercising his time there.

The trial court issued its order, providing for joint legal custody and a parenting time consistent with Father's proposal. Mother appealed.

On the issue of forum, the Court of Appeals reviewed Indiana's codification of the UCCJA, which lists relevant factors for the determination of forum. In light of the totality of the circumstances, especially including that Child had lived most of his life in Indiana, not Michigan, the trial court's determination that Indiana was the more appropriate forum was not an abuse of discretion.

The Court of Appeals quickly dispensed with Mother's argument that the award of joint legal custody was erroneous, since Mother had stipulated to it at trial and had never requested sole legal custody.

On the issue of parenting time, the Court of Appeals noted the highly discretionary nature of parenting time orders in "distance as a factor" cases. Including because of the limitations on Father not to leave the state of Indiana, the trial court's order that Father's two weekends per month could both be exercised in Indiana was not an abuse of discretion.

The trial court's order was affirmed.

Judge Tavitas wrote separately to concur. But she pointed out that the Indiana trial court neglected to follow the provisions of the UCCJA about communicating on the forum issue with its corresponding court in Michigan. However, because neither party objected, the argument was waived.

## STATUTE AND RULE CHANGES:

### SB 259 / Parents with Disabilities

Signed by the Governor on April 29, 2021

- Specifies that it is the policy of the state to recognize the parenting rights of a parent regardless of whether the parent has a disability.

- Provides that the right of a person with a disability to parent the person's child may not be denied or restricted solely because the person has a disability.

- Provides that: (1) a court, in: (A) considering the appointment of a person as a guardian; (B) hearing an action to modify custody or an action to determine or modify parenting time; or (C) determining whether to grant a petition for adoption; and (2) the department of child services, in determining whether to grant a person a license to operate a foster family home; may not discriminate against, and shall take into consideration the provision of reasonable accommodations to, a person with a disability.

### HB 1448 / Adoption

Signed by the Governor on April 29, 2021

- Permits an individual who seeks to adopt a child less than 18 years of age to file a petition for adoption in any county in Indiana if either of the following is filed with the petition: (1) A written consent to the adoption from each individual whose consent to the adoption is required under Indiana law; (2) A certified copy of a court order terminating the parental rights of each parent whose consent to the adoption is required under Indiana law.

- Requires notice of an adoption petition to be delivered to imprisoned or detained individuals.

- Specifies certain requirements when delivering notice of a petition for adoption to an individual whose address is unknown.

- Provides that certain notice requirements concerning petitions for adoption are met even when the recipient of the notice refuses to accept the offer or tender of the notice.

- Requires that the notice of an adoption must be given to the local office of the department of child services, if the child is the subject of an open or pending child in need of services proceeding.

- Mandates that the notice of an adoption must be given to the entity, facility, or individual of which the child is a ward if the child is a subject of an open or pending juvenile delinquency proceeding.

- Requires the setting aside of an adoption decree if notice is not properly effectuated and the adoption decree is challenged within 45 days of when it was entered.

- Allows the court to consider, in the context of a motion to contest, (1) the parent's substance abuse; (2) the parent's voluntary unemployment; or (3) instability in the parent's household, if the parent has made substantial and continuing progress and it appears reasonably likely that progress will continue.

# Section Five

# Real Estate Law Update

**Mary A. Slade**
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## Section Five

## Real Estate Law Update…… Mary A. Slade

**2020 Real Estate Law Update**

**By**

**Mary A. Slade**

**PGP Title and Premier Land Title Insurance Company**[1]

## I. Ownership Dispute Cases

***Millikan v. City of Noblesville,* 160 N.E.3d 231 (Ind. Ct. App. 2020)**

The Millikans' property and Lot 5 of the Park 32 West subdivision were separated by a Conrail railroad right of way. After Conrail's abandonment of the railway and right of way area, the Millikans control of the right of way area began with Mr. Millikan's 1982removal of rails, ties, and stones in from the railroad track bed. The Millikans also removed a hedge row from the "Disputed Property" in this case and planted an evergreen tree row with 33 years of exclusive maintenance of the lawn and trees of the Disputed Property. A November 6, 1991 record affidavit disclosed a legal description for the abandoned railroad right of way, including the Disputed Property and Millikans' claim that they owned the described land. The 1991 affidavit described the affidavit's purpose to establish "vested title in the railroad right of way… pursuant to Ind. Code § 8-4-35-5" (now Ind. Code § 32-23-11-10). Although the Hamilton County Recorder's Office stamped the 1991 affidavit with "duly entered for taxation,", no property taxes were assessed on the Disputed Property

[1] The following material is for informational purposes only and is not and may not be construed as a legal advice. PGP Title and Premier Land Title Insurance Company, as well as PulteGroup are not a law firm and does not offer legal services of any kind. No third party entity may rely upon anything contained herein when making legal and/or other determinations regarding title practices.

portion of the railroad right of way: drainage assessments were imposed on the Disputed Property for the years 2009-2015.

As the result of a 1991 quitclaim deed from White River, Noblesville, and Westfield Railroad, Inc., Noblesville was referenced as the owner of record of the Disputed Property: however, "Noblesville was aware that the quitclaim deed conveying nothing because the grantor had no ownership interest in the Disputed Property". Noblesville paid the 2010-2016 drainage assessments. Mr. Millikan informed the Noblesville City Engineer on August 7, 2014 of the Millikans' ownership of the entire railroad right away along the north border of the Millikan s' land and informed the city's appraiser on September 30, 2015 of the Millkans' ownership of the Disputed Property. In December of 2015 the of Lot 5 of the Park 32 West subdivision executed a Warranty Deed to convey a portion of the Disputed Property to Noblesville except for a 5 x 277-foot strip: however, the Lot 5 owner did not use or maintain the Disputed Property.

After its July 2016 condemnation action, the Millikans and Noblesville agreed to terms for the city to acquire the south half of the railroad right of way from the Millikans. In December of 2018 the Millikans filed a quiet title action based upon adverse possession and a claim of trespass against Noblesville. After the trespass was ultimately dismissed, a summary judgment order in favor of the city indicated that the Millikans "had satisfied 'the common law elements of adverse possession to the Disputed Property', but that they 'failed to prove they had substantially complied with the requirements of [Indiana Code section 32-21-7-1], which requires an adverse claimant to have a reasonable and good faith belief that they paid the Special Assessments due during the period of adverse possession

period.'" In their appeal, the Millikans , contended that they satisfied both the common law requirements and the tax payment requirements for adverse possession with exclusive possession and control of the of the area for 27 years prior to any assessment. The Millikans also asserted that they had a good faith belief that they were paying the property tax requirements for the Disputed Property since the Recorder's Office had marked the 1991 affidavit with "duly entered for taxation" and no property taxes were assessed on the Disputed Property during their time of possessing and maintaining the property. After reviewing prior Indiana cases where property owners were successful in meeting the tax element for adverse possession when no property taxes were ever assessed on the land, the Indiana Court of Appeals reversed the trial court's decision and remanded for summary judgment to be entered in favor of the Millikans. The Indiana Court of Appeals concluded that for at least a 10-year period from 1982, the Millikans had substantially complied with the taxation statute component of Indiana's adverse possession law with a reasonable and good faith belief that property taxes were satisfied when no property taxes had been assessed on the Disputed Property during the adverse possession time period. *See also*, *Celebration Worship Ctr., Inc. v. Tucker*, 35 N.E.3d 251, 254 (Ind. 2015); *Fraley v. Minger*, 829 N.E.2d 476, 486-, 493 (Ind. 2005).

***Moseley v. Trs of Larkin Baptist Church,* 155 N.E.3d 1221 (Ind. Ct. App. 2020), *trans. denied*.**

After the Moseleys purchased their Rockport, Indiana home in 1991, Mr. Moseley "regularly mowed and maintained" an area (the "Disputed Property") along the common boundary line with the adjacent Larkin Baptist Church (the "Church"). Periodically, Mr.

Moseley would park various vehicles on a portion of the Disputed Property. According to the record title for their respective land, the Church owned approximately 3.5 acres and the Moseleys owned an adjacent and approximately one acre property. After Church officials showed Mrs. Moseley 2017 survey disclosing the disputed area as part of the Church property, Mr. Moseley installed fence posts near and along the Disputed Property. after receipt of the church's March 28, 2017 cease and dissent trespass letter, Mr. Moseley completed the fence.

In its October 26 2017 complaint, the church alleged that the Moseleys committed trespass, conversions, and nuisance in the Disputed Property area, and the Church sought to quiet title to the Disputed Property. The Moseleys' subsequent quiet title an adverse complaint where consolidated into the Church's case as a counterclaim. The trial court granted a summary judgment motion on the counterclaims in favor the of the Church in January 2019. The November 2019 bench trial resulted in a judgment in favor of the Church on the trespass and quiet title counts. The trial court subsequently issued a final judgment on remaining claims and awarded damages in the amount of $1300.00 plus $18,000.00 in attorney fees in favor of the Church.

In their appeal, the Moseleys alleged that there were genuine issues of material fact regarding their adverse possession claim that should not have been decided at the summary judgment phase period: alternatively, the Moseleys claimed that the designated evidence satisfied all elements of adverse possession. In affirming the trial court's decision, the Indiana Court of Appeals recognized that the only evidence of actual use of the Disputed Property by the Moseleys were the limited times of mowing, maintenance of the Disputed

Property, or irregular parking of vehicles without maintenance of any structures or fence on the Disputed Property. This "occasional use is not equivalent to actual control" and did not overcome the Church's designated evidence at the summary judgment phase.

***Stephens v. Tabscott,* 156 N.E.3d 634 (Ind. Ct. App. 2020)**

Tabscott and Stephens were co-employees. In April of 2017, Stephens moved into a vacant property that Tabscott owned. After Stephens paid utility bills and maintained the house and Tabscott paid the property taxes, Stephens and Tabscott entered into an oral agreement for Stephens to purchase the property for $16,000.00. In anticipation of completing the real estate transaction, Mr. and Mrs. Tabscott bought a warranty deed form from Office Depot and with the warranty deed signed and notarized on August 22, 2018. The Tabscotts' warranty deed included language that indicated the "valuable consideration in the sum of $16,000 the receipt of which is hereby acknowledged." However, Stephens never paid $16,000. While Mr. Tabscott and Stephens were at the recorder's office, Stephens did not present any check or money for the purchase but promised to pay and pressed for the immediate recording of the warranty deed. Mr. Tabscott recorded the warranty deed. Despite subsequent request by Tabscott and his attorney, Stephens never responded with the purchase funds.

In February of 2019, Tabscott filed a complaint alleging breach of contract, fraud, theft, conversion, and requested the additional relief of recovering the purchase price from Stephens or reformation of the warranty deed. Stephens claimed the statute of frauds among his various affirmative defenses. After the bench trial, the trial court issued a February 28, 2020 order indicating that Stephens breached the oral purchase contract by

never paying the purchase price or consideration for the property: the trial court also found that Stephens theft and conversion of the real estate. The trial court also concluded that Stephens had "fraudulently induced Tabscott to transfer the property with no intention to pay the agreed price." The trial court gave Stephens 90 days to pay the monetary judgment entered by the court: if the payments were not made within that time frame the court would reform the deed and transfer the property to the Tabscotts. If Stephens paid the required judgment amount within 90 days , a deed would be issued to Stephens as grantee with the judgment reduced to $4000.00.

Stephens alleged in his appeal that the statute of frauds prevented Tabscott from enforcing an oral contract. In affirming the trial court's decision, the Indiana Court of Appeals would not permit Ind. Code §32 - 21- 1- 1(b) as a sword to prevent the equitable capability of enforcing an oral contract under the doctrine of part performance. *See also, Powel v. Nusbaum*, 136 N.E. 571, 572 (Ind. 1922); *Summerlot v. Summerlot*, 408 N.E. 2d 820, 828 (Ind. Ct. App. 1980). The appellate court noted the part performance by the parties given the deed signed by the Tabscotts and Stephens' possession and claims to the property in relationship to the recorded warranty deed resulting from Stephens' actions at the recorder's office. The treble damage award of $4,000 in attorney fees was also consistent with Ind. Code § 34-24-3-1 when a preponderance of evidence in a civil suit proves the crime of theft or conversion. "The evidence supports the trial court's finding that Stephens accepted and encouraged the deed transfer while promising to pay $16,000 to Tabscott but with no intention to do so." The case was remanded to the trial court regarding the calculation of reasonable attorney fees associated with the treble damage award.

## II. Easement Cases

***Steele v. Steuben Lakes Reg'l Waste Dist.*, 168 N.E.3d 1000 (Ind. Ct. App. 2021)**

In May 2015, the Steuben Lakes Regional Waste District (the "District") made plans to expand its Lake Pleasant sewer system. The expansion engineering plans included construction and infrastructure on two properties owned by the Steeles in the District's service area. The District disclosed to the Steeles that a grinder pump system for the sewage system collection upgrade would be installed on various properties, including the Steeles' land. The District indicated "we will need a 'Permanent Sewer Utility Easement' from you" with the following explanation:

> If you fail to return the Easement in the application, you will still be a part of the Project in the District, as permitted by state law, will require you to connect. If you do not return the Easement, the District will bypass your property. Once the main line is within three hundred (300) feet of your property, the District will proceed with a necessary connection action permitted under Indiana law. You will then be required, as significant expense to you, to connect to the system.

After the Steeles did not enter into the easement provided with the District's application, the District proceeded with its expansion project.

After its February 2017 ninety (90) day connection notice to the Steels to connect to the project's completed sewer line, the District filed a petition in court to require the Steeles to connect to the sewer line at their own expense. The January 2020 bench trial resulted in the trial court granting the District's petition, rejecting all of the Steeles' counterclaims, and requiring the Steeles to pay for related connection equipment, back user fees and rates, connection penalties, capacity fees "contractor reimbursement fee" and attorney fees; estimated at $78,500.00 to $88,500.00. As part of its appeal, the Steeles claimed three areas that warranted a favorable appeal: the District's late response to the Steeles' counterclaims, the various connection infrastructure and fees, and the attorney fees. Consistent with the Indiana Court of Appeals decision in *Steuben Lakes Regional Waste*

*District v. Tucker*, 904 N.E.2d 718 (Ind. Ct. App. 2009 ), the Indiana Court of Appeals affirmed in part, reversed in part, and remanded this case. Based upon *Tucker*, the Indiana Court of Appeals determined that the District should have initiated an eminent domain proceeding and compensated the Steeles for the use of their properties regardless of whether an easement results from a grant from the property owner or from an eminent domain proceeding.

***Blind Hunting Club, LLC v. Martini*, 169 N.E.3d 1121 (Ind. Ct. App. 2021)**

Blind Hunting Club, LLC ("BHC"), Martini, and Farrell are adjacent property owners in Dearborn County Indiana. The Martini and Farrell parcels are adjacent to York Ridge Road. Prior owners of these three properties entered into a 2016 easement that traversed over the Martini and Farrell lands to provide access to the current BHC land and New York Ridge Road. Prior to November 2019, BHC had leased a portion of its land for a corn and soybean farm operation (April 2017-May 2019) and leased the entire parcel in 2019 for a fee-based hunt club for birds and deer with birds purchased from third party sources and grain plants used for cover as opposed to crop harvesting. With their November 2019 amended complaint, Martini and Farrell sought a declaration by the trial court as to the easement right usage given the current hunting business on BHC's property. "Specifically, Martini and Farrell asked the court to declare that the easement is 'limited to farm and residential use' and 'specifically prohibits BHC's use of the easement for its hunting business." The trial court granted summary judgment in favor of Martini and Farrell finding "the framers of the [easement] [a]greement intended the following: 'you can farm the land, and/or you can build up to two homes on the land.'" with BHC's business was not contemplated or permitted by the easement's drafters and their agreement. In its appeal, BHC alleged the easement does not have use restrictions but if certain use

restrictions did exist, its business was within the use parameters of easement. After considering definitions with the entire easement agreement, the Indiana Court of Appeals concluded that the easement specifically limit access to BHC's land for farming or for two residences with the following agreement provisions:

> Subject only to the conditions stated herein, Grantor[s] hereby convey[] and grant[] to Grantees an *unrestricted right* of ingress, egress, use and access to, over, across and upon a perpetual easement . . . to provide access for farm equipment, pedestrian and vehicular traffic to and from the Dominant Estate[.]
>
> Grantor[s'] grant of the Easement herein is *subject to* the following condition, and Grantees do hereby covenant and *agree to limit* the use of said Easement *for the ingress and egress to no more than two (2) residences* in total, that may hereafter be constructed[.]

Since BHC's tenant did not raise the birds and lets the grain plants remain unharvested, BHC's land use was not used to "cultivate soil, produce crops, or raise livestock."

***Hicks & Sons, LLC v. Carewell Int'l, LLC,* 2021 Ind. App. LEXIS 190, 2021 WL 2346139 (Ind. Ct. App. 2021)**

Carewell International, LLC ("Carewell") acquired its property for its hotel in Cloverdale, Indiana in 1996, and Hicks & Sons, LLC ("Hicks") subsequently acquired in 2014 certain land adjacent to County Road 900 South (Beagle Club Road) and the Carewell property for Hicks' flooring business. Carewell had previously negotiated various access and sign easements with adjacent property owners in 1996 including the former owner of the Hicks' property. The 2015 surveyed site plan for Hicks' future building disclosed:

1. a 40-foot ingress-egress easement extending from the county road to the Carewell property and to the west property line of Hicks' land;
2. a 30 x 30-foot sign easement north of the proposed building site; and

3. a hotel sign within the ingress-egress easement as opposed to the sign easement.

This hotel sign was placed based upon an unrecorded 1997 license with a prior owner of Hicks' land: the original sign measured "12' from the ground to the bottom of the sign face, with the sign face width of 8' 8" and height of 5' 8," for a total sign height of 17' 8" . The 2009 replacement and existing sign was "electrified, with the face of the sign measuring 6'-1 ¼" x 12' 5", with an overall height of 21' 5"." After Hicks' new building was completed in 2016 with a business sign installed in January 2017, Hicks requested Carewell's removal of the hotel sign and subsequently filed a complaint against Carewell in September 2017 for trespass as to the sign. Carewell contended the sign did not impair use of the ingress-egress easement and requested the trial court to quiet the title as to Carewell's easement rights.

The trial court found in favor of Carewell on the criminal trespass claim at the summary judgment stage and found in favor of Carewell after concluding a June 2020 bench trial. In its findings, the trial court disclosed the existence of the easement for access to County Road 900 South and a 1996 recorded easement and sign agreement encumbering Hicks' land and benefiting Carewell. The trial court's comparison of the evidence with the case, *Wendy's of Fort Wayne, Inc. v. Fagan*, 644 N.E.2d 159, 161 (Ind. Ct. App. 1994), also resulted in findings and conclusions of law that Carewell's sign was a directional sign permitted under the *Wendy's* case in the ingress/egress easement.

Hicks' appellate claim asserts that the access easement does not include the use and maintenance of Carewell's hotel sign given its size, burden, and lack of need when

contrasted with the easement's language. The Indiana Court of Appeals affirmed the trial court's decision with reference to:

1. The broad "freely use and enjoy" and "for such use and purpose as are common to commercial driveways generally" language in the 1996 easement that was not included in the Wendy's easement; and
2. The bench trial evidence disclosed the utility of the hotel direction sign for U.S. 231 traffic to find the hotel driveway and the utility and size of the hotel direction sign for aiding Interstate 70 travelers to reach the hotel driveway.

(The opinion for this appellate case was issued on June 9, 2021 and certified on August 4, 2021.)

***Huntzinger v. Champion Lake Ski Club, Inc.*, 165 N.E.3d 605 (Ind. Ct. App. 2021), *trans. denied*.**

Huntzinger developed the Champion Lakes Estates subdivision (the "Subdivision") and also owned one of the residentially improved Subdivision lots. The Champion Lake Ski Club Inc. (the "Club") acted as the homeowners association for the Subdivision and its owners. In order to settle a dispute as to the clubs governance and administration, various parties executed a settlement in February 1997 which subsequently resulted in a May 29th 1997 judgment. This settlement required various owners' rights as to the development and Subdivision, including the guarantee to all lake homeowners of access rights to the boat dock and common areas by easement and a separate inalienable lifetime ski right to Huntzinger. The lifetime right was also subject to compliance with all of the validly enacted and uniform rules of the Club. Pursuant to the settlement, Huntzinger's development company conveyed the Subdivision lake to the Club in August 1997. The December 27, 2010 recording of the amended and restated Subdivision covenants disclosed the following rights:

1. Ownership of one or more platted waterfront lot(s) at [C]hampion Lake is a requisite for ownership of Lake use rights.
2. There are two classes of Lake use rights. The number of class A rights is limited to fifteen (15). Class A rights have unrestricted use of the Lake at all times. Class A rights include the first right of use of any water-ski courses on the Lake.
3. An additional lifetime class A right, personal and inalienable to Mr. John Huntzinger also exists. Mr. Huntzinger's lifetime A right is equal to any of [the] 15 property owner A rights.
4. All classes of rights allow the non-exclusive use, enjoyment and ingress and egress to the Common Area and common boat docks and launch ramp.

Subsequently, Huntzinger sold his lakefront home in the Subdivision. The Club's president denied Huntzinger's February 19, 2018 request for permission to install a dock on the Subdivision's common area pursuant to Huntzinger's lake use right. Subsequently, the Club special meeting request resulted in the Club also rejecting Huntzinger's dock construction request.

Huntzinger's August 26, 2019 complaint included various claims for breach and non-compliance with the settlement agreement, intentional interference by the Club president with the contract between Huntzinger and the Club, and injunctive relief regarding the refusal of the dock construction and the Club president's interference. The trial court entered summary judgment in favor of the Club and the Club's president on August 17, 2020. Huntzinger's appellate claims included his assertion that a contractual agreement exists between the Club and Huntzinger in terms of his right to build a dock in the Subdivision's common area. The Indiana Court of Appeals found Huntzinger's lifetime ski right was consistent and equal to the Class A landowners' rights for unrestricted use of the lake at all times as well as rights to use any water-ski courses on the lake as

opposed to other easement rights afforded by the settlement and the covenants. Since Huntzinger was no longer a property owner in the subdivision, Huntzinger no longer had any rights under the settlement afforded to lakeowners for the enjoyment and ingress and egress areas of the common areas, common boat docks, and launch ramp. "Simply put, waterskiing does not include dock building" as opposed to the unrestricted easement lake rights or contract rights alleged by Huntzinger. Without a contractual right, the Indiana Court of Appeals also concluded that the breach claim and interference regarding the Club and the Club's president had no underlying basis.

## III. Recent 2021 Legislation: Recording and Notarization Laws

Last year, the real estate law update discussed how SEA 340's change from "or" to "and" in IC 32-21-2-3 impacting recording throughout the state. This change and pandemic concerns renewed efforts to align the recording laws with uniform and current recording practices, contemporary language, and the 2017 and 2018 modernization of the Notarial Act; Ind. Code § 33-42. HEA 1056 and HEA 1255 consolidated these efforts during the 2021 General Assembly in two emergency acts effective on passage. Besides restoring "or" to IC 32-21-2-3 for flexibility of a proof or acknowledgment notarial certificate for recorded instruments, these two acts also addressed the following areas. Notarial certificate requirements were aligned in the recording laws with the Notarial Act, Ind. Code § 33-42, including the acknowledgment definition of Ind. Code § 33-42-0.5-2 and the new proof definition in Ind. Code 32-21-2-1.7. Earlier promulgated recording law requirements were eliminated on notarial acts in foreign countries, military notarizations, documents notarized and recorded in different Indiana counties, private seals, notarization in different

states (Ind. Code §§ 32-21-1-11 and 12; Ind. Code §§ 32-21-2-4 and 5; Ind. Code §§ 32-21-9-1 through 4) that were inconsistent with the foreign, military, and state notarial officer and seal requirements recognized in Ind. Code § 33-42. Clarification was provided that electronic and tangible instruments need to be in writing for deeds, mortgages, conveyance of a land interest, leases in excess of three years, land contracts, and a memorandum of lease or land contract with an acknowledgment or a proof, including for recording purposes; Ind. Code § 32-21-1-13; Ind. Code § 32-21-2-3; and Ind. Code § 32-21-2- Acceptable forms of acknowledgment or proof notarial certificates by notarial officers were confirmed that are consistent with the Notarial Act: compliance with the Notarial Act, Ind. Code § 33-42, and the recording laws under Ind. Code § 36-2-11 entitles an instrument to recording. Ind. Code §§ 32-21-2-6 and 7. The law was preserved with clearer language that a recorded instrument without an acknowledgment or proof notarial certificate cannot be read or received as evidence. Ind. Code § 33-21-2-11. Balance was created between the ability to rebut the force and effect of a proof or certificate in a recorded instrument under Ind. Code § 32-21-2-12 with the technical deficiency protections for instruments under Ind. Code § 32-21-4-1(d), and the expansive deficiency protection for electronic records under Ind. Code § 32-21-4-1(d)(2)(D). Ind. Code §32-21-1-14 was updated to refer to an attorney in fact's execution of a conveyance with a proof or an acknowledgment as opposed to a conveyance by an "attorney". Implementation of electronic recording, indexing, retrieval and acceptance of related fees and taxes for electronic records was updated for Indiana counties to July 1, 2022. Ind. Code § 32-21-2.5-8. An Indiana recorder's ability to perform a notarial act in the recorder's respective county was

preserved. Ind. Code 33-42-9-7. Inconsistent commission language in Ind. Code § 33-42-17-12 was eliminated in favor of the existing recognition statutes of foreign, other state, federal, and federal recognized Indiana tribe notarial officers (Ind. Code §§ 33-42-9-8 through 11) and the notarial administrative rules under 75 IAC 7. Ind. Code § 36-2-11-3 provides a notice mechanism by the county recorder of available recorder services and submission options when a county office is closed for three (3) or more business days. Ind. Code § 32-21-2-3 preserves that an English translation is required for recording when an instrument executed in a foreign country includes language other than English.


43rd ANNUAL
JUDGE ROBERT H. STATON
INDIANA LAW UPDATE

# ANNUAL REAL ESTATE LAW UPDATE

## SEPTEMBER 21, 2021

MARY A. SLADE

# Millikan v. City of Noblesville
# 160 N.E. 3d 231
# (Ind. Ct. App. 2020)

- 1982 Railway Right of Way
- 1991 Recorded Affidavit
- 1991 Quitclaim Deed
- 2005 Warranty Deed
- 2016 Condemnation Action
- 2018 Quiet Title Action

# Moseley v. Trs of Larkin Baptist Church 155 N.E. 3d 1221 (Ind. Ct. App. 2020), trans. denied.

- 1991 Purchase
- 2017 Survey
- 2017 Fence Activity
- 2017 Complaints

# Stephens v. Tabscott
# 156 N.E. 3d 634
# (Ind. Ct. App. 2020)

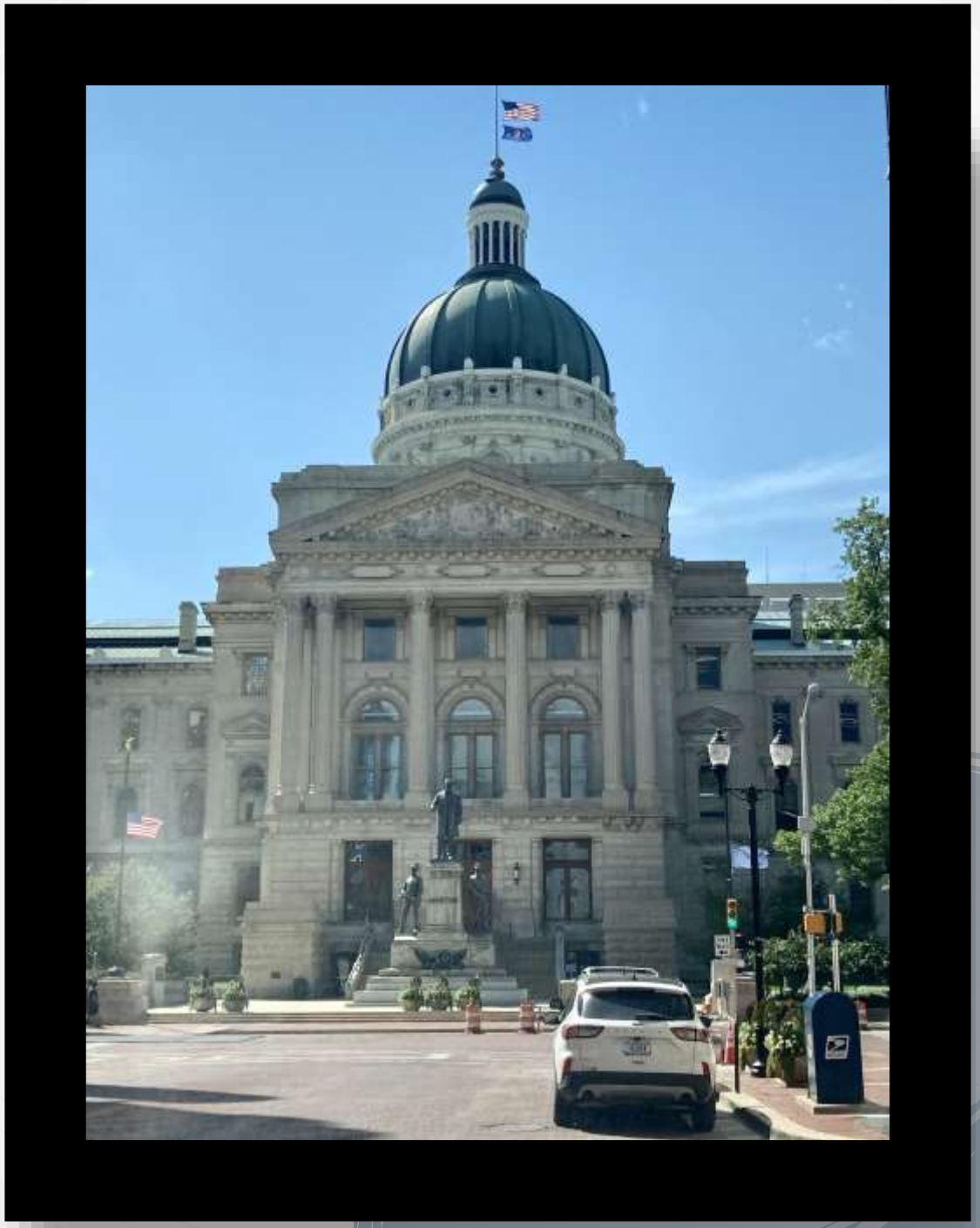
- April 2017: Move In
- August 2018: Deed Signing
- February 2019: Complaint

# Steele v. Steuben Lakes Reg'l Waste Dist. 168 N.E.3d 1000 (Ind. Ct. App. 2021)

- May 2015: Plans
- February 2017: Notice
- March 2018: Complaint
- January 2020: Trial

# Blind Hunting Club, LLC v. Martini 169 N.E.3d 1121 (Ind. Ct. App.2021)

- 2016: Easement
- 2019: Leases
- November 2019: Amended Complaint



# Hicks & Sons, LLC v. Carewell Int'l, LLC (Ind. Ct. App. 2021)

- 1996: Acquisition and Easements
- 2014: Acquisition
- 2015: Site Plan
- January 2017: Request
- September 2017: Complaint

- 1997: Settlement
- 2010: Covenants
- 2018: Dock Request
- 2019: Complaint

# Huntzinger v. Champion Lake Ski Club, Inc. 165 N.E.3d 605 (Ind. Ct. App. 2021); trans. denied.

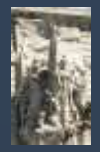
# Recent 2021 Legislation: Recording

# HEA 1056

# HEA1255

- Abrogate SEA 340's Recording Impact
- Proof and Acknowledgments
- Prominence of Notarial Act
- Electronic and Paper Records
- Recorder's Notice
- Electronic Recording

# THANK YOU



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# Section Six

# Internet Law / Social Media

**Jessica L. Ballard-Barnett**
Judicial Law Clerk, The Honorable Melissa S. May, Judge
Indiana Court of Appeals
Indianapolis, Indiana

**Seth R. Wilson**
Adler Attorneys
Noblesville, Indiana

## Section Six

## Internet Law / Social Media…….Jessica L. Ballard Barnett
## Seth R. Wilson

#New_Tech



#Data_Breach



#Censorship_Free_Speech_Social_Media



#Right_to_Repair



#Self-Driving_Cars



#Investigation_Software



#Name_Image_Likeness

# Indiana Law Update 2021

Jessica Ballard-Barnett
Seth R. Wilson

# #New_Tech

I. Amazon Sidewalk[1]
   A. General Information
      1. Free shared network between Amazon smart products - Echo devices, Ring security cameras, Tile trackers, as well as certain outdoor lights and motion sensors
      2. Creates a low-bandwidth network using a "Sidewalk Bridge" between Echo and Ring devices; the devices share a small portion of the user's internet bandwidth with other Echo and Ring users to provide the services amongst the community
      3. Allows connected items to stay connected to a wi-fi connection despite being out of range of the initial router.
      4. Designed to supplement wi-fi strength
   B. Privacy Concerns[2]
      1. Devices linked by the "Sidewalk Bridges" as part of Amazon Sidewalk could allow unauthorized access
      2. Cannot see other devices or participants in the network, so it is unclear what security precautions they are taking, which could affect the security of the user's devices
      3. If a hacker is able to access a connected device, and all of the devices connected to that device via Amazon Sidewalk. This could mean that a hacker could hack into your neighbor's Ring doorbell and ultimately gain access to your security cameras.

II. Apple AirTags[3]
   A. General Information
      1. Coin-sized device that can be attached to anything and tracked using Apple's "Find My" service.

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[1] https://www.amazon.com/Amazon-Sidewalk/

[2] http://www.theindianalawyer.com/articles/wilson-do-you-like-to-share-your-network-amazon-and-apple-do

[3] https://www.apple.com/airtag/

2. When activated, the AirTag sends out a signal, received by other Apple devices, assisting the signal to reach the owner's Apple device
3. Must be close enough to another Apple device to work

B. Security Concerns[4]
1. Many expressed concerns about unwanted personal tracking
2. Apple attempted to address that by incorporating warnings from the device and on Apple devices, which solves some of the problem
3. However, those warnings stop after three days and do not broadcast to Android devices

# #Data_Breach

I. What is Ransomware?[5]
A. Form of malware that encrypts a victim's data, requiring the victim to pay a "ransom" to regain control of their data.
1. Payment is normally in the form of cryptocurrency
B. Often delivered via phishing scam - someone within the organization opens an attachment to an email masquerading as a file they should trust.
C. Also leakware or doxware attacks, where an attacker threatens to publicize sensitive data allegedly on victim's hard drive unless a ransom is paid.
D. Targets are often organizations who need immediate access to their data - governmental agencies, hospitals, banks.
E. To prevent ransomware
1. Keep operating system updated to ensure the organization has fewer vulnerabilities to exploit.
2. Don't install software unless you know what it does
3. Do not give administrative privileges to all employees
4. Consider antivirus or whitelisting software
5. Back up files
F. In 2017, ransomware resulted in $5 billion in losses
1. Eskenazi Hospital targeting August 2021, paid $55,000 to unlock data[6]
2. City of Gary, Indiana attacked May 2021[7]

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[4] https://www.washingtonpost.com/technology/2021/05/05/apple-airtags-stalking/

[5] https://www.csoonline.com/article/3236183/what-is-ransomware-how-it-works-and-how-to-remove-it.html

[6] https://digitalguardian.com/blog/following-ransomware-attack-indiana-hospital-pays-55k-unlock-data

[7] https://abc7chicago.com/gary-indiana-ransomware-attack-cyber-cybersecurity-hack/10625374/

II. Indiana Data breach notification requirements[8]
    A. Covered in Ind. Code §§4-1-11, et. seq.; 24-4.9 et. seq.
        1. Must be made without "unreasonable delay"
        2. Customarily, 45 days, though that time frame is not codified in Indiana
III. Data breaches continue to be an issue
    A. In August 2021, the Indiana Department of Health announced an Australian cybersecurity company Upguard improperly accessed the data of approximately 750,000 Hoosiers who had submitted their information to an online COVID-19 tracing survey database.[9]
        1. Upguard signed a "certificate of destruction" to confirm that the data was not released to a third party and was destroyed.
        2. Affected parties were sent a letter in the U.S. Mail notifying them that one year of free credit monitoring is available.
IV. *In re Blackbaud, Inc., Customer Data Breach MDL Litigation*, 2021 WL 3568394, 2021 U.S. Dist. LEXIS 151831 (D.S.C. 2021)
    A. Blackbaud is a South Carolina-based company that provides "data collection and maintenance software solutions for administration, fundraising, marketing, and analytics to social good entities such as non-profit organizations, foundations, educational institutions, faith communities, and healthcare organizations." Its services collect and store Personally Identifiable Information (PII) and Protected Health Information (PHI) from its customers' donors, patients, students, and congregants.
    B. From February 7, 2020, to May 20, 2020, Blackbaud's systems were attacked in a two-part ransomware attack. Based on the forensic report supplied by Blackbaud, only some PII was affected, and not credit card data.
    C. Claimants in the lawsuit are not Blackbaud's customers, but those whose information was stolen as part of Blackbaud's customers' databases.
        1. Blackbaud did not notify claimants as required and instead waited until at least July 2020, and as late as January 2021.
    D. The relevant issue in the case is the definition of "business" under the California Consumer Privacy Act (CCPA), which was invoked by the California claimants.
        1. The CCPA provides "a private right of action for actual or statutory damages to '[a]ny consumer whose nonencrypted and nonredacted personal information . . . is subject to an unauthorized access and exfiltration, theft or disclosure as a result of the business's violation of the duty to implement and maintain reasonable security procedures and

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8 https://info.digitalguardian.com/rs/768-OQW-145/images/the-definitive-guide-to-us-state-data-breach-laws.pdf

9 https://www.theindianalawyer.com/articles/covid-contact-tracing-information-of-nearly-750k-hoosiers-improperly-accessed

practices appropriate to the nature of the information to protect the personal information[.]"

2. Under the CCPA, "business" is defined as a
    a) A sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity that is organized or operated for the profit or financial benefit of its shareholders or other owners that collects consumers' personal information or on the behalf of which that information is collected and that alone, or jointly with others, determines the purposes and means of the processing of consumers' personal information, that does business in the State of California, and that satisfies one or more of the following thresholds:
        (1) Has annual gross revenues in excess of twenty-five million dollars ($25,000,000), as adjusted pursuant to paragraph (5) of subdivision (a) of Section 1798.185.
        (2) Alone or in combination, annually buys, receives for the business's commercial purposes, sells, or shares for commercial purposes, alone or in combination, the personal information of 50,000 or more consumers, households, or devices.
        (3) Derives 50 percent or more of its annual revenues from selling consumers' personal information.
    b) Any entity that controls or is controlled by a business as defined in [the first paragraph of the statute] and that shares common branding with the business. "Control" or "controlled" means ownership of, or the power to vote, more than 50 percent of the outstanding shares of any class of voting security of a business; control in any manner over the election of a majority of the directors, or of individuals exercising similar functions; or the power to exercise a controlling influence over the management of a company. "Common branding" means a shared name, servicemark, or trademark.[10]
3. A "service provider" under the CCPA is
    a) "a sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity that is organized or operated for the profit or financial benefit of its shareholders or other owners, that processes information on behalf of a business and to which the business discloses a consumer's personal information for a business purpose pursuant to a written contract, provided that the contract prohibits the entity receiving the information from retaining, using, or disclosing the personal information for any purpose other than for the specific purpose of performing the services specified in the contract for the business,

[10] Cal. Civ. Code § 1798.140(c)

or as otherwise permitted by this title, including retaining, using, or disclosing the personal information for a commercial purpose other than providing the services specified in the contract with the business." Cal. Civ. Code § 1798.140(v).

4. Blackbaud claimed it was not a "business" as regulated by the CCPA; instead it was a "service provider" which exempts it from the CCPA.
5. Plaintiffs argue Blackbaud qualifies a business under the CCPA because "Blackbaud and its direct customers determine the purposes and means of processing consumers' personal information. Blackbaud uses consumers' personal data to provide services at customers' requests, as well as to develop, improve, and test Blackbaud's services." Plaintiffs pointed to Blackbaud's own claims to support their contention. Additionally, Blackbaud is registered as a "data broker" in California and has annual gross revenue over $25 million.
6. The trial court determined Blackbaud was a business not only based on Plaintiff's arguments but because "the statutory definition of 'service provider' suggests that 'business' is a broader term that encompasses 'service provider.'"

E. Some in the tech industry have criticized this decision because it equated business with service provider, despite the drafters of the CCPA finding it necessary to define both, which, in their opinion, means they should not be equated. Instead, those in the tech industry suggested that the court should have recognized how Blackbaud was functioning at the time of the breach - either as a business or a service provider.[11]

# #Censorship_Free_Speech_Social_Media

I. Six Constitutional concerns that arise when Congress tries to regulate platforms and online speech[12]
   A. Congress can't ban constitutionally protected speech
      1. SCOTUS has ruled in the past that racist hate speech, lies, and vile and traumatizing remarks to grieving families are protected under the First Amendment, as is offensive and dangerous speech. Only SCOTUS can reinterpret these key doctrines.
   B. Laws that restrict only illegal speech, but foreseeably cause platforms to restrict legal speech, can violate the First Amendment.

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[11] https://blog.ericgoldman.org/archives/2021/08/ccpa-definitions-confuse-the-judge-in-a-data-breach-case-in-re-blackbaud.htm

[12] http://cyberlaw.stanford.edu/blog/2021/01/six-constitutional-hurdles-platform-speech-regulation-0

1. Current protections under the DMCA aren't perfect, but they are better than adjudicating the hazy doctrines of "reasonable" and "reckless."

C. Laws requiring platforms to remove speech and laws requiring them to reduce its "reach" both trigger First Amendment scrutiny.
   1. There is precedent restricting reach or invasiveness of otherwise protected speech as it is relevant to broadcasting, but SCOTUS has repeatedly refused to extend those cases to cases involving online speech.

D. Laws explicitly or implicitly requiring platforms to monitor and police their users raise multiple constitutional issues.
   1. Especially when the platforms employ automatic filters fueled by AI. These filters cannot tell the difference between the source video that may be illegal, to a news story video featuring that information. Further, AI has been shown to be racially biased, targeting enforcement of African American English regardless of its content.
   2. Human filters aren't better, as they have similar and more nuanced issues of bias.

E. Laws designed to regulate conduct are a bad idea for regulating online speech, but Congress has reason to use them anyway.
   1. Because drafting laws to combat online speech is difficult because of the Constitutional implications, Congress sometimes tries to reuse or restructure existing laws in other contexts to address an online speech issue. This was done with SESTA and FOSTA.
   2. However, some of the language of the older laws don't allow for certain desired regulation.

F. Congress probably can't avoid First Amendment restrictions by merely incentivizing, instead of requiring, platforms to take down lawful speech.

II. Protecting Americans from Dangerous Algorithms (PADAA)[13]

A. Introduced in early 2021

B. Proposed to limit online planning or support for violent extremism and regulation of platforms' amplification, rather than simple hosting or transmission, of prohibited content.

C. Takes away CDA 230 immunity for platforms with over 50 million users in situations where they have amplified two specific kinds of unlawful conduct.
   1. Amplified, as defined by the bill, means the use of an "algorithm, model, or other computational process to rank, order, promote, recommend, amplify, or similarly alter the delivery or display of information."
      a) Chronological ranking, user-voted ranking, and search results are not prohibited
   2. Prohibited Conduct 1 - foreign terrorism

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13 http://cyberlaw.stanford.edu/blog/2021/02/one-law-six-hurdles-congresss-first-attempt-regulate-speech-amplification-padaa

3. Prohibited Conduct 2 - domestic extremism

D. Concerns about PADAA
   1. Where is the line? What type of foreign terrorism or domestic extremism speech is ok, and what is not?
      a) Could result in suppression of lawful speech
   2. Despite focusing on the platform's role in the "amplification" of speech and not the speech itself, PADAA raises First Amendment concerns by seemingly regulating online speech indirectly.
   3. Possible over enforcement of non-English speakers, especially Arabic speakers or Muslim users
   4. PADAA relies heavily on pre-existing laws, which may not fit well with regulating online speech

III. *Netchoice, LLC v. Ashley Brooke Moody, et al.*, Case 4:21cv220-RH-MAF (N.D. Fl. June 30, 2021)[14]

A. Challenges Florida Senate Bill 7072 as adopted by the 2021 Florida Legislature, which creates three new Florida statutes:
   1. F.S.A. §501.2041 - Unlawful Acts and Practices by Social Media Platforms
      a) Defines "social media platform" as
         (1) any information service, system, Internet search engine, or access software provider that:
            (a) Provides or enables computer access by multiple users to a computer server, including an Internet platform or a social media site;
            (b) Operates as a sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity;
            (c) Does business in the state; and
            (d) Satisfies at least one of the following thresholds:
               (i) Has annual gross revenues in excess of $100 million, as adjusted in January of each odd-numbered year to reflect any increase in the Consumer Price Index.
               (ii) Has at least 100 million monthly individual platform participants globally.
            (e) The term does not include any information service, system, Internet search engine, or access software provider operated by a company that owns and operates a theme park or entertainment complex as defined in s. 509.013.
      b) Under the statute, a social media platform may not, in relevant part:

[14] https://ilccyberreport.wordpress.com/2021/07/01/court-blocks-enforcement-of-floridas-social-media-law/

(1) may not take any action to censor, deplatform, or shadow ban a journalistic enterprise based on the content of its publication or broadcast. Post-prioritization of certain journalistic enterprise content based on payments to the social media platform by such journalistic enterprise is not a violation of this paragraph. This paragraph does not apply if the content or material is obscene as defined in s. 847.001.

2. F.S.A. §106.072 - Social Media Deplatforming of Political Candidates
    a) A social media platform may not willfully deplatform a candidate for office who is known by the social media platform to be a candidate, beginning on the date of qualification and ending on the date of the election or the date the candidate ceases to be a candidate. A social media platform must provide each user a method by which the user may be identified as a qualified candidate and which provides sufficient information to allow the social media platform to confirm the user's qualification by reviewing the website of the Division of Elections or the website of the local supervisor of elections.
    b) Upon a finding of a violation of subsection (2) by the Florida Elections Commission, in addition to the remedies provided in ss. 106.265 and 106.27, the social media platform may be fined $250,000 per day for a candidate for statewide office and $25,000 per day for a candidate for other offices.
    c) A social media platform that willfully provides free advertising for a candidate must inform the candidate of such in-kind contribution. Posts, content, material, and comments by candidates which are shown on the platform in the same or similar way as other users' posts, content, material, and comments are not considered free advertising.
3. F.S.A. §287.137 - Antitrust law punishing violation of F.S.A. §501.2041

B. The plaintiffs, trade associations whose members include social-media providers subject to the legislation at issue, allege the statutes:
    1. Violate the First Amendment’s free speech clause by interfering with the providers’ editorial judgment, compelling speech, and prohibiting speech
    2. Are vague in the violation of the Fourteenth Amendment
    3. Violate the Fourteenth Amendment’s equal protection clause by impermissibly discriminating between providers that are or are not under common ownership with a large theme park and by discriminating between providers that do or do not meet the Act’s size requirements
    4. Violate the Constitution’s dormant commerce clause
    5. Are preempted by CDA 230, which expressly prohibits imposition of liability on an interactive computer service for action taken in good faith to restrict access to material the service finds objectionable.

C. The court ordered a preliminary injunction on the enforcement of the relevant statutes, finding:
    1. The statutes violate CDA 230 by imposing penalties on social media platforms for deplatforming political candidates or restricting access to certain content and
    2. Forcing platforms to carry certain content violates the First Amendment.
D. Litigation is ongoing.

# #Right_to_Repair

I. What is the Right to Repair?[15]
    A. COVID-19 brought to the forefront a problem many consumers have faced for years - the inability to repair their own items without using the repair services of the original manufacturer or someone authorized by the original manufacturer.
    B. Manufacturers argue that allowing consumers the proprietary information to repair their own items violates IP law.[16]
        1. Many manufacturers construct their products in a way that prevents repair without special tools or knowledge
            a) As an example, for years, John Deere has sold tractors with software systems that can only be bypassed by an authorized repairperson, angering many self-reliant farmers. In 2021, John Deere implemented a training program for consumers which would teach them how to repair the software issues on their own, provided they have the proper certification.
    C. Proponents of Right to Repair laws argue that repairing an item is no different than customizing it or reselling it. They contend the manufacturer relinquishes control over the item at the time of sale.
II. Right to Repair laws have been introduced in 32 states, including Indiana, but none have passed
    A. A December 2016 report by the US Copyright Office entitled, “Software-Enabled Consumer Products,” concluded that copyright law does not, under most circumstances, restrict repair, tinkering, customization, security research, or resale.[17]

[15] https://themarkup.org/ask-the-markup/2020/10/20/0-electronics-right-to-repair-ventilators-iphone

[16] https://www.repair.org/stand-up

[17] https://www.copyright.gov/policy/software/software-full-report.pdf

B. On July 1, 2021, FTC Chair Lina M. Khan rescinded a 2015 antitrust policy statement that some felt constrained the FTC's ability to combat unfair "anticompetitive business tactics" such as restrictions on self-repair.[18]
C. On July 9, 2021, President Biden issued an executive order addressing some Right to Repair concerns[19]
    1. The order
        a) Affirms the administration's policy of enforcing antitrust laws to combat issues such as monopolies in repair markets.
        b) Urges the Chair of the Federal Trade Commission to enact rules to address "unfair anti-competitive restrictions on third-party repair or self-repair of items, such as restrictions imposed by power manufacturers that prevent farmers from repairing their own equipment."
        c) Orders the Secretary of Defense to "not later than 180 days after the dates of this order, submit a report to the Chair of the White House Competition Counsel, on a plan for avoiding contract terms in procurement agreements that make it challenging or impossible for the Department of Defense or service members to repair their own equipment, particularly in the field."

# #Self-Driving_Cars

I. Self-driving cars are being developed globally and will likely become integrated into U.S. roadways in the near future.[20]
    A. The National Highway Traffic Safety Administration adopted the Society of Automotive Engineers Automation Levels to classify self-driving vehicles
        1. 0 = No Automation; Zero autonomy, the driver performs all driving tasks
        2. 1 = Driver Assistance; Vehicle is controlled by the driver, but some diving assist features may be included in the vehicle design.
        3. 2 = Partial Automation; Vehicle has combined automated functions, like acceleration and steering, but the driver must remain engaged with the driving task and monitor the environment at all times.
        4. 3 = Conditional Automation; Driver is a necessity, but is not required to monitor the environment. The driver must be ready to take control of the vehicle at all times with notice.

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18 https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under

19 https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/

20 https://www.nhtsa.gov/technology-innovation/automated-vehicles-safety

5. 4 = High Automation; The vehicle is capable of performing all driving functions under certain conditions. The driver may have the option to control the vehicle.
6. 5 = Full Automation; The vehicle is capable of performing all driving functions under all conditions. The driver may have the option to control the vehicle.

B. Dangers of Self-Driving Vehicles[21]
   1. Currently have a higher rate of accidents than human driven cars, but the injuries sustained in incidents involving self-driving cars are less severe.
   2. Can create a false sense of security; most accidents involving self-driving cars occur when human drivers are distracted and do not take control over the vehicle when needed.
   3. Batteries used in most self-driving cars are highly combustible and difficult to extinguish.
   4. Experience some type of technological issue on the average of every eight miles in real world driving.
      a) 2016 - Tesla self driving technology caused a Tesla car to crash into the side of an 18 wheeler truck because it could not distinguish the white side of the truck against the brightly-lit sky.
      b) 2019 - driver dies due to self driving Tesla autopilot navigation error, an issue for which the driver had sought repair for several times prior to the crash
      c) 2021 - Waymo[22]
         (1) Waymo is a limited self driving ride hail service in Chandler, Arizona. It has had some technological issues…
            (a) During one incident, the Waymo car stopped in the middle of the street, and then moved when the Waymo roadside assistance human came to reclaim it. It then became stuck further down the road, which was lined with construction cones. A human Waymo driver drove the passenger to his final destination.
            (b) During another incident, a Waymo van paused at a stop sign and would not turn on a street lined with cones initially. When it did complete the turn, the van stopped in the road, blocking a partial lane of traffic. After it was stopped for four minutes, the van backed up, and further blocked the traffic lane. The construction crew removed a cone that

[21] https://www.natlawreview.com/article/dangers-driverless-cars

[22] https://www.kctv5.com/traffic-cones-confused-a-waymo-self-driving-car-then-things-got-worse/article_20889d51-8c4f-5dec-87ee-fbd17c457fbd.html

seemed to be in the van's way, but the car did not move. A few minutes later the van started to move without explanation and to the complete surprise of the Waymo human worker who was telling the passenger that roadside assistance was on the way. Further down the road, the Waymo van stopped again because of cones. Waymo roadside assistance arrived, and the human indicated he would take control of the van. However, as the human driver approached the van, the Waymo van drove a short distance away. The human driver was finally able to take control of the van and take the passenger to his destination.

5. More vulnerable to cyber attacks.
6. Unable to make split-second decisions or adjust for weather conditions; while self-driving vehicles can be extremely useful, they are still unable to adapt to some real-life driving situations.
7. Lack of governmental regulation regarding self-driving vehicles.

C. United States is projected to have 4.5 million self-driving vehicles on the road by 2035.

# #Investigation_Software

I. Many law enforcement agencies use mobile device forensic tools to extract data from mobile devices.[23]
   A. One vendor, Cellebrite, is an Israeli company used by many different law enforcement agencies (including some in Indiana) whose devices perform two parts of a system:
      1. Universal Forensic Extraction Device (UFED)
         a) Extracts the data from a mobile phone and backs it up on a Windows PC
      2. Physical Analyzer
         a) Parses and indexes the data to make it searchable
      3. System requires physical possession of the device
      4. Preserves data in its original format (see #Emoji Competency below)
   B. Signal, a private messenger app, was not pleased that Cellebrite had announced it could extract data from the Signal app on Android phones. It manipulated Cellebrite's technology and uncovered several security flaws that call into question the integrity and reliability of the data extracted, as well as the reports generated from that data.

[23] http://cyberlaw.stanford.edu/blog/2021/05/i-have-lot-say-about-signal%E2%80%99s-cellebrite-hack

1. By placing an arbitrary file on a mobile phone, Signal was able to force the Cellebrite system to execute code that not only manipulated the data imported into the Cellebrite report but also any past and future reports of Cellebrite with no detectable time stamp or indication of the attack.
2. Cellebrite then started to include random files that are not integral to app use but will likely cause problems with Cellebrite scans

C. In response, Cellebrite updated its terms limiting the products that can perform full iOS extraction.
D. What does this mean for the use of Cellebrite by law enforcement agencies?
    1. Any hack like the one run by Signal could spoil evidence, which is a crime; however, so is computer hacking.
    2. Cellebrite is not the only vendor, but the vulnerabilities call into question the reliability of other vendors as well
E. What does this mean to the legal community?
    1. Defense attorneys should hold prosecutors accountable for the reliability of the data extracted in these instances
    2. If a client has already been convicted, PCR attorneys might want to consider requesting to view the Cellebrite machine, if used.
    3. Remember Cellebrite only works on an unlocked phone - and Indiana Case law does not require a defendant to unlock a phone.
F. Also calls into question the reliability of other similar tools used by law enforcement to gather evidence
    1. TrueAllele - Analyzes DNA Samples
        a) Refuses to allow defense attorneys to examine internal code, claiming trade secret
    2. Stingray devices - used to mimic cell phone towers and force anyone in the immediate vicinity to connect to them
        a) Agencies using the devices had to sign Non-Disclosure Agreements
    3. Various algorithms used by state agencies to determine bail, benefit eligibility, employee promotion
G. To assist in combating these security flaws that may or may not be known to the manufacturer, and may be exploiting or improperly analyzing data, there have been calls for a number of years to update the DMCA Safe Harbor protections to include security research activities.[24]

II. Apple's efforts to combat Child Sexual Abuse Material (CSAM)[25]
    A. Announced August 2021 - will be be updates to iOS 15, iPadOS 15, watchOS 8, and macOS Monterey

[24] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3055814

[25] https://www.apple.com/child-safety/

B. New communication tools will enable parents to play a more informed role in helping their child navigate communication online
    1. Will blur sexually explicit photos sent to children
    2. Advise children that the photo is explicit and that parent will be notified if they view it
    3. Similar protections available if child tries to send sexually explicit photo
C. New applications of cryptography to help limit the spread of CSAM online
    1. New tech will allow Apple to detect known CSAM images stored in a user's iCloud photos
    2. If the photo has certain markers identified by child protection groups, it will be flagged for human review
    3. If child pornography is confirmed, the user's account will be disabled and Apple will notify the National Center for Missing and Exploited Children.
D. Siri and Search provide parents and children expanded information and help if they encounter unsafe situations; will intervene when users try to search for CSAM-related topics
    1. Points users to resources to report CSAM
    2. If user is searching for CSAM, advises that interest in the topic is harmful and problematic
E. Concerns[26]
    1. As the photo detection system works on mathematical triggers, once those triggers are determined, a user could be sent innocuous images with the relevant triggers to frame an innocent user.
    2. Use of the technology for government surveillance of dissidents or protestors
    3. Unknown manipulation and misuse of technology in ways unintended and unrelated to CSAM

# #Name_Image_Likeness

I. Historically, the NCAA has not allowed student athletes to benefit from the use of their name, image, or likeness ("NIL").
    A. In response to several state laws regarding this issue, on June 30, 2021, the NCAA issued an interim policy regarding the student athlete's ability to benefit from the use of their NIL.[27]
        1. For institutions in states without NIL laws or executive actions or with NIL laws or executive actions that have not yet taken effect, if an individual elects to engage in an NIL activity, the individual's eligibility for

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[26] https://www.cnet.com/tech/services-and-software/iphone-privacy-how-apples-plan-to-go-after-child-abusers-might-affect-you/

[27] http://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf

intercollegiate athletics will not be impacted by application of [NCAA] Bylaw 12 (Amateurism and Athletics Eligibility).

2. For institutions with NIL laws or executive actions with the force of law in effect, if an individual or member institution elects to engage in an NIL activity that is protected by law or executive order, the individual's eligibility for and/or the membership institution's full participation in NCAA athletics will not be impacted by application of NCAA Bylaws unless the state law is invalidated or rendered unenforceable by operation of law.
3. Use of a professional services provider is also permissible for NIL activities, except as otherwise provided by a state law or executive action with the force of law that has not been invalidated or rendered unenforceable by operation of law.
4. The NCAA will continue its normal regulatory operations but will not monitor for compliance with state law.
5. Individuals should report NIL activities consistent with state law and/or institutional requirements.

B. NCAA adopted an interim policy as it continues to "work with Congress to develop a collusion that will provide clarity on a national level."[28]

II. Practical Considerations when Navigating NIL Deals[29]

A. As laws vary from state to state and institution to institution, ensure the contract set forth comply with the relevant set of regulations.
B. Not all NIL deals are allowable
    1. Schools may require modification if there is a conflict between the proposal and an existing agreement with a university sponsor.
    2. Deals with companies that may harm the school's reputation are prohibited.
C. Some deal terms may affect eligibility
    1. "Pay to play" deals - bonuses for scoring a certain number of points, for example, are against NCAA regulations
    2. Deals that require a student athlete to enroll in a specific institution may also cost the student athlete their NCAA eligibility.
D. The Student Athlete's rights are not the only rights implicated in a NIL deal
    1. Remember the rights of third parties
        a) Can the sponsor use highlight reel footage owned by a third party?
        b) Did the school give its consent to use its trademark when a student athlete's image is captured by a third party?
        c) What about other student athletes with their own NIL deals?

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28 https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy

29 https://www.bodmanlaw.com/news/article-what-every-student-athlete-needs-to-know-six-key-issues-for-name-image-and-likeness-deals

E. Keep the long-term future in mind
    1. Think about the implications of a short term deal several years after the deal is over
        a) What if the student athlete or the sponsor becomes the subject of significant negative publicity?
        b) How will the student's participation in the deal now affect their post-athletic career?
F. NIL money can affect student aid
    1. Compensation for NIL deals is excluded from NCAA financial aid limitations, but the increased income could alter eligibility for need-based financial aid.

# #Emoji_Competence

I. *Rossbach v. Montefiore Medical Center*, 2021WL 3421569, 2021 U.S. Dist. LEXIS 147031 (SDNY Aug. 5, 2021).
    A. Andrea Rossbach alleged that her supervisor, Norman Morales, sexually harassed her over a period of time, and that her complaint regarding the issue resulted in retaliatory termination.
    B. Most of the evidence was anecdotal. However, Rossbach submitted to the court .pdf and .jpg copies of a text message with a "heart eyes" emoji in it that contained a sexual message that she claimed was from Morales. She claimed she received the message on her iPhone 5. She turned over her phone to the defense during discovery but they were never able to view the actual text message on her iPhone because her passcode did not work.
    C. Rossbach further contended that she could not view the text message on the iPhone 5 because the screen was cracked and had developed an "ink bleed." She then claimed the phone "flickered erratically." She purportedly submitted a picture of her iPhone 5 screen taken with her new iPhone X, however, the picture did not show a crack in the iPhone 5 screen.
    D. The court determined the image was fabricated based on:
        1. Rossbach's frequent change in status of the iPhone 5, specifically concerning whether the screen was cracked, flickering, or had ink bleed.
        2. The image submitted did not contain any elements that were consistent with any iPhone operating system including the way Morales' name was displayed, the battery life icon, the icons near the header, and the font used.
        3. Finally, the court noted that the design of the "heart eyes" emoji in the alleged text message "is the version displayed on iPhones running OS 13 or later. Because the visual characteristics of a text message displayed on an iPhone depend on the iPhone's OS, this version of the emoji is not displayed on iPhones running OS 10, even if the text message is sent from an iPhone running OS 13 or later to an iPhone running OS 10. . . . [T]he iPhone 5 is not capable of running OS 13."

E. The court dismissed the action with prejudice and ordered a "monetary sanction in the amount of the defendant's attorneys' fees, costs, and expenses associated with addressing Rossbach's fabrication[.]"

II. Lessons from Rossbach[30]
   A. Emojis vary based on device and operating system. Do not assume that the text message your client sees looks the same as what the other party or witness sees.
   B. You need to see the emojis as the sender and recipient actually saw them - do not rely upon what the emoji looks like on your device or on a picture or .pdf. Often discovery takes place years after the text message is sent, and it is possible the OS could have changed in the interim.
   C. If it's not possible to replicate the evidence in its native digital format, get declarations from the opposing party regarding the device and OS used at the time the text was sent. Then use variations in emoji versions to double-check the timeline and purported equipment and software.
   D. Not taking these steps could call into question attorney competence - if you don't know how to navigate these issues, work with someone who does!

# #Terms_of_Service

I. Types of online user agreements (a review)[31]
   A. Clickwrap agreements
      1. User affirmatively agrees to online agreement by clicking "I agree"
      2. Company must make terms of the agreement accessible via link near the check box or "I agree"
      3. Some clickwrap agreements have been successfully challenged based on the design of the page, the location of the link to the agreement, and the color and size of font used.
   B. Browsewrap agreements
      1. Assent to company's terms by using website
      2. User is advised of this assent normally by a notice somewhere on the screen indicating use is agreement to the terms.
      3. Rarely enforced because it does not require the user to take an affirmative step to agree to the terms.
   C. Sign-in-Wrap agreements
      1. Hybrid of Clickwrap and Browsewrap

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30 https://blog.ericgoldman.org/archives/2021/08/emoji-version-variations-help-identify-fabricated-evidence-rossbach-v-montefiore-medical.htm

31 https://www.pactsafe.com/blog/three-types-of-online-agreements-in-clickthrough-litigation

a) Do not require user to affirmatively agree to terms by clicking a button or checkbox
b) Instead notify user that, by clicking on a button to proceed, that user is agreeing to the terms of use.

II. *Silver v. Stripe, Inc.*, 2021 WL 3191752 (N.D. Cal. July 28, 2021)[32]

A. Stripe is the payment processor for Instacart, a service which provides personal shopping, mostly for grocery items. Silver represents a class of plaintiffs who allege violations of the California Penal Code based on certain privacy actions taken with the users' data by Stripe.
B. All users consented to a "sign in wrap" which appeared on the check out screen each time the user made an order.
C. The trial court determined some of the plaintiffs' claims should be dismissed based on the enforceability of the sign in wrap agreement, which it found "conspicuous and obvious":
    1. "First, the hyperlink to the privacy policy is displayed in a bright green font against a white background, which stands out from most of the surrounding text. Further, the hyperlink to the privacy policy is located close to the "place order" button, thus it is hard for a user placing an order to miss it. The bold font alerting consumers to the amount of the charge hold placed on their card calls additional attention to the area where Instacart's privacy policy is located. There is nothing about the text that makes it inconspicuous or nonobvious."
D. The lesson here, as it has been in most online agreements - understand what you are agreeing to! Don't just click the box!

[32] https://blog.ericgoldman.org/archives/2021/07/instacarts-privacy-policy-protects-stripe-from-consumer-privacy-claims-silver-v-stripe.htm

Indiana Law Update

# INTERNET SOCIAL MEDIA LAW

SEPTEMBER 21, 2021

**Jessica L. Ballard-Barnett & Seth R. Wilson**

INDIANAPOLIS

# #NEW_TECH

- Amazon Sidewalk
- Apple AirTags

# #NEW_TECH

- **Amazon Sidewalk**
  - **What is it?**
  - **Privacy Considerations**

# #NEW_TECH

- **Apple AirTags**
  - **What are they?**
  - **Privacy Considerations**

# #DATA_BREACH

- **Ransomware**
  - **What is it?**
  - **Why is it a problem?**

- **Data Breach Notification**
  - **Ind. Code §§4-1-11, et. seq.; 24-4.9 et. seq.**
  - **In re Blackbaud, Inc., Customer Data Breach MDL Litigation, 2021 WL 3568394, 2021 U.S. Dist. LEXIS 151831 (D.S.C. 2021)**

# #CENSORSHIP_FREE_SPEECH_SOCIAL_MEDIA

- **Regulating Platforms**
  - **Is speech free?**
  - **Laws restricting illegal speech**
  - **Laws requiring removal of speech**

- **Laws requiring monitoring**
- **Conduct regulation = speech regulation?**

#CENSORSHIP_FREE_SPEECH_SOCIAL_MEDIA

- **Protecting Americans from Dangerous Algorithms (PADAA)**
  - **What is it?**
  - **Concerns?**

# #CENSORSHIP_FREE_SPEECH_SOCIAL_MEDIA

- **Netchoice, LLC v. Ashley Brooke Moody, et al., Case 4:21cv220-RH-MAF (N.D. Fl. June 30, 2021)**
  - **Challenge to FL Statutes on social media issues**

# #RIGHT_TO_REPAIR

- **What is it?**
- **Intellectual Property concerns**
- **Legislative/Executive Status**

# #SELF-DRIVING_CARS

- It’s how you got here, right?
- Classification System
- Dangers!
- Tesla/Waymo

# #INVESTIGATION_SOFTWARE

- **Law Enforcement Agencies**
- **What is it?**
- **How does it work?**
- **Concerns**

# APPLE'S EFFORTS TO COMBAT CHILD SEXUAL ABUSE MATERIAL (CSAM)

- **What is it?**
- **How does it work?**
- **Concerns**

# #NAME_IMAGE_LIKENESS

- NCAA athletes
- Use of social media
- Considerations

# #EMOJI_COMPETENCE

- **Do you know what that emoji means?**
- **Rossbach v. Montefiore Medical Center, 2021WL 3421569, 2021 U.S. Dist. LEXIS 147031 (SDNY Aug. 5, 2021)**
- **Do you know how to defend against fake emoji?**

# #TERMS_OF_SERVICE

- No one will read this slide
- Types of Agreements/Inc. by reference
- Silver v. Stripe, Inc., 2021 WL 3191752 (N.D. Cal. July 28, 2021)

# Section Seven

# 2021 CRIMINAL
# CASE LAW UPDATE

Presented by:
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# Section Seven

## 2021 Criminal Case Law Update.....Kathie A. Perry
## Mark E. Kamish

Indiana Public Defender Council Legislative Update

## ACKNOWLEDGMENT

We are grateful to the Indiana Public Defender Council (IPDC) and especially to IPDC Director of Research and Publications Jack Kenney, Research Attorney Liz Houdek and Executive Director Bernice Corley for permission to use parts of their presentations from IPDC's 44th Annual Update, as well as the handout materials provided to you today.

Getting to know IPDC is a must for any Indiana attorney who chooses to represent clients accused of crime. While its mission is to support public defenders and those in the trenches of indigent defense, the IPDC has resources available to all criminal defense lawyers. Visit IPDC's website at https://www.in.gov/ipdc/ for more information.


## DISCLAIMER

All information provided is subject to constant and ongoing change. It should, therefore, only be used as a starting point for further research, investigation and study.

# I. SEARCH AND SEIZURE

## A. Warrantless Stops & Seizures

*State v. Torres*, (12/17/2020) 159 N.E.3d 1018, (Ind. Ct. App.), **Concurring judge requests legislative review of turn signal statute noting, "[a]ll Hoosiers will appreciate and benefit from a traffic code that reduces the opportunity for arbitrary enforcement."**

In a consolidated appeal, the Court of Appeals reversed the trial court's grant of two motions to suppress evidence obtained after traffic stops for failing to signal the intention to turn at least 200 feet in advance, as required by Ind. Code Section 9-21-8-25. Both defendants were driving on a city block approximately 500 feet in length, not speeding or driving erratically, and they both came to a complete stop and activated their turn signals before turning. The trial court determined that "in many circumstances within a normal city block it is impossible to comply" with that requirement. The Court of Appeals reversed, finding that regardless of whether compliance with the statute was possible under the circumstances, Defendants' failure to signal a turn until they reached a stop sign was enough for the officer, the same officer in both cases, "to establish a reasonable belief the statute had been violated, and that is all that is required." Judge Mathias concurred, writing separately to express his frustration "to be required to apply a statute that authorizes a traffic stop on any city street if the driver does not continuously signal for at least 200 feet before turning or changing lanes" and noting "this precise statute appears to be employed often to make arbitrary traffic stops."

*Cox v. State*, (12/21/2020) 160 N.E.3d 557 (Ind. Ct. App.) **No custody or *Pirtle* violation despite officer's request to search after the purpose of traffic stop was complete**

Defendant was a passenger in a vehicle that was stopped by police. Police found the vehicle to be unsafe, informed the occupants it would be towed and that they were free to leave. However, the driver and passengers all agreed to wait for a ride, which prompted the officer's request to search them for officer safety. Defendant gave his consent to search, resulting in the discovery of a small socket containing marijuana. Three other officers arrived on the scene. Defendant was given a summons and charged, tried and convicted of misdemeanor possession of paraphernalia. Defendant argued the purpose of the traffic stop had been fulfilled when he was detained and asked for consent to search, rendering his consent invalid. The Court of Appeals concluded that Defendant was never detained or in custody and was not coerced into providing consent to search. Thus, the *Pirtle* requirement to advise him he had the right to consult with an attorney before consenting to a search of his person was not triggered. The totality of the circumstances indicates Defendant's consent to search was knowing and voluntary and his Fourth Amendment rights were not violated. Held, denial of motion to suppress affirmed.

*Torres v. Madrid*, (03/25/2021) 141 S. Ct. 989, (U.S.) **The application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person**

Torres was involved in an incident with police officers in which she was operating a vehicle under the influence of methamphetamine and in the process of trying to get away, endangered the two officers pursuing her. In the process, one of the officers shot and injured her. Torres pleaded no contest to three crimes: (1) aggravated fleeing from a law enforcement officer, (2) assault on a police officer, and (3) unlawfully taking a motor vehicle. Later, she filed a civil-rights complaint in federal court against the two officers, alleging claims including excessive force and conspiracy to engage in excessive force. Construing Torres's complaint as asserting the excessive-force claims under the Fourth Amendment, the court concluded that the officers were entitled to qualified immunity. In the court's view, the officers had not seized Torres at the time of the shooting, and without a seizure, there could be no Fourth Amendment violation. The U.S. Court of Appeals for the Tenth Circuit affirmed.

Under the Court's precedents, common law arrests are considered seizures under the Fourth Amendment, and the application of force to the body of a person with intent to restrain constitutes an arrest even if the arrestee escapes. The use of a device, here, a gun, to effect the arrest, makes no difference in the outcome; it is still a seizure. There is no reason to draw an "artificial line" between grasping an arrestee with a hand and using some other means of applying physical force to effect an arrest. The key consideration is whether the conduct objectively manifests the intent to restrain; subjective perceptions are irrelevant. Additionally, the requirement of intent to restrain lasts only as long as the application of force. In this case, the officers' conduct clearly manifested intent to restrain Torres and was thus a seizure under the Fourth Amendment.

## B. Warrantless Searches/Arrests

*Johnson v. State*, (12/01/2021) 157 N.E.3d 1199 (Ind.) **Admission of evidence found after pat-down search affirmed under Fourth Amendment**

Defendant offered to sell a substance he called "white girl" to a fellow patron at a casino. The patron believed the term was slang for cocaine and reported the incident to security. After his report was verified by looking at the video surveillance, a Gaming Enforcement Agent led Defendant to an interview room and told him he would need to pat him down. During the pat-down, the agent felt what he called a "giant ball" in Defendant's pocket and immediately believed the lump was packaged drugs. He removed the item from Defendant's pocket, saw that it was a baggie containing a white powder, and placed him under arrest. Testing revealed the substance was baking soda, and Defendant was convicted of dealing in a look-a-like substance as a Level 5 felony. The Supreme Court found the agent was justified in performing a *Terry* stop after speaking to the other patron and viewing the surveillance video. Noting that the tipster stayed at the scene and confirmed his account to the agent, the court found "scant reason to doubt the veracity" of the account and that the agent had the necessary reasonable suspicion to stop Defendant. Next, the court found it was reasonable to believe Defendant was armed and dangerous so that the agent could lawfully perform a pat-down search. The facts supported the reasonableness of the pat-down because the agent suspected him of trying to sell drugs and was about to interview him one-on-one in a small windowless room early in the morning. Finally, the court found

the agent could seize the baggie when he immediately identified the lump as contraband the moment he touched it through Defendant's pocket. The agent immediately recognized, consistent with his training and knowledge of the situation, that the lump felt "like a ball of drugs." Held, the pat-down search did not run afoul of the Fourth Amendment and the trial court did not abuse its discretion in admitting the evidence obtained as a result. Justice Slaughter dissented, noting that unlike the majority he did not find Defendant's suspected drug activity, in combination with the time of the encounter and the fact the agent was alone in a room with the Defendant, would be enough to suggest Defendant was armed and dangerous. "Because neither the time nor the location gives rise to the inference that [Defendant] was armed, *Terry*'s critical link is missing, and this protective weapons search was unconstitutional."

*Triblet v. State*, (05/25/2021), 20A-CR-1686 (Ind. Ct. App.) **Officer could rely on criminal history to determine if Defendant "armed and dangerous"**

After a traffic stop for an expired license plate, a police officer searched Defendant and found a firearm. The Court of Appeals noted the "escalating events" of his passenger being arrested and his vehicle towed, combined with the officer's knowledge Defendant's criminal history precluded him from legally possessing a firearm, the size and shape of the bulge in Defendant's pocket as well as his attempts to conceal the firearm all support the officer's deduction he was armed and dangerous. The search was justified and reasonable under both the United States and Indiana constitutions. Held, denial of motion to suppress affirmed.

*Alexander-Woods v. State*, (02/03/2021) 163 N.E.3d 902 (Ind. Ct. App.) **Argument regarding police officer's qualifications to distinguish smell of marijuana from hemp waived on appeal**

On appeal of his convictions and habitual offender enhancement for possession of a narcotic drug, carrying a handgun without a license and possession of marijuana, Defendant challenged the admission of evidence as unconstitutional, and the evidence of marijuana admitted in court was fundamental error because a police officer failed to show he was qualified to distinguish between the odors of illegal marijuana and legal hemp. Defendant's failure to raise the "hemp argument" or challenge the officer's qualifications in the trial court was fatal to his claim that the trial court fundamentally erred in finding probable cause for the vehicle search. Moreover, waiver notwithstanding, Court found that the facts and circumstances within officer's knowledge support the trial court's finding of probable cause for the vehicle search.

*Marling v. Littlejohn*, (07/13/2020) 964 F.3d 667 (7th Cir.) **Police acted within discretion authorized by their local policy in conducting inventory search**

Defendant arrested on a warrant while driving car. Officers took an inventory of car and found locked box in trunk. Officers opened locked box with a screwdriver, causing damage to the box, and found illegal drugs. Motion to suppress denied at trial and conviction affirmed by Court of Appeals. U.S. District Court for Southern District granted habeas corpus relief finding that because police department had a local policy that forbid damage to a container, the officer's damage to the locked box with a screwdriver was a violation of the police policy which was constitutional error, *citing Florida v. Wells*,

495 U.S. 1 (1990). Wells holds that the validity of an inventory search rests on the police department having a policy about when to take inventories and that compliance with the local policy is essential and a violation of the local policy also violates the Constitution. 7th Circuit reverses district court grant of habeas corpus relief stating in this case the local police policy gave the police discretion and here the officer who opened the locked box acted within the discretion permitted by the police department's local policy which forbade "unreasonable damage." Here the lock was damaged but not the box and there had been no finding below of unreasonable damage. 7th Circuit found the U.S. District court "misunderstood" the holding in *Wells*.

**Unlawful warrantless search of arrestee's vehicle in driveway**

*Combs v. State*, (07/09/2020) 150 N.E.3d 266, ***TRANSFER GRANTED*** (Ind. Ct. App.)

Warrantless search of Defendant's van following a crash violated his Fourth Amendment rights. After driving his van into an electrical box to avoid hitting another vehicle, Defendant took photos of the damage to the van, rummaged around under the driver's seat and then left the scene. A police officer who arrived shortly after followed a fluid trail that eventually led to Defendant's home at a nearby neighborhood, where he had parked the damaged van. Defendant, whom the officer suspected was under the influence of medication or drugs, then failed two field sobriety tests and stated that he had taken his prescribed Adderall medication. After agreeing to submit to a chemical test and being handcuffed for transport, but before he was taken to the hospital, Defendant told officers they could look under the seat of his van but not open the black bag they had found. But the officers searched the van in Defendant's driveway without a warrant after calling for the vehicle to be towed, finding three different controlled substances. Court of Appeals found that the warrantless search of Defendant's van was impermissible under the open view and plain view doctrines, as well as the Fourth Amendment. Additionally, the record supported a finding that the officers' inventory search was a pretext for searching the van, and that officers did not need the van in solving the OWI or leaving accident scene investigation. Held, possession of narcotic drug convictions reversed, operating while intoxicated and leaving accident scene convictions affirmed.

*Reagan v. State*, (11/06/2020) 157 N.E.3d 1266 (Ind. Ct. App.) **Warrantless strip search of misdemeanor arrestee at jail did not violate Indiana Constitution**

Although *Litchfield v. State*, 824 N.E.2d 356 (Ind. 2005) controls the constitutionality of a strip search under Article 1, Section 11 of the Indiana Constitution, the specific analysis regarding the reasonableness of warrantless strip searches set forth in *Edwards v. State*, 759 N.E.2d 626 (Ind. 2001) offers guidance. Here, after police arrested Defendant on suspicion of operating a vehicle while intoxicated, she was taken to the processing center at the Marion County jail. There, an officer conducted a strip search after noticing Defendant was "fidgety," shaking her leg, trying to engage in small talk and looking around the room. The search revealed a small baggie of cocaine stuck to Defendant's breast. Court acknowledged that the search involved a high degree of intrusion, but law enforcement needs balanced in favor of permitting the strip search here. Where, as here, law enforcement has a high degree of suspicion that an arrestee is concealing contraband, there is a strong

need to search for contraband during the intake procedures for the safety of the offender and the jail population. *Edwards* disapproved of the routine practice of subjecting all misdemeanor arrestees to a warrantless strip search but permitted them on the basis of reasonable suspicion. The search here was reasonable under the totality of the circumstances and did not run afoul of Article 1, Section 11 of the Indiana Constitution. Thus, the court did not abuse its discretion in admitting evidence obtained from the strip search. Held, judgment affirmed. Weissmann, J., dissenting, believes that the officer's vague "feeling" that Defendant may have been in possession of contraband after her arrest for OVWI was insufficient suspicion to justify the strip search. Although law enforcement "undeniably" has a strong interest in protecting inmates and keeping jails free from contraband, the State did not establish that law enforcement needs for a strip search were significant in this case. The dissent warned the majority's holding "would render per se reasonable a strip search of every person being processed for a substance offense, no matter how minor."

*Shorter v. State*, (07/06/2020) 151 N.E.3d 296 (Ind. Ct. App.) **Defendant's statement to confidential informant that he wanted to leave town was an exigent circumstance justifying warrantless arrest**

Fact that officers knew Defendant wanted to leave town was an exigent circumstance justifying Defendant's warrantless arrest. Defendant sold drugs to a confidential informant and later told the informant that he knew the police were looking for him and he wanted to leave town. Police went to home where they knew Defendant to be staying and watched him, for over forty minutes, through an open door where they could plainly see him sitting on a couch. Police approached the house and arrested Defendant inside the home and then brought in a drug sniffing dog who indicated on drugs outside the home. Defendant was tried and convicted of dealing and conspiracy to deal in methamphetamine and narcotics. The Court of Appeals found the warrantless search of Defendant was supported by probable cause and exigent circumstances, although stating "it would have been advisable and best practice for the officers to at least attempt to obtain an electronic warrant prior to arrest but because there were sufficient exigent circumstances...a warrant was not required." The search was also reasonable under the Indiana Constitution. Judge Pyle, dissenting, finding that an arrest warrant could have been obtained, especially when considering the advent of technology that could have assisted in obtaining an arrest warrant in an expedited manner. Also, there was no evidence of the existence of an emergency or imminent destruction of evidence, and police could have obtained an arrest warrant based upon an identifiable description of Defendant even without the police knowing Defendant's actual name.

## C. Warrantless Home Searches

Caniglia v. Strom, (05/17/2021) No. 20–157 (U.S.) "**Community caretaking" exception cannot justify warrantless home entry and search**

Law enforcement cannot legally enter homes without a warrant, exigency or consent, even in cases where doing so may benefit the public interest under the "community caretaking" exception. Here, police acted unlawfully by entering a Caniglia's home and removing his firearms without a warrant after he had expressed thoughts of suicide and was taken to the hospital for a psychiatric evaluation.

Police entered the home under a “community caretaking” exception that allows entry in cases where doing so benefits the public interest, which has traditionally applied to incidents regarding vehicles but not in homes. Noting that "[w]hat is reasonable for vehicles is different from what is reasonable for homes," the Court ruled that the community caretaking exception could not be extended to the home without violating the Fourth Amendment. Kavanaugh, J., issued a concurring opinion to note that the court's decision does not affect police officers’ ability to take “reasonable steps to assist those who are inside a home and in need of aid” that are protected under a separate “exigent circumstances” doctrine, such as when an elderly person has fallen or to prevent a potential suicide. Alito, J., concurring, noted that court's ruling implicates but does not address “red flag” laws that allow police to seize guns pursuant to a court order to prevent harm to oneself or others.

*State v. Ellis*, (04/23/2021) No. 21S-CR-159 (Ind.) **Waiver of "right against search and seizure" clearly informs community-corrections participant of waiver of right against warrantless/suspicionless searches**

A community-corrections home-detention contract stating that the defendant “waives all rights against search and seizure” unambiguously informs the defendant that a search may be conducted without reasonable suspicion. Additional language specifying that the defendant may be searched without reasonable suspicion and waives the right against "unreasonable" search and seizure is unnecessary. To the extent that *Jarman v. State,* 114 N.E.3d 911 (Ind. Ct. App. 2018), suggests language should be used in community-corrections contracts to clarify that the defendant is consenting to warrantless, suspicionless searches, Court found that language unnecessary. When an individual waives his rights against search and seizure, this waiver clearly encompasses the right to be free from search and seizure absent reasonable suspicion. Here, because Defendant unambiguously consented to community correction searches absent reasonable suspicion, the trial court erred when it suppressed the evidence obtained from the search of his home. Held, transfer granted, Court of Appeals' opinion at 153 N.E.3d 305 vacated, trial court's judgment reversed.

## D. Search Warrants

*Albrecht v. State*, (12/16/2020) 159 N.E.3d 1004 (Ind. Ct. App.) **Substantial basis for search warrant for hard drive found in bathroom of residence**

Police sought and obtained a search warrant for Defendant’s apartment based upon allegations of child molestation. The search warrant was specifically for condoms believed to be located in the bathroom of the residence. While searching for condoms in the bathroom, police found an external hard drive within arm’s reach of the condoms. The police sought a second warrant to seize and search the hard drive and Defendant’s cell phone. Court of Appeals finds that considering the totality of the circumstances, the nature of the crime being investigated, the proximity of the hard drive to other evidence relating to the crime, the clandestine storage of the hard drive, the nature of the hard drive and the reasonable inference that a bathroom is not where one usually stores such an item and the normal and common sense inferences that perpetrators in child molest cases often photograph or video themselves committing sexual acts, the issuing judge had a substantial basis for concluding that

probable cause existed for the issuance off the search warrant and that there was a fair probability that evidence of a crime may be present on the hard drive. The warrant set forth that police sought potential seizure and review of digital media that would include procedures to find hidden, erased, compressed, password-protected or encrypted files and by a computer expert which may require examination of all stored data. The Court of Appeals finds the warrant was not impermissibly general but contained sufficient particularity of the items to be seized and scope of search to be performed. Court explains that a government's search of an electronic device is like looking through drawers in a filing cabinet for relevant files which may require sifting through a great deal of information on the electronic device to find the relevant information. Held, denial of motion to suppress affirmed.

*Ryder v. State*, (06/29/2020) 148 N.E.3d 306 (Ind.) **Filing requirement for search warrant satisfied where signing judge certified that probable cause affidavit had been delivered to her at time of warrant's authorization**

A blood-draw search warrant application satisfied the filing requirement of Ind. Code § 35-33-5-2(a) because the signing judge's uncontroverted certification that an affidavit had been delivered to her at the time of the warrant's authorization established that the filing requirement had been satisfied. Police arrived at an early morning crash to find that Defendant had been driving the wrong way on I-465. After refusing a breath test, Defendant was taken to the arrestee processing center but no judge was available to sign a warrant for a blood draw. So, the state trooper called a local judge who met him at a gas station to review the probable cause affidavit and proposed warrant for blood draw. A warrant was obtained. Defendant was taken to the hospital for a blood draw. The probable cause affidavit and warrant were not file-stamped with the clerk until four hours later. Defendant moved to suppress the results of the blood draw, arguing the results were obtained in violation of Ind. Code § 35-33-5-2 (warrant requirement statute), the Fourth Amendment and Article 1, section 11 of the Indiana Constitution. Defendant argued the search warrant was unauthorized because it was obtained prior to an affidavit being filed with the judge, in violation of Ind. Code 35-33-5-2. Trial court granted Defendant's motion to suppress, which was affirmed by a divided panel of the Indiana Court of Appeals. On transfer, the Indiana Supreme Court unanimously reversed and remanded, finding that the warrant-authorizing judge certified contemporaneously, and in writing, that the probable cause affidavit had been properly filed with her when the search warrant was issued. Second, the court held that even if the affidavit was filed a few hours after it was presented to the authorizing judge — as the trial court found — it was still valid under Indiana's substantial compliance filing doctrine and suppression of evidence obtained from the search warrant was not justified.

*Bunnell v. State*, (12/18/2020) 160 N.E.3d 1142, ***TRANSFER GRANTED*** (Ind. Ct. App.) **Officers must explain basis for "training and experience" to get search warrants based solely on drug odors**

The smell of marijuana emanating from a residence, when detected by law enforcement that is qualified to identify and distinguish the odor, by itself can establish probable cause for issuing a search warrant. But where, as here, probable cause for a warrant is premised solely on law enforcement's detection of the odor of raw marijuana, the assertion must be based on more than a personal belief: the affiant-officer must provide some information about the detecting officers' relevant qualifications,

experience, or training in identifying and distinguishing the odor that led to the ultimate conclusion. *Johnson v. United States*, 333 U.S. 10, 13 (1948). Here, while responding to a domestic violence call at Defendant's home, two sheriff deputies smelled raw marijuana emitting from one of the doors of the residence. This odor, based on the deputies' "training and experience," was the sole basis for establishing probable cause to search the home. But the probable cause affidavit did not include any information about the deputies' relevant qualifications, experience, or training from which a warrant-issuing judicial officer could find either deputy qualified to identify or distinguish the odor of raw marijuana. Thus, the affidavit failed to provide the warrant-issuing judge with a substantial basis for its probable-cause determination. Because there was no probable cause to issue the warrant under "the unique facts and circumstances of this case," the initial search of Defendant's home was illegal and the exclusionary rule requires suppression of the evidence seized from both the initial search warrant and a subsequently issued warrant. Held, denial of motion to suppress reversed.

*State v. Stone*, (08/31/2020) 151 N.E.3d 815 (Ind. Ct. App.) **Statements made to police by person who sold stolen gun to Defendant were statements against interest and supported probable cause for search warrant**

After an investigation of two stolen firearms led police to Defendant – who had purchased one of the guns -- law enforcement received and executed a search warrant for Defendant's home. The search resulted in the discovery of multiple firearms, though not the stolen gun, as well as drugs and $6,000 in cash. Defendant was arrested at the scene for possession of methamphetamine and later charged with Level 4 felony unlawful possession of a firearm by a serious violent felon, and Level 5 felony possession of methamphetamine, as well as Level 5 felony possession of a narcotic drug and Class A misdemeanor theft. The trial court granted Defendant's motion to suppress all evidence seized as a result of the search warrant, expressly determining that "[t]he analysis of the facts in this case is controlled by the Indiana Supreme court's holding in *State v. Spillers*, 847 N.E.2d 949 (Ind. 2006)." But the Indiana Court of Appeals reversed, agreeing with the State that the warrant was supported by probable cause and that the trial court erred in suppressing the evidence. Specifically, the appellate court disagreed with the trial court's finding that statements to law enforcement by the person who sold the gun to Defendant were not declarations against penal interest. Reversed and remanded.

*Hardin v. State*, (06/23/2020) 148 N.E.3d 932 (Ind.) **Search extended to vehicle on curtilage even though not specifically listed on warrant**

Though not explicitly listed in the search warrant, it was not improper for police to search Defendant's vehicle which he drove up and parked on his driveway while they were executing the warrant. The warrant permitted police to search areas of Defendant's yard, curtilage, and the interior of his home. The search did not violate the Fourth Amendment because police knew that Defendant owned and controlled the vehicle searched and objectively reasonable indicia showed the same, so the vehicle in this situation fell within the scope of the warrant for the home. Balancing the three factors set forth in *Litchfield v. State*, 824 N.E.2d 356 (Ind. 2005), a 3-2 majority of the Supreme Court held the search did not violate Article 1, Section 11 of the Indiana Constitution because the high degree of law-enforcement concern and moderate law-enforcement need outweighed the moderate intrusion caused

by the search, so the search was constitutionally reasonable under the totality of circumstances. Held, transfer granted, Court of Appeals' opinion at 124 N.E.3d 117 vacated, judgment affirmed. Slaughter, J., concurring, urges Court to reconsider *Litchfield* given the "widely varying conclusions" and "ongoing uncertainty among litigants and lower courts" in applying its three factors. David, J., joined by Rush, C.J., concurring with the majority's Fourth Amendment analysis, but would find that evidence obtained from Defendant's vehicle must be suppressed under Article 1, Section 11 because the search was "highly intrusive" and law enforcement needs were "extremely low." Because police could have and should have obtained a warrant to search Defendant's vehicle, the search was unreasonable under the Indiana Constitution.

*Brown v. Eaton, Hancock Co. Prosecutor*, (02/10/2021) 164 N.E.3d 153 (Ind. Ct. App.) **Erroneous exclusion of cellphone data in civil forfeiture proceeding**

In civil forfeiture proceeding, trial court erred in excluding data obtained from Defendant's cell phone on the basis of a nine-day delay in the officer's execution of the search warrant. Defendant argued the search of his cell phone was unconstitutional under the Indiana Constitution. Under the *Litchfield* analysis, Court found the cellphone search is intrusive, but law enforcement has a broad need to combat the war on drugs and probable cause was found to issue the search warrant in this case. On balance, police did not unreasonably execute the search warrant and the cell phone data should have been admitted as evidence. Court noted that the amendment of I.C. 35-33-5-7 to include subsection (f) was a remedial measure intended to clarify that a search warrant is considered "executed" for purposes of the statute when officers seize the items described in the search warrant. The Court remanded the case for a new evidentiary hearing where Defendant's pre-*Miranda* statements should be excluded but the cellphone data may be admitted.

## *II.* CONFESSIONS/COMPELLED TESTIMONY

*State v. Diego*, (08/19/2020) 150 N.E.3d 715, (Ind. Ct. App.) **D's statements properly suppressed -- custodial interrogation without warnings**

Trial court did not err in granting Defendant's motion to suppress his statement to police because, as in *State v. Ruiz*, 123 N.E.3d 675 (Ind. 2019), his statement was obtained during a custodial interrogation without *Miranda* warnings. In finding substantial evidence of probative value to support trial court's suppression order, Court of Appeals noted that Defendant's freedom of movement was curtailed to the degree associated with an arrest and he was subjected to inherently coercive pressures such as those at issue in *Miranda*. The police determined and controlled the environment in which the interrogation took place, *i.e.*, Defendant was removed from his girlfriend and placed in a closed room in a police station with a police department employee sitting between Defendant and the closed door. Although Defendant was told he was not under arrest and was free to leave, he was also told that he "needed" to be there to answer the detective's questions. He was never told that he was free to refuse to answer the questions, nor was he told that he could leave through the secured police station door without police assistance. Additionally, the Court noted that Defendant was subjected to prolonged questioning that lasted 40 minutes and that the questioning was "persistent and accusatory." The

detective repeatedly stated as fact that Defendant had engaged in sexual contact with the complaining witness, repeatedly accused Defendant of lying when he denied such activity, and repeatedly asked questions that focused on encouraging Defendant to admit to the detective's description of the wrong-doing.

*Pedraza v. State*, (06/05/2020) 145 N.E.3d 152 (Ind. Ct. App.) ***Miranda* does not require accused to be informed of specificity of charges**

Court granted Defendant's petition for rehearing to clarify its factual recitation regarding the circumstances of Defendant's *Miranda* waiver. In its original memorandum opinion, Court rejected Defendant's argument that his *Miranda* waiver was not knowing or voluntary because detective did not recite the specific charges pending against him despite Defendant's multiple requests during the custodial interrogation. Court *clarified* that the detective referred to the incident involving victim's death approximately twenty seconds after Defendant signed the *Miranda* waiver.

*Crabtree v. State*, (09/02/2020) 152 N.E.3d 687 (Ind. Ct. App.) **Defendant who voluntarily went to police station, took polygraph examination and spoke to police officers not in custody for *Miranda* purposes**

Defendant argued his statements, made under questioning after a polygraph examination he volunteered to take and conducted at a police station, were inadmissible under the Fifth Amendment to the United States Constitution. Defendant argued the trial court erred by admitting his statements because: (1) he was in custody and, therefore, was entitled to *Miranda* warnings; (2) he was not advised of his *Miranda* rights a second time after the polygraph examination ended; and (3) law enforcement violated his Fifth Amendment right against self-incrimination by failing to honor his right to remain silent. The Court of Appeals compared the facts of this case to *State v. Ruiz*, 123 N.E.3d 675 (Ind. 2019) to determine if Defendant was in custody. In Ruiz, the Indiana Supreme Court determined that the defendant's freedom of movement had been curtailed and the aggressive nature of the questioning added up to a situation where a reasonable person would not feel free to end the interrogation and leave. Court found the facts here distinguishable because Defendant volunteered to take a polygraph examination, was advised that the interview room door was unlocked; and Defendant could simply ask officers to unlock the door that was locked to leave. Defendant was advised of his rights and signed a waiver. And even though twice during conversations with police Defendant asked to reschedule the interview, on both occasions Defendant continued talking to the officers and answering questions. Unlike in Ruiz, the officers' questioning was not aggressive or deceptive, and the officers did not outnumber Defendant. Defendant argued he should have been re-read his *Miranda* rights after the polygraph examination and prior to subsequent questioning. The Court of Appeals concluded Defendant was not in custody and, thus, was not entitled to *Miranda* warnings, much less a second *Miranda* warning. Defendant argued he twice invoked his right to remain silent by asking to reschedule his interview and because the officers did not stop the interrogation when he asked to reschedule, his statements to the officers were inadmissible. Court of Appeals finds here the assertion was not clear and unequivocal and Defendant continued to talk to the officers even after asking to reschedule.

*Brown v. Eaton, Hancock Co. Prosecutor*, (02/10/2021) 164 N.E.3d 153 (Ind. Ct. App.) **Erroneous admission of pre-*Miranda* statements and exclusion of cellphone data in civil forfeiture proceeding**

In a civil forfeiture proceeding, trial court abused its discretion by admitting Defendant's pre-*Miranda* statements from a traffic stop in violation of his Fifth Amendment right against self-incrimination. While forfeiture proceedings are civil in nature, there is a punitive nature to them because the State uses them to confiscate property associated with criminal activity. Here, Defendant was in custody and questioned without receiving warnings, thus his pre-*Miranda* statements should not have been admitted.

*Ross v. State*, (09/02/2020) 151 N.E.3d 1287 (Ind. Ct. App.) **Custodial statements given to police were voluntary and and did not violate *Miranda***

Custodial statements given to police were voluntary and and did not violate *Miranda*. Court of Appeals held that although Defendant was in custody, his statements were volunteered and not the result of interrogation. And even assuming that removing the Tupperware lid and showing it to Defendant was an action likely to elicit an incriminating statement, it was merely cumulative of his first statement. Consequently, the Court of Appeals found the admission of the second statement, even if erroneous, was harmless error. Judge Mathias concurred in result but wrote separately to note that the police officers never advised Defendant of his *Miranda* rights, not when he was placed in restraints, when his car was searched, when he was told he had a warrant, or when he was taken to the police station and the failure to provide *Miranda* warnings risked that any statements would be inadmissible. Judge Mathias found the police conduct of showing the content of the container to Defendant was reasonably likely to elicit an incriminating response from him. However, because his response was merely cumulative of his previous statement, which was volunteered, any error in the admission of the statement was harmless.

*Perkins v. State*, (11/30/2020) 158 N.E.3d 1274 (Ind. Ct. App.) **Waiver of previously-invoked right to counsel during police interrogation**

Following Defendant's request for an attorney during his interview in a felony murder and attempted murder case, he initiated further discussions with law enforcement officers and knowingly, voluntarily and intelligently waived the right previously invoked. The initiation of further communication by an accused, standing alone, is not sufficient to establish a waiver of the previously invoked right to counsel. *Osborne v. State*, 754 N.E.2d 916, 922 (Ind. 2001). But here, there is no evidence that Defendant lacked the capacity to understand his rights, and at no point did police threaten, intimidate, deceive, or make promises in order induce him to continue the second interview. The decision to waive his right to counsel at the start of the second interview was an informed one. Accordingly, under the totality of circumstances, Defendant's Fifth Amendment right to counsel was not violated and the trial court did not abuse its discretion by admitting the statements Defendant made during his second interview with police.

*Johnson v. State*, (06/24/2020) 150 N.E.3d 647 (Ind. Ct. App.) **Insufficient evidence of corpus delicti to support admission of confession**

Complaining witness (C.W.) did not appear in court for Defendant's trial for Level 5 battery with a deadly weapon. Over objection, testimony of police officer as to her conversation with C.W., photos of bruises of C.W., a stick and Defendant's out-of-court confession were admitted into evidence. Court of Appeals found insufficient evidence to support the inference that a crime had been committed with regard to battery with a deadly weapon before Defendant's out-of-court confession regarding that charge was admitted into evidence. Even assuming the photographs, the stick and the C.W.'s statements to the police officer were properly admitted, there was still insufficient evidence to support conviction that Defendant committed battery by a deadly weapon against C.W. Held, conviction reversed.

*Schneider v. State*, (10/20/2020) 155 N.E.3d 1268 (Ind. Ct. App.) **No abuse of discretion in admitting Defendant's statements**

In murder prosecution, trial court did not abuse its discretion in admitting two recorded statements and a written confession nor when it excluded a note purportedly written by the victim. The Court of Appeals found Defendant's alleged intoxication did not render his first statement involuntary when the detectives both testified that they did not notice any signs Defendant was intoxicated and a forensic toxicologist testified that a person with the levels of drugs found in Defendant's system would have been "conscious of what [he was] doing and would not [have] be[en] in a state of mania." The second challenged statement was given at the jail and the detective admitted at trial that he was not truthful with Defendant about recording the interview. The Court of Appeals found that the detective's deception was just one factor to consider in determining the voluntariness of the confession and held that under the totality of the circumstances the State proved by both a preponderance of the evidence and beyond a reasonable doubt that the statement was given voluntarily. During the recorded interview, Defendant wrote a confession but then attempted to cross out what he had written. In an incident that lasted less than one minute, several officers entered the room to help the detective retrieve the confession. The Court held the written confession was not induced by violence or other improper influence and the force used to retrieve the confession was not unreasonable.

*Seo v. State*, (06/23/2020) 148 N.E.3d 952 (Ind.) **Compelling D to unlock iPhone was testimonial and violated Fifth Amendment**

After the trial court ordered the Defendant to unlock her smartphone and a divided panel of the Court of Appeals reversed, the Indiana Supreme Court accepted transfer and held that the compelled production of an unlocked smartphone is testimonial and entitled to Fifth Amendment protection—unless the State demonstrates the foregone conclusion exception applies. A suspect surrendering an unlocked smartphone implicitly communicates that the suspect knows the password, the files on the device exist, and the suspect possessed those files. And, unless the State can show it already knows this information, the communicative aspects of the production fall within the Fifth Amendment's protection. Here, the court concluded that the State did not. Instead, law enforcement sought to compel Defendant

to unlock her iPhone so that it could then scour the device for incriminating information, providing the State with information that it did not already know. The court also noted that extending the foregone conclusion exception to the compelled production of an unlocked smartphone is concerning because such an expansion fails to account for the unique ubiquity and capacity of smartphones, may prove unworkable, and runs counter to U.S. Supreme Court precedent. Massa, J, joined by Slaughter, J, dissented because the resolution of the underlying criminal case rendered the issue moot and to resolve it under Indiana's "great public interest" exception would violate the core principles of federalism and leave our state's court as the final arbiter of our nation's fundamental law. Slaughter, J., wrote separately to express his view that the mootness standard of "novel, important issue of great public interest that will surely recur" cannot be reconciled with the actual-injury requirement implicit in our constitution's separation-of-powers command. Instead, he would adopt "capable of repetition, yet evading review" as the court's mootness standard.

# III. PRETRIAL PROCEEDINGS

## A. Charging Information/Amendments

*Hobbs v. State*, (11/30/2020) 160 N.E.3d 543 (Ind. Ct. App.) **Abuse of discretion to allow State's belated amendment to charging information**

Trial court abused its discretion by allowing the State, over objection and 14 days before trial, to amend the charging information to include three new counts of child molesting. The trial court also denied Defendant's motion for a continuance to prepare to defend against the new charges. While the new charges involved the same alleged victims, the State added a Class A felony child molesting charge relating to one of the victims for a time period that was not previously charged and a Level 1 felony child-molesting charge relating to the other victim when the prior charging information set forth only a Level 4 felony child-molesting charge for her. Although Defendant's primary defense at trial was the complaining witnesses were lying, he should have been given the opportunity to see if there was anything about the new allegations that supported his theory. Defendant cannot be faulted for not being able to explain to the trial court how a continuance would assist in his defense, as he did not know what he did not know. An investigation was fundamental. And fourteen days before trial was an insufficient amount of time to conduct one. It is too broad a stroke to say if a defendant's defense remains the same, then the State can add new charges up to the time of trial. Held, judgment affirmed in part and remanded with instructions to reverse convictions and corresponding sentences on added counts.

*Campbell v. State*, (12/21/2020) 161 N.E.3d 371 (Ind. Ct. App.) **Belated habitual offender charge requires State to affirmatively demonstrate good cause - ongoing plea negotiations**

Trial court abused its discretion in allowing the belated filing of an habitual offender enhancement one business day before trial without requiring or making any finding of good cause for the tardiness.

Defendant was charged with unlawful possession of a firearm by a serious violent felon (SVF), auto theft, three counts of resisting law enforcement, possession of marijuana and two counts of leaving the scene of an accident. In May, the State filed a Notice of Intent to File Habitual Offender Enhancement, notifying Defendant it intended to file an habitual offender sentencing enhancement if good faith plea negotiations were unsuccessful. Nine months later, on the eve of trial, the State filed the Habitual Offender Enhancement. The State argued the belated filing was due to ongoing plea negotiations and that it waited until the last minute to file the Habitual Offender Enhancement to give Defendant the opportunity to accept a plea offer. The trial court found good cause and allowed for the late filing. Trial counsel objected and moved for a continuance, which was granted. In finding an abuse of discretion in allowing the late habitual offender enhancement, the Court of Appeals found the State's tendering of the same plea offer several times and then asking Defendant if he wanted to make a counteroffer is not a bona fide ongoing plea negotiation. Judge Brown, concurring in part and dissenting on this issue, found that because the intent to file the habitual offender enhancement was filed nine months prior to the charge being filed and then the trial did not occur until four months after the charge was filed, the trial court did not abuse its discretion in allowing the State to file the enhancement.

## B. Bail/Initial Hearing

*DeWeese v. State*, (02/15/2021) 163 N.E.3d 357 (Ind. Ct. App.) **Defendant who was not a flight risk entitled to pre-trial release regardless of alleged victim's testimony of fear of release**

Indiana Criminal Rule 26 provides that, where a qualifying arrestee does not present a substantial risk of flight or danger to self or others, the trial court should release the arrestee without money bail or surety subject to such restrictions and conditions as determined by the court. Moreover, in setting the amount of bail or deciding whether to grant conditional pre-trial release, trial courts must consider all facts relevant to the risk of a defendant's failure to appear, including factors enumerated in I.C. 35-33-8-4(b). Here, Defendant was charged with Level 2 felony aiding, inducing or causing a burglary after police stopped the car she was driving and Defendant admitted to being the getaway driver in a home invasion gone wrong. Three others entered the home of a 67 year-old man and attempted to rob him. Gunfire was exchanged and one of the three was shot by the home owner. At Defendant's initial hearing, her bond was set at "$50,000 NO 10% CASH ONLY." Defendant lived with her mother and stepfather in a neighboring county. Defendant moved for bond reduction or conditional pretrial release. Among other things, Defendant noted a lack of criminal history, that she had been pre-screened and was eligible for electronic home detention through community corrections. She also was a high school senior who had been accepted into two universities to study nursing. But the homeowner testified that he was in fear of Defendant and the accomplices, and the trial court wrongly determined that was enough to find Defendant was not entitled to pretrial release under Criminal Rule 26. The Court of Appeals granted an emergency stay of that order pending appeal, which was granted, and Defendant was released to pretrial home detention. The Court of Appeals' decision reaffirmed its emergency order and found the trial court abused its discretion. The Court stated "Although we are sympathetic to [the home owner's] distress, [his] testimony that he remains in a fearful state cannot, standing alone, sustain

the trial court's finding that [Defendant] poses a risk to [his] physical safety. We decline to find, as the trial court did, that [his] testimony sufficed to establish, by clear and convincing evidence, that [Defendant] posed a risk to [his] physical safety," "Moreover, we regard the trial court's elevation of [his] testimony over the Indiana Code Section 35-33-8-4(b) factors, and its reliance 'primarily' thereon in denying [Defendant's] conditional pre-trial release, as impermissibly punitive. … We do not reach this conclusion lightly." Lastly, the record on appeal reveals that the State granted conditional pretrial release on home detention to one of the accomplices who went into the home, possibly wielding a firearm, and was shot by the homeowner. The court noted its decision was effective immediately and that Defendant was to remain in pretrial home detention.

*Utley v. State*, (04/07/2021) 20A-CR-1741 (Ind. Ct. App.) **Day of arrest not included in 15-day time frame for which a person arrested for a probation violation and not admitted to bail may be held in jail without a hearing**

Defendant arrested on a probation violation and held without bond argued he did not have a hearing within fifteen days as required by I.C. 35-38-2-3(d). Considering Trial Rule 6(A) and the general rule that when computing time for performance of an act which must take place within a certain number of days of the triggering event, Court of Appeals held that the day of the triggering event is not included. Here, Defendant had a hearing on the 15th day, excluding the day of his arrest. Held, probation violation affirmed.

*Doroszko v. State*, (10/02/2020) 154 N.E.3d 874 (Ind. Ct. App.) **Denial of request for bail in murder case affirmed**

In murder prosecution stemming from a fatal drug deal, trial court did not abuse its discretion in denying Defendant's request for release on bail. A defendant charged with murder can be held without bail "when the proof is evident, or the presumption strong." Ind. Const. art. I § 17; Ind. Code § 35-33-8-2. Here, Defendant armed himself and arranged for marijuana deal to be carried out in a well-lit location, showing his awareness of the inherent dangers and potential for violence associated with drug dealing. Evidence at bail hearing also showed that Defendant shot victim to prevent him from stealing the marijuana. Thus, it was reasonable for the trial court to find by a preponderance of the evidence that there was an immediate and causal connection to the contemporaneous crime being committed and the confrontation that led to victim's death. in so holding, Court rejected Defendant's reliance on *Gammons v. State*, 148 N.E.3d 301 (Ind. 2020), for the proposition that the State was obligated to prove beyond a reasonable doubt at the bail hearing that Defendant did not act in self-defense.

*Hall v. State*, (04/13/2021) 21A-CR-41 (Ind. Ct. App.) **Denial of bail in murder case affirmed; State disproved self-defense and sudden heat by a preponderance of the evidence**

Defendant, charged with murder, appealed the trial court's denial of his petition for release on bail, arguing the State failed to carry its burden to show that the proof of his guilt for murder is evident or the presumption of guilt is strong. Defendant argued that the State failed to rebut his claims he acted in self-

defense or in sudden heat. The Court of Appeals found the State disproved Defendant's self-defense claim by a preponderance of the evidence because his actions as a security guard who shot a woman as she drove away after an altercation were not a proportionate response to the situation. The Court also applied the preponderance of the evidence standard to the State's burden of proof to show Defendant did not act in sudden heat, holding that there was evidence to support the trial court's ruling the State carried its burden to show Defendant committed murder. Held, denial of petition for release on bail affirmed.

*Broering v. State*, (04/30/2021), 20A-CR-2232 (Ind. Ct. App.) **Failure to show prejudice from State's failure to hold initial hearing six days after arrest**

Ind. Code § 35-33-7-1(a) provides that a "person arrested without a warrant for a crime shall be taken promptly before a judicial officer . . . for an initial hearing in court" in which bail can be set. "If the prosecuting attorney states that more time is required to evaluate the case and determine whether a charge should be filed...then the court shall recess or continue the initial hearing for up to seventy-two (72) hours, excluding intervening Saturdays, Sundays, and legal holidays." Ind. Code § 35-33-7-3(b). Here, majority of Court implicitly concluded that a six-day delay in bringing Defendant before judge for an initial hearing automatically violated the promptness requirement of I.C. 35-33-7-1(a). When the State filed its request for a 72-hour extension, the trial court should have denied the request and set an initial hearing at which the prosecuting attorney could make the request on the record with Defendant present. However, Defendant did not show prejudice from State's failure to promptly bring him before a judicial officer for an initial hearing within 48 hours of his arrest. Held, denial of motion to reduce bond affirmed; Bradford, C.J., concurring in result with separate opinion.

## C. Speedy Trial

*Battering v. State*, (08/05/2020) 150 N.E.3d 597 (Ind.) **State seeking interlocutory appeal must seek stay of proceeding to toll Criminal Rule 4(C)'s one year limitation**

When the State pursues an interlocutory appeal and the trial-court proceedings get stayed as a result, the deadline is extended accordingly. *Pelley v. State*, 901 N.E.2d 494 (Ind. 2009). Here, trial court abused its discretion in denying Defendant's motion for discharge of his child molesting and child solicitation counts because the State waited too long to bring a stay of the proceedings for interlocutory appeal in order to toll Indiana Criminal Rule 4(C)'s one-year limitation. The State filed an interlocutory appeal after Defendant successfully suppressed certain evidence. Rather than request a stay of the proceedings—a motion that almost certainly would have been granted—the State specifically asked for only a continuance during the pendency of its appeal. After Defendant moved for discharge under Criminal Rule 4(C), the State belatedly asked for and received a stay of the proceedings. Defendant renewed his motion for discharge and the trial court denied his request. Reviewing the plain language of Indiana Rule of Appellate Procedure 14 in conjunction with Criminal Rule 4(C), Indiana Supreme Court held that Rule 4(C)'s clock continued to tick until the State formally moved for a stay of the proceedings.

Because this time continued to count against Rule 4's one-year limitation in prosecuting the charged crimes and the State exceeded this limitation, the Court found that Defendant is entitled to discharge.

*Watson v. State*, (10/21/2020) 155 N.E.3d 609 (Ind.) **CR 4(C) inapplicable to retrial of habitual offender (HO) determinations - constitutional speedy trial violation found**

One-year time limitation to bring a defendant to trial under Criminal Rule 4(C) does not apply to persons being held for habitual offender rehearings, Defendant's constitutional right to a speedy trial in this case was violated by the nearly six and a half years of delay. After securing post-conviction relief that vacated the 30-year habitual offender enhancement, retrial was continued on motions from Defendant, the State and the trial court, while two judicial recusals further delayed the proceedings. Defendant also wrote four letters to trial court demanding to be brought to trial when his first attorney was unresponsive to his inquiries and not filing documents with the court to expedite the process. The Court found that all four of the factors outlined in *Barker v. Wingo*, 407 U.S. 514 (1970), weighed in favor of finding a violation of Defendant's constitutional right to speedy trial. Six-plus years of delay to try Defendant on a habitual-offender allegation is uncommonly long; the government was responsible for a majority of that delay; Defendant appropriately asserted his right to a speedy trial, and has shown prejudice resulting from the extraordinary delay. Held, transfer granted, Court of Appeals opinion at 135 N.E.3d 982 vacated, habitual offender enhancement vacated.

**NOTE:** In a footnote, Court appears to send a strong signal that defendants should argue Article 1, Section 12 is more protective than the Sixth Amendment under *Barker v. Wingo*. The Court implied that the Indiana constitutional analysis for speedy trial claims is different from the federal analysis in that Article 1, Section 12 is a "directive" rather than a "right." Thus, a defendant need not assert his right to a speedy trial in making a claim under the Indiana Constitution because "the speedy trial demand is effectively made for him."

*Anderson v. State*,(01/26/2021) 160 N.E.3d 1102 (Ind.) **Pro se CR 4(B) motion for early trial after counsel appointed - D speaks to court through counsel**

Per Curiam. Court granted transfer of Court of Appeals' memorandum opinion to clarify that once counsel has been appointed, even if counsel has not yet entered an appearance, a defendant speaks to the court through counsel. When a defendant files a pro se motion after counsel has been appointed to represent him, such as Defendant's pro se request for an early trial under Indiana Criminal Rule 4(B), the trial court is not required to consider that request. *See Underwood v. State*, 722 N.E.2d 828, 832 (Ind. 2000). Before counsel's appointment, a trial court must consider a defendant's pro se motion, like a request for an early trial. But after counsel's appointment, this consideration is left to the trial court's discretion.

Here, counsel was appointed for Defendant at the initial hearing. Shortly thereafter, Defendant mailed the trial court a document requesting a speedy trial. At a subsequent hearing, the trial court explained that Defendant's "request [was] not an actual Speedy Trial request," because it was filed after counsel had been appointed. Though Defendant's counsel was not present at this hearing, the trial court advised Defendant that he could discuss with his attorney whether seeking a speedy trial would be

beneficial and that his "attorney actually makes the formal request." Because counsel had been appointed for Defendant, the trial court was not required to consider his pro se motion and therefore acted within its discretion by disregarding it. Held, transfer granted, Court of Appeals' memorandum decision summarily affirmed, judgment affirmed in part and remanded in part on other grounds.

*Owens v. State*, (04/30/2021), 20A-CR-1685 (Ind. Ct. App.) **Denial of Defendant's motion for release under Criminal Rule 4(A) affirmed**

Trial court properly denied Defendant's Criminal Rule 4(A) motion for release from jail, where less than six months was attributable to the Criminal Rule 4(A) period. Defendant was arrested on April 12, 2019 and could not be detained pending trial for more than six months from that date "except where a continuance was had on his motion, or the delay was caused by his act[.]" Crim. R. 4(A). Because Defendant moved to continue his scheduled jury trial on June 25, 2019 to depose State witnesses, the time limitation contained in Criminal Rule 4 was "extended by the amount of the resulting period of such delay caused thereby." Crim. R. 4(F). Defendant acknowledged that some delay following his continuance motion would be attributable to him, but argued that only the time between his continuance motion (June 25, 2019) to the date that the State requested the trial court to reschedule the trial (January 14, 2020), which totals 203 days, should be attributable to him, while the remaining 125 days from the State's trial scheduling request (January 14, 2020) to the new trial date (May 18, 2020) should be counted toward the six-month limitation of Criminal Rule 4(A). Court disagreed, noting that when a defendant requests a continuance, the elapsed period between his motion for a continuance and the new trial date is generally chargeable to the defendant. Stephenson v. State, 742 N.E.2d 463, 488 (Ind. 2001). Court declined to address the applicability of the Indiana Supreme Court's emergency COVID-19 orders, noting the issue was not before the Court. Held, judgment affirmed.

## D. Venue/Jurisdiction

*Nix v. State*, (10/26/2020) 158 N.E.3d 795 (Ind. Ct. App.) **Denial of change of venue affirmed despite juror's post-trial comments indicating knowledge of defendant's criminal history**

Defendant was convicted of Level 3 felony rape. He moved for a change of venue because, in the six months prior to his motion, he had been sentenced in three other, similar cases that had been reported in the local media. The court denied the change of venue motion. At the close of sentencing, defense counsel told the court that after trial the jury foreperson stated that several jurors knew about Defendant's prior cases. Court of Appeals rejects Defendant's argument he was denied an impartial jury and should have received a change of venue, finding the arguments as to how the jurors were exposed to his prior criminal history speculative and that the issue was not preserved. Moreover, Defendant invited error by: 1) questioning potential jurors about his prior criminal history; 2) not asking the court to separate or admonish the prospective jurors and not objecting to the procedure the court employed with the jurors; and 4) not renewing his motion for change of venue.

*Riggle v. State*, (07/16/2020) 151 N.E.3d 766 (Ind. Ct. App.) **Defendant failed to establish lack of jurisdiction over offense on Indian land**

Defendant was convicted of Unlawful Possession of a Syringe after an incident on tribal land of the Pokagon Tribe. Defendant challenged the sufficiency of the State's evidence and asserted the State failed to establish the offense was governed by state law and failed to prove he is non-Indian. Territorial jurisdiction is the authority for the State to prosecute an offense within its territorial boundaries. Although not necessarily an element of the offense, the State must prove it beyond a reasonable doubt. *Ortiz v. State*, 766 N.E.2d 370 (Ind. 2002). The State's witness, an officer with the Pokagon Band Tribal Police Department and a special deputy of the St. Joseph's County Sheriff's Department, was qualified to give an opinion as a skilled witness. The officer testified about his training regarding jurisdiction for a victimless crime on tribal land and the Court held that his testimony was sufficient to establish the authority of the State to charge Defendant in this case. The Court further held that the burden to show facts that would divest the trial court of jurisdiction under the Indian Country Crimes Act, specifically that Defendant was Indian, is on Defendant, not the State.

## E. Discovery

*Sawyer v. State,* (05/19/2021), 20A-CR-1446 (Ind. Ct. App.) **Statute restricting D's ability to take child depositions in sex cases conflicts with Indiana Trial Rules and is invalid**

Defendant, accused of sex crimes, petitioned the trial court for funds to obtain sworn testimony of witnesses. The prosecutor invoked newly-enacted IC 35-40-5-11.5, which requires "extraordinary circumstances" or prosecutorial consent to depose an alleged child victim under sixteen years of age. Defendant filed a motion for hearing pursuant to the statute, but objected to the hearing on the basis it shifted the burden of proof. The trial court denied Defendant's request to despose the child accusers after the hearing and certified its order for interlocutory appeal. Thereafter, Defendant challenged the statute, arguing that it significantly alters the ability of those accused of particular sex crimes to investigate allegations against them and irreconcilably conflicts with the Indiana Trial Rules. The Court of Appeals agreed, finding the statute is procedural and in conflict with the Trial Rules, specifically Rules 26 and 30(A), in that "it necessitates the prosecutor's permissions...and...requires a defendant to move for a hearing when the permission sought is not forthcoming- and otherwise places the burden of proof on the defendant at the contemplated hearing." Therefore, the provisions of the trial rules govern. *Key v. State*, 48 N.E.3d 333 (Ind. Ct. App. 2015). The Court reversed the trial court's order denying Defendant's petition for depositions.

*Archer v. State*, (04/12/2021) 20A-CR-1677 (Ind. Ct. App.) **Erroneous quash of defense subpoena for deposition; State failed to show paramount interest in non-disclosure**

After Defendant's child molesting conviction was affirmed on direct appeal, Court of Appeals vacated the conviction and remanded for a new trial on appeal from denial of post-conviction relief. In preparation for the new trial, counsel requested to depose the alleged victim (AV) seven years after her original allegations. When trial counsel issued a subpoena to depose the AV, the State move to quash the subpoena. The trial court granted the State's motion to quash notice of deposition and trial counsel

moved for interlocutory appeal, which was granted. Because the Order granting the State's motion to quash was non-specific, leaving the Court of Appeals with no details about the grounds on which it relied, the Court of Appeals review was akin to de novo. The Court of Appeals relies on the three-part test outlined in *Dillard v. State*, 274 N.E.3d 387 (Ind. 1971), to determine if the discovery request should have been granted. The test is: 1) whether there is sufficient particularity of items to be discovered, 2) whether the items sought to be discovered are relevant and 3) does the State have a paramount interest in non-disclosure. Here, the Court determined that the Defendant's request did show sufficient particularity, specifically that trial counsel should be permitted to determine what a witness remembers many years after the event. The request was also relevant, as this was a new trial where the defense needed to form a specific defense strategy and the State failed to show a paramount interest in non-disclosure. The Court emphasized the State failed to make a record to support that any trauma the AV would experience would outweigh trial counsel's need to take the deposition to properly defend her client. On balance, the 20-50 year exposure of the client and the need for counsel to depose the AV to properly prepare a defense outweighed any uncomfortable feeling the AV may have about being deposed. In this instance the State did not meet its burden of showing paramount interest in non-disclosure under the *Dillard* test and therefore the trial court abused its discretion by quashing the subpoena for the AV's deposition. Held, judgment reversed and remanded for further proceedings.

*State v. Jones*, (11/02/2020) 155 N.E.3d 1287 (Ind. Ct. App.), *TRANSFER GRANTED;* Oral argument held 4/8/21. **State failed to meet burden to show application of informer's privilege**

To prevent disclosure of a confidential informant's (CI's) identity, it is not enough to show that the CI's identity might be revealed. Rather, it is the State's burden to prove that the CI's identity would be revealed as a result of a face-to-face interview. Here, Defendant was charged with Level 2 felony burglary, Level 3 felony counts of robbery, criminal confinement and kidnapping, Level 5 felony kidnapping and Level 6 felony auto theft. The charges came after a police officer spoke with a CI who had specific information about a home invasion and possible subjects. That information was forwarded to other officers who were investigating the home invasion, leading to the charges against Defendant.

Defendant's counsel made three attempts at questioning the CI in a manner that protected the informant's identity, but all three attempts failed. Counsel then amended his motion to compel and the trial court ordered the State to produce the CI for a face-to-face interview with Defendant's counsel but ordered counsel not to ask any questions that may disclose the CI's identity, identifiers, residence, etc. The Court of Appeals upheld trial court's grant of Defendant's motion to compel, finding Defendant had met his burden to demonstrate that the CI had information that was relevant and helpful to his defense or necessary for a fair trial. Court found that the trial court fashioned a solution that balanced Defendant's right to information that would allow him to prepare his defense with the State's desire to keep the CI's identity hidden when it allowed defense counsel to interview the CI without asking any questions that would reveal the CI's identity. Because the State did not meet its burden to demonstrate that the CI's identity would be revealed, it failed to meet its initial burden to establish that the informer's privilege applied. Moreover, the Court concluded that even if the privilege applied, the defense had adequately overcome the privilege by showing that the CI "had information that is relevant and helpful to his defense or necessary for a fair trial...[T]he information from the CI would be helpful

for him to understand how the officers investigating the robbery at [victim's] house linked him to that offense."

## F. Guilty Pleas

*Bautista v. State*, (01/29/2021) 163 N.E.3d 892 (Ind. Ct. App.) **Involuntary guilty plea - inadequate translation for Spanish-speaking defendant**

Defendant's guilty plea to child molesting was not knowingly, intelligently, and voluntarily entered because the Spanish translation he received at his guilty plea hearing did not adequately advise him of one of the rights required by *Boykin v. Alabama*, 395 U.S. 238 (1969), namely, the right to confront the witnesses against him. Although interpreter's translation informed Defendant that he could ask questions, it failed to specify to whom Defendant may ask questions. The translation failed to make any mention of the witnesses against him or use other words that would convey a similar meaning. Thus, it did not effectively communicate that Defendant had the right to confront or cross-examine the witnesses against him. The defendant does not bear the burden to establish that he did not know he was waiving his *Boykin* rights; rather, a defendant who demonstrates that the trial court failed to properly give a *Boykin* advisement during the guilty plea hearing has met his threshold burden for obtaining post-conviction relief. *Ponce v. State*, 9 N.E.3d 1265, (Ind. 2014).

Here, Defendant carried his initial burden of demonstrating that he failed to receive an adequate advisement at the guilty plea hearing that he had the right to confront and cross-examine the witnesses against him, and the State failed to show that the record as a whole nonetheless demonstrated that Defendant understood this right and that he was waiving it by pleading guilty. Held, denial of post-conviction relief reversed and remanded with instructions to vacate guilty plea.

*Williams v. State*, (03/16/2021) 21S-CR-113 Ind.) **Trial courts must be clear and consistent as to whether Defendant waives only right to appeal conviction or right to appeal conviction and sentence**

Defendant entered into a guilty plea agreement and at the sentencing hearing, the judge advised him he was waiving the right to appeal his conviction but failed to clarify whether he was also waiving his right to appeal his sentence. *Johnson v. State*, 145 N.E.3d 785, 786-7 (Ind. 2020), held that a plea agreement's generalized statement that the defendant "waives right to appeal," without more, was insufficient to establish a knowing and voluntary waiver of the defendant's right to appeal his sentence. Here, the Court granted transfer for the sole purpose of reminding trial judges that "the plea agreement, guilty plea and sentencing hearing colloquy, and sentencing order must be clear and consistent as to whether a defendant waives only the right to appeal the conviction or the right to appeal the conviction and sentence." Held, sentence affirmed.

*McHenry v. State*, (07/17/2020) 152 N.E.3d 41 (Ind. Ct. App.) **Defendant can appeal "open plea" where plea agreement leaves sentencing discretion to trial court even if plea agreement wrongly states that plea is not an open plea and appeal is waived.**

Defendant pleaded guilty pursuant to an open plea and appealed his sentenced. The State argued the appeal should be dismissed because a paragraph in the plea agreement erroneously stated the plea was not an open plea and he could not appeal his sentence. Defendant's plea agreement notified him that a defendant has a right to appeal the sentence imposed after entering an open plea but erroneously characterized his plea as not an open plea. The plea agreement left Defendant's sentence to the trial court's discretion, and the trial court was only limited in the sentence it could impose by the statute outlining the maximum and minimum penalties for a Level 4 felony. Also, the trial court advised Defendant of his right to appeal at the end of Defendant's sentencing hearing, and the State did not object. Therefore, the Court of Appeals declined to dismiss the appeal allowing the appeal to go forward; however the Court rejected Defendant's appropriateness challenge to his 24-year sentence for two level 4 child molesting charges.

*Merriweather v. State*, (08/21/2020) 151 N.E.3d 1281 (Ind. Ct. App.) **No waiver of right to appeal sentence notwithstanding waiver of right to appeal in plea agreement**

Defendant placed his initials next to the provision in plea agreement indicating he had waived his right to appeal his sentence. When asked by the trial court during his guilty plea hearing whether he understood each of the rights he was waiving pursuant to the terms of the plea agreement, Defendant answered in the affirmative. However, while conducting an oral review of the rights that Defendant was waiving pursuant to the agreement, and prior to the trial court's acceptance of his guilty plea, the court advised Defendant, "Since the sentence that is being imposed is one that the Court decides its [sic] discretionary within thirty (30) years. You do have the right to appeal the sentence if you feel it is fundamentally unfair. Do you understand that sir?" Defendant answered in the affirmative. Neither the deputy prosecutor nor defense counsel objected to these statements. Subsequently, during the sentencing hearing, the court again advised Defendant, "[S]ince the Court had discretion in announcing your sentence; you have the right to appeal the Court's sentence." The trial court went on to explain the timeline for filing a notice of appeal and, after Defendant indicated that he did, in fact, wish to appeal his sentence, appointed appellate counsel. Again, neither the prosecutor nor defense counsel objected. Court of Appeals finds *Bonilla v. State*, 907 N.E.2d 586 (Ind. Ct. App. 2009), *trans. denied*, controls. In *Bonilla*, Defendant was advised at his guilty plea and sentencing hearings that he had a right to appeal even though Bonilla's plea agreement, as the case here, contained a written waiver of the right to appeal. The Court of Appeals notes that had they not found Defendant's waiver of the right to appeal his sentence invalid, an argument could be made that the State waived the ability to enforce the waiver provision and seek dismissal of this appeal by sitting idly by during the plea hearing, and again at the sentencing hearing, while the trial court gave the erroneous advisements. Neither party should be rewarded for behavior that is contrary to the administration of justice. Court finds thirty year sentence not inappropriate following plea to three counts of level 4 felony burglary under Indiana Appellate Rule 7(B) review.

*Harris v. State*, (11/17/2020) 159 N.E.3d 988 (Ind. Ct. App.) **Trial court's rejection of Defendant's plea agreement after reviewing PSI affirmed**

Trial court acted within its discretion when it accepted a guilty plea but explained it would not be accepted until review of Defendant's PSI report. Charged with Level 1 felony neglect of a dependent resulting in death, Defendant agreed to plead guilty to Level 3 neglect resulting in serious bodily injury with a sentence of nine years with eight years suspended. The trial court accepted Defendant's plea of guilty but stated it would withhold sentence until a pre-sentence investigation was done. After reviewing the PSI, the trial court rejected the plea agreement and following a jury trial, Defendant was convicted of Level 1 felony neglect of a dependent resulting in death and sentenced to thirty years of incarceration. In affirming Defendant's conviction, the Court of Appeals distinguished these circumstances from *Reffett v. State*, 571 N.E.2d 1227 (Ind. 1991), where the trial court had explicitly accepted both the guilty plea and the plea agreement and then rescinded its initial acceptance. In this case, trial court determined the plea agreement was unacceptable after reviewing the PSI and did not abuse its discretion in rejecting the plea agreement.

*Fields v. State*, (01/26/2021) 162 N.E.3d 571 (Ind. Ct. App.) **Notwithstanding waiver of appeal provision in plea agreement, belated appeal permitted under PC Rule 2**

Defendant entered into a plea agreement with the State wherein he pleaded guilty to six felony counts as well as a habitual offender sentencing enhancement with sentencing "open to argument" but with "a cap of 25 years on any executed sentence." The plea agreement included a provision that waived "the right to appeal any sentence imposed by the Court…so long as the Court sentences the defendant within the terms of this plea agreement." The trial court sentenced Defendant to an aggregate term of 37 years, with 25 years executed and 12 years suspended. Four years later, Defendant filed a petition for permission to file a belated notice of appeal, asserting that his sentence was contrary to law because the trial court had used an improper aggravator when it sentenced him. The trial court denied the petition without a hearing.

The Court of Appeals noted that even when a waiver of appellate review appears to be unqualified, a defendant retains the right to appeal his sentence when it is imposed contrary to law and the defendant did not agree to the specific sentence. *See Crider v. State*, 984 N.E.2d 618, 625 (Ind. 2013). Here, while Defendant agreed to the cap on the executed portion of his sentence, he did not agree to be sentenced either to the full executed term or to an additional 12 years suspended based on an improper aggravator. Defendant would have had the right to raise that issue in a timely appeal. Held, Defendant is an eligible defendant pursuant to Post-Conviction Rule 2(A).

*Wilson v. State*, (11/30/2020) 160 N.E.3d 222 (Ind. Ct. App.) **Rejection of voluntary manslaughter plea affirmed**

Trial court had discretion to reject the plea agreement even though there was ambiguity as to whether the trial court had accepted the plea and entered judgment or taken the plea under advisement. Defendant shot and killed the victim inside Defendant's apartment, resulting in a murder charge. On the morning of her scheduled jury trial, Defendant agreed to plead guilty to Level 2 felony

voluntary manslaughter pursuant to a written plea agreement. In exchange for her plea, the State agreed to dismiss the murder charge and agreed to a cap of fifteen years executed. After an agreed factual basis was entered, the trial court stated it was "going to take this plea under advisement and . . . enter[] . . . an order of conviction for the offense of Voluntary Manslaughter." The court's chronological case summary ("CCS") states that the court entered "[j]udgment" on the voluntary manslaughter charge at this time. The court then set the matter for a sentencing hearing, during which it expressed concern about whether Defendant had entered her plea knowingly and voluntarily based on her statements in the PSI about acting in self-defense. Thus, the trial court reset the matter for trial.

# IV. TRIAL

## A. Right to Counsel/Right to Self-Representation

*Vonhoene v. State*, (03/18/2021) 165 N.E.3d 630 (Ind. Ct. App.) **Erroneous finding of forfeiture of right to counsel and proceeding with pro se trial without first investigating eligibility for pauper counsel**

On the morning of her trial, Defendant moved for a continuance in order to secure counsel. The trial court found she "waived" her right to counsel due to her prior request for a continuance and the court's general advisements of her legal rights. Defendant proceeded pro se and trial court convicted her of possession of marijuana after a bench trial. Distinguishing *Kowalskey v. State*, 42 N.E.3d 97 (Ind. Ct. App. 2015), the Court of Appeals found the record did not support a finding that Defendant either waived or forfeited her right to the assistance of counsel by her conduct. Further, Defendant's statements before her trial that she did not know how to secure court-appointed counsel triggered the trial court's duty to conduct further inquiry regarding her eligibility for pauper counsel. Held, judgment reversed and remanded.

*Wright v. State*, (05/04/2021), 20S-LW-260 (Ind.) **Denial of D's equivocal request for self-representation affirmed - State's interest in the fairness of capital/LWOP cases**

When deciding whether a defendant properly waives the right to counsel in capital and LWOP cases, a trial court should frame its waiver inquiry with the State's heightened reliability interests in mind. That inquiry should focus on whether, and to what extent, the defendant has prior experience in the legal system; the scope of the defendant's knowledge of criminal law and legal procedures, rules of evidence, and sentencing; and whether and to what extent the defendant can articulate and present possible defenses, including lesser-included offenses and mitigating evidence. Here, Defendant was charged with murder, along with other felony offenses, and after the State sought the death penalty a few months after his initial hearing, the trial court appointed new capital-qualified attorneys to represent him. Defendant was unhappy with his new counsel and notified the court he wanted to represent himself. After a lengthy colloquoy with Defendant about why he wanted to represent himself, the trial court denied the motion, finding Defendant was equivocal in his request and that rather than truly wishing to represent himself, he just wanted different counsel. Defendant was convicted and sentenced to life

without the possibility of parole. The Indiana Supreme Court held the trial court's denial of Defendant's request to act as his own attorney was proper. The Court discussed the historical background of the constitutional right to self-representation, including the seminal U.S. Supreme Court case *Faretta v. California*, 422 U.S. 806, 816 (1975). The majority held that courts should weigh a request for self-representation with a particular focus on the State's interest in heightened reliability on the fairness of the proceedings because capital and LWOP cases have the most serious consequences for criminal defendants. As a result, trial courts should hold a presumption against waiver and in cases where the defendant is permitted to represent himself be ready to appoint standby counsel. The Court also rejected Defendant's appropriateness challenge to his LWOP sentence. Justice Massa concurred in result with the majority because he found Defendant's waiver of counsel was equivocal. However, he agreed with the dissenting opinion that the majority's decision seems to contradict the U.S. Supreme Court's decision in *Faretta*. Justice Slaughter dissented for the reason noted in the concurrence and because he found Defendant invoked his right to self-representation clearly and unequivocally.

## B. Right to Jury Trial

*Wiley v. State*, (07/16/2020) 150 N.E.3d 710 (Ind. Ct. App.) **Implied waiver of right to misdemeanor jury trial was not knowing and is therefore invalid**

Defendant was charged with two misdemeanor offenses and advised regarding Crim. R. 22 of his right to a jury trial and the procedural effects if a request for a jury trial was not timely filed in writing. His counsel made an oral request for a jury and later indicated he had filed a written request for a jury trial. The trial court set the matter for a jury trial which was later continued. The statements of trial counsel and the actions of the trial court led Defendant to believe that the necessary steps had been taken to ensure a jury trial. Defendant appeared at the first setting of his jury trial and paid the costs associated with securing the jury pool in order to obtain a continuance. It was not until the State filed a motion to strike the jury trial five months later and just three weeks before the reset jury trial that Defendant was made aware that no written jury demand had been filed. Further, by the time the trial court struck the jury trial it was impossible for Defendant to comply with the requirements of Crim. R. 22 as the deadline for filing a written jury demand had already passed. The Court of Appeals held that under these circumstances, Defendant established that his implied waiver of his jury right was not knowing and therefore invalid. Reversed and remanded for a jury trial.

## C. Right to be present/Trial *in absentia*

*Smith v. State*, (01/20/2021) 160 N.E.3d 1152 (Ind. Ct. App.) **In trial in absentia, no fundamental error for trial court to inform jurors that court personally advised Defendant of trial date a few weeks before trial**

Trial court did not abuse is discretion by conducting jury trial in absentia, where record established that Defendant knew of court date, did not appear and clearly waived his right to be present. Court of

Appeals held it was not fundamental error for trial court to advise potential jurors that the court had personally advised Defendant of the trial date a few weeks before trial. This was not a prohibited comment on defendant's refusal to testify but rather recognition of Defendant's absence. Also, jurors were appropriately instructed regarding presumption of innocence and State's burden of proof.

## D. Contempt

*Grogg v. State*, (10/21/2020) 156 N.E.3d 744 (Ind. Ct. App.) **450-day sentence affirmed for four separate findings of contempt of court resulting from D's repeated attempts to contact person with whom he was court-ordered to have no contact**

Court affirmed Defendant's aggregate 450-day sentence imposed for committing four separate acts of contempt based on his repeated attempts to contact a person in violation of a no-contact order. The Court rejected Defendant's argument that this should have been one continuous act of contempt because it involved the same protected person and the same conduct. The trial court imposed a 60-day, 90-day, 120- day and 180-day sentence on four separate counts of contempt, running them consecutively to each other and to Defendant's sentence for Level 5 felony domestic battery. Because the maximum possible sentence on each contempt charge was six months and none of the individual sentences imposed by the trial court exceeded six months, the trial court did not abuse its discretion at sentencing. Further, even though the trial court waited until after the conclusion of the trial on the underlying charges to determine whether the Defendant's conduct constituted contempt, the no-conduct order remained in effect, all the contempt charges included alleged distinct violations of the no-contact order, and three allegedly occurred prior to trial. Given the no-contact order remained in place following trial, there was a risk of continued contemptuous behavior by Defendant and an ongoing necessity for the trial court to ensure compliance with its order.

*Wine v. State*, (05/27/2020) 147 N.E.3d 409 (Ind. Ct. App.) **Multiple contempt citations for disruptive behavior in court affirmed**

At trial, Defendant committed repeated acts of contemptuous behavior and trial court sentenced him to consecutive 180-day sentences for five counts of contempt totaling 900 days. In his petition for post-conviction relief (PCR), Defendant alleged that trial and appellate counsel were ineffective for failing to challenge the contempt citations as one single episode. Court of Appeals affirmed trial court's denial of PCR, finding each act was separate and distinct and not one continuous episode of contempt and therefore trial and appellate counsel were not ineffective. However, Court found four separate acts of contempt rather than five and reduced sentence to 720 days for the four counts. State cross appealed, arguing case should be dismissed for lack of subject matter jurisdiction because post-conviction rules do not apply to criminal contempt adjudications. Court disagreed, finding post-conviction relief is a criminal contemnor's only opportunity to collaterally challenge such an adjudication.

## E. Voir Dire

*Peppers v. State*, (08/31/2020) 152 N.E.3d 678 (Ind. Ct. App.) **No error in trial court conducting voir dire where Defendant submitted written questions**

Defendant was arrested on a warrant at his home and was cooperative with officers. One month after Defendant's arrest, a video called “To The Judges” was posted on YouTube. In the video, Defendant threatened to kill “Big Country,” the nickname of one of the police officers who arrested him, for allegedly pointing a gun in his face and at his stepdaughter during the arrest. Defendant was charged with one count of Level 6 felony intimidation. Prior to jury trial, the parties submitted written questions for voir dire, with Defendant submitting 86 questions for the prospective jurors and the State submitting eight. The trial court conducted voir dire and did not ask all of Defendant's submitted questions finding them either covered by the court's questions or conditioning the jury and therefore not appropriate to ask. Trial counsel did not object to the jury panel before it was sworn or submit additional questions for the jury after his motion to orally examine prospective jurors was denied. Finding the issue waived and reviewed under a fundamental error standard, the Court of Appeals rejected Defendant's argument that the trial court violated Indiana Trial Rule 47(D) by denying his counsel the right to question the prospective jurors and to ask them follow-up questions. The Court found Defendant failed to show how the trial court’s voir dire procedure led to a jury panel that was not fair or impartial, or in violation of Indiana Trial Rule 47(D), finding no error in the trial court’s conduct of voir dire. The court also found the evidence sufficient to support the intimidation charge in that the jury could reasonably infer that Defendant publicly posted the video to YouTube and that was enough to support the required element that he knew or would have had good reason to believe the video would reach the police officer, relying on prior cases that affirmed the communication can be indirect and not limited to only those threats made directly to or in the presence of the threatened party.

## F. Jury Instructions

*Gammons v. State*, (06/26/2020) 148 N.E.3d 301 (Ind.) **Self-defense jury instruction - contemporaneous crime limitation did not apply**

Under Indiana’s self-defense statute, “a person is not justified in using force if the person,” among other things, “is committing . . . a crime.” Ind. Code § 35-41-3-2. Here, during Defendant's trial for attempted murder and carrying a handgun without a license, he asserted that he acted in self-defense when he fired six shots at a man who aggressively confronted him and whom he knew had a history of violence. Over Defendant's objection, the trial court instructed the jury using language that tweaked his tendered self-defense instruction and stated that "a person may not use force if," among other things, "he is committing a crime that is directly and immediately related to the confrontation." Noting and agreeing with Justice Boehm's concurring opinion in *Mayes v. State*, 744 N.E.2d 390, 396 (Ind. 2001), which warned that the "but for" test was too broad and could foreclose self-defense where the defendant should be free to argue it, the Indiana Supreme Court held that self-defense is only barred when there is "an immediate causal connection between the crime and the confrontation."

Because the instructional error could have served as the basis for the jury's decision to convict, the Court reversed Defendant's conviction and remanded for a new trial.

*Littleton v. State*, (12/30/2020) 162 N.E.3d 531 (Ind. Ct. App.) **Jury sufficiently instructed on presumption of innocence**

In *McCowan v. State*, 27 N.E.3d 760 (Ind. 2015), the Indiana Supreme Court held that a defendant is per se entitled to a jury instruction on the presumption of innocence and when requested trial courts do not have discretion whether to instruct the jury that the presumption of innocence continues throughout the trial. Here, Defendant tendered instructions that tracked the approved language the Indiana Supreme Court had set out in *McCowan*. The trial court declined to give Defendant's proffered instruction and instead provided its own instructions. The Court of Appeals stated it would have been "better practice" for the trial court to give an instruction that included the same words proscribed by the Indiana Supreme Court. However, the Court found that the court's instructions, although stated differently than the precise language of McCowan, contained the same substantive information, namely that the jury was instructed that Defendant was presumed innocent of any crime and that presumption continued throughout the trial and the jury was to consider evidence under the presumption that Defendant was innocent if reasonably possible.

*Larkin v. State*, (11/09/2020) 159 N.E.3d 976 (Ind. Ct. App.) **Erroneous instruction on involuntary manslaughter -- not a factually included lesser offense of charged voluntary manslaughter offense**

In voluntary manslaughter prosecution, trial court erred in instructing the jury on involuntary manslaughter based on a battery just minutes before closing arguments. Defendant claimed the shooting of his wife which resulted in her death was an accident in the course of self defense. The defendant’s intent (to kill or to batter) distinguishes the offenses of voluntary manslaughter and involuntary manslaughter. While a person may shoot another person with an intent to batter rather than with an intent to kill, the Court of Appeals concluded that neither the charging instrument nor the State's argument at trial made such an allegation in this case. Rather, in requesting the involuntary manslaughter instruction, the prosecutor argued Defendant intended to commit a battery by pushing his wife. The charging information referred to a handgun but did not allege all of the elements of a battery by pushing or an incidental killing. The Court declined to conclude that the mere assertion that the charged offense was committed by means of a handgun, without more, automatically means the information also asserted a battery. Thus, because involuntary manslaughter was not an inherently or factually included lesser offense of the charged crime, the jury should not have received an involuntary manslaughter instruction.

Moreover, a defendant must receive fair notice of the charge against which he must defend at trial. Here, at a minimum, there was a reasonable doubt as to whether the State’s charging instrument provided Defendant with fair notice of the charge of which he was eventually convicted. Additionally, based on the lack of sufficient evidence to contradict Defendant's statement of self-defense, Court was compelled to find the State did not meet its burden of negating Defendant's self-defense claim beyond a

reasonable doubt. Held, conviction reversed and remanded with instructions to enter a judgment of acquittal.

*Shepherd v. State*, (09/14/2020) 155 N.E.3d 1227 (Ind. Ct. App.) **No evidence to support defendant's proposed reckless homicide instruction**

In reckless homicide and criminal recklessness with deadly weapon prosecution, trial court did not abuse its discretion when it rejected Defendant's proposed instruction that read: "[p]roof that an accident arose out of the inadvertence, lack of attention, forgetfulness or thoughtfulness of the driver of a vehicle or from an error in judgment on his part, will not support a charge of reckless homicide." Charges resulted from the deaths of three young children and serious injury of another struck by pickup truck Defendant was driving that failed to stop for a school bus stopped to pick up the children for school. Defendant's theory at trial was that she experienced an error of judgment which caused the collision. Nonetheless, Court of Appeals found there was no evidence at trial to support giving the instruction because Defendant did not point to evidence supporting portions of her proffered instruction regarding "inadvertence, lack of attention, forgetfulness or thoughtfulness." Even if there were evidence to support defense theory that the collision resulted from an error of judgment, Defendant did not offer a separate instruction limited just to that wording. The Court of Appeals found sufficient evidence Defendant acted recklessly rather than negligently, thus sustaining her convictions for reckless homicide and criminal recklessness. The jury reasonably concluded that Defendant recognized that the vehicle before her in the road was a stopped school bus or that she was aware of conditions that would have disclosed that fact to any reasonable person.

However, the Court vacated Defendant's misdemeanor reckless driving conviction on double jeopardy grounds, finding that the reckless driving and criminal recklessness convictions were both established by the same evidence and same act of recklessly driving past the stopped school bus. Thus, the Court remanded the case with instructions to issue a new sentencing order expressly indicating the two ordered license suspensions are to be served concurrently.

**See also:** *Schneider v. State*, 19A-CR-1928, 10/20/2020, Ind. Ct. App. (No abuse of discretion in refusing to give D's tendered instruction on the lesser- included offense of reckless homicide, where multiple stab wounds to the head and chest were evidence of an awareness of a high probability that the victim will be killed and there was no serious evidentiary dispute permitting the jury to find D acted recklessly but not knowingly).

*Atkinson v. State*, (07/09/2020) 151 N.E.3d 311 (Ind. Ct. App.) **No error in failing to instruct jury on lesser included offenses of reckless homicide and involuntary manslaughter**

In murder, aggravated battery and neglect causing death prosecution, trial court did not err in refusing Defendant's tendered lesser included offense instructions on reckless homicide and involuntary manslaughter. Defendant's conviction stemmed from the death of his girlfriend’s minor child from multiple blunt force traumatic injuries. Experts testified that the child’s injuries occurred through multiple blows and falls and that the injuries included multiple blunt force traumatic injuries to the head, and blunt force injuries to the chest, abdomen, and pelvis. In affirming the trial court's refusal to

instruct the jury on reckless homicide, Court noted that the child's injuries were so severe that no reasonable person could have found the injuries to have been inflicted only recklessly. There was likewise no evidentiary dispute regarding Defendant's intent to kill, even assuming involuntary manslaughter was a factually-included lesser offense. Thus, the proposed involuntary manslaughter instruction was not warranted.

*Morales v. State*, (03/25/2021) 20A-CR-913 (Ind. Ct. App.) **Arson convictions violated statutory prohibitions on substantive double jeopardy**

On appeal of his arson and burglary convictions, Court rejected Defendant's argument he was entitled to a "reasonable theory of innocence" instruction following *Hampton v. State*, 961 N.E.2d 480 (Ind. 2012), which found such an instruction mandatory when the only evidence of the actus reus was circumstantial. Here, the court noted that the State's evidence included Defendant's statement to his girlfriend he would burn the parole office, which was direct evidence of the actus reus.

## G. Mistrial

*Jarrett v. State*, (11/30/2020) 160 N.E.3d 526 (Ind. Ct. App.) **Denial of motion for mistrial affirmed**

Defendant shot and killed a man while trying to rob him at a convenience store. At trial, Defendant twice moved for a mistrial. Once because Defendant wished the judge a happy birthday making the judge feel uncomfortable although she stated she could still be fair and second when an investigator's statements could have been inferred to indicate Defendant had fled after the shooting. The Court of Appeals affirmed the trial court's denial of mistrial in both instances, finding neither incident had placed Defendant in grave peril or prejudiced his trial.p

## H. Juror Misconduct

*Loehrlein v. State*, (12/09/2020) 158 N.E.3d 768 (Ind.) **Defendant not harmed by jury forewoman's gross misconduct in providing a misleading answer on a jury questionnaire**

Proof that a juror was biased against the defendant or lied during voir dire generally entitles the defendant to a new trial. *State v. Dye*, 784 N.E.2d 469 (Ind. 2003). But when a juror commits gross misconduct, defendants must still demonstrate that they were probably harmed as a result of that misconduct to be entitled to relief. Here, in a case where Defendant murdered his wife and savagely attacked his two daughters, Defendant was not harmed by the attorney juror forewoman's gross misconduct in providing a misleading answer on her jury questionnaire. The juror (L.W.) falsely answered "N/A," meaning not applicable, instead of "yes" to questions concerning whether she, immediate family members or close friends had been charged or convicted with a crime. The Supreme Court first noted that L.W. committed gross misconduct, and her actions were even more egregious "because she is an attorney who had previously handled some criminal matters and as such, she should have known better." Because L.W.'s answers on the jury questionnaire were cryptic and her demeanor during her post trial deposition was defensive and evasive, Court found that her misconduct was gross.

But given the facts and circumstances of this case, including strong evidence of Defendant's sanity, it was not likely that he was harmed. L.W.'s personal experience with domestic violence is not directly related to a sanity inquiry and further, she testified that she was impartial. Thus, trial court did not abuse its discretion in denying Defendant's motion to set aside the jury verdict. Held, transfer granted, Court of Appeals' opinion at 142 N.E.3d 966 vacated, denial of request for new trial affirmed.

# V. SENTENCING

## A. Sentencing Procedure

*Wampler v. State,* (04/28/2021) 20A-PC-2043 (Ind. Ct. App.) **Trial court lacked jurisdiction to resentence Defendant who had served sentence and been released from DOC**

Trial courts are limited to imposing sentences that are authorized by statute. *Wilson v. State*, 5 N.E.3d 759, 762 (Ind. 2014). Here, Defendant was sentenced in 2015 to an aggregate 33-year sentence following his convictions for two counts of burglary and a habitual offender enhancement. The Indiana Supreme Court found Defendant's sentence inappropriate and reduced his term to an aggregate 16 years. Defendant then filed for post-conviction relief, arguing in a 2020 amendment to his petition that his habitual offender adjudication and sentence should be vacated because the Court of Appeals earlier that year had vacated one of the convictions that supported his adjudication. The trial court granted his motion and concluded that, without the habitual offender enhancement, Defendant's sentence for the burglary convictions would have been complete in July 2017. Thus, Defendant was released. But on the same day as the trial court's ruling, the State moved to resentence Defendant on one of the burglary convictions. The trial court granted the State's motion, and Defendant filed an interlocutory appeal. Defendant argued that the trial court erred in granting the State's motion to resentence him because the Indiana Supreme Court had ordered a specific six-year sentence for each burglary conviction upon remand of Defendant's direct appeal. Court did not address Defendant's argument because the trial court erred in granting the State's motion to resentence Defendant for another reason. Because Defendant has served his sentence for the burglary convictions and has been released from the Department of Correction, the trial court had no authority to resentence him. There is no statute authorizing trial courts to resentence a defendant who has served his sentence and been released from the DOC. In addition, it would be manifestly unfair for the trial court to call Defendant back into court and potentially resentence him to additional time for the burglary conviction when he had already served his sentence for that conviction and been released from the DOC. Accordingly, Court reversed the trial court's order granting the State's motion to resentence Defendant.

*Crane v. State*, (06/18/2020) 147 N.E.3d 424 (Ind. Ct. App.) **Sentencing orders should reflect disposition of all charges**

Defendant was tried to a jury on two counts. The jury found him guilty on Count II and not guilty on Count I. The trial court's sentencing order did not reflect the disposition of Count I. The Court of Appeals remanded to the trial court to amend its sentencing order to reflect Defendant was tried and acquitted

of Count I. In so holding, Court noted that the better practice is for sentencing orders to be complete and accurate with respect to the charges that were tried and the disposition of each, not just the charges that were reduced to a conviction.

## B. Aggravating/Mitigating Circumstances

*Chastain v. State*, (03/04/2021) 165 N.E.3d 589 (Ind. Ct. App.) **23-year sentence for child molesting affirmed despite improper aggravator**

Despite a trial court improperly considering an aggravating factor that went against a "clear directive" from the Indiana Court of Appeals, Defendant's 23-year sentence for molesting his niece was upheld on remand. In 2019, Defendant's Class A felony child molesting conviction was reduced to a Class B felony on direct appeal, and the case was remanded for resentencing. In its first opinion in the case, the Court of Appeals found "concerning" an aggravating factor noting other allegations of child abuse against Defendant, even though he did not admit, was not charged or had been acquitted of charges based on those allegations. However, in resentencing Defendant to 23 years on remand, the trial court again noted the other allegations of sexual misconduct made by three individuals against Defendant.

The trial court assigned "the greatest weight" to the aggravator that Defendant was at least 21 years old at the time he molested C.W., allowing his age to be an enhancing factor. Because Defendant admitted his date of birth at the sentencing hearing, this aggravator did not run afoul of *Blakely v. Washington,* 542 U.S. 296 (2004), and his right to have a jury determine whether his age should have constituted an aggravating factor. Defendant also waived his Blakely arguments by not objecting at the time of sentencing. Court also found no abuse of discretion based on the trial court's use of the other allegations of molestation as a "moderating factor" that diminished Defendant's lack of criminal history, despite the trial court's improper consideration of this factor in violation of the court's "clear directive." A single aggravating circummstance is enough to justify an enhancement or the imposition of consecutive sentences. Here, the trial court found several valid aggravators and several other mitigators. Under these circumstances, the Court could say with confidence that the trial court would have imposed the same sentence even without the improper consideration that was used to diminish the weight of the mitigator. The Court likewise rejected Defendant's argument that his sentence was inappropriate in light of the nature of his crime and character.

*McCain v. State*, (06/30/2020) 148 N.E.3d 977 (Ind.) **Trial court did not impermissibly increase sentence based on disagreement with jury's verdict**

Trial court's comments disagreeing with the jury's verdict were insufficient to taint the sentencing decision, and the sentence was not inappropriate given the nature of the crime and defendant's demonstrated character. Defendant was charged with murder, but jury convicted him of manslaughter. At sentencing, the trial court stated the verdict was a "gift" and the evidence was presented "the cleanest cut video I have ever seen of my impression of murder." Court unanimously found that although trial court's comments expressing disagreement with the jury's verdict came very close to unacceptable comment indicating judicial disagreement with the verdict, the record contained sufficient other factors

that demonstrate the judge did not enhance the sentence based on that disagreement. Further, Defendant did not receive a maximum sentence, and his 45-year sentence is "substantially lower" than what it would have been for murder. Court denied Defendant relief under Appellate Rule 7(B) given Defendant's extensive criminal history, his Facebook post "showing a desire for a violent conflict" and his "point-blank shooting of a complete stranger in a crowded fast-food restaurant after getting into an argument because someone looked at him sideways."

*Scott v. State*, (01/27/2021) 162 N.E.3d 578 (Ind. Ct. App.) **Failure to consider D's significant history as victim of human trafficking**

In robbery and fraud prosecution, trial court abused its discretion in failing to consider and include as a mitigating circumstance Defendant's significant history as a victim of human trafficking. Although the Court would not second-guess the trial court's possible disbelief of Defendant's report of her own mental condition, the trial court effectively found that Defendant experienced no trauma whatsoever in refusing to consider trafficking a mitigating circumstance. To support such a finding, the trial court would have to conclude either that Defendant was never trafficked at all and had hoodwinked Indiana's statewide human trafficking task force (IPATH), advocates and federal prosecutors or that her victimization had no traumatic effect. Both conclusions are clearly against the logic and effect of the facts before the court. However, the trial court's error was harmless because considering the many unconstested aggravating circumstances, it would have reached the same 14-year sentence even after duly considering Defendant's history of being trafficked.

## C. Consecutive Sentences

*Gober v. State*, (02/03/2021) 163 N.E.3d 347 (Ind. Ct. App.) **Erroneous consecutive sentence for neglect causing death of two children in fire - not a crime of violence**

Because neglect of a dependent resulting in death is not "a crime of violence" as specified in Ind. Code 35-50-1-2(a), the trial court was constrained to impose an aggregate sentence of no more than 42 years under subsection (d) because the two counts arose from a single episode of criminal conduct. Thus, the trial court abused its discretion in imposing an aggregate sentence of 51 years. Defendant left her children-- ages 2, 4, and 6-- unattended in her apartment while she stayed in another apartment in the same building with a man she was dating. The two younger children died after setting the apartment on fire while trying to make breakfast. Defendant pleaded guilty and her sentences were capped at 30 years on the Level 1 charges and one year on the Level 6 count, the advisory sentences for each felony. The court sentenced her to 51 years — 25 each on the Level 1 counts, served consecutively, plus one year served consecutively on the lesser count. The Court of Appeals found the sentence in violation of Indiana Code 35-50-1-2(d), which provides that except for crimes of violence, the total consecutive term of imprisonment in a Level 1 sentence may not exceed 42 years. The three convictions arose out of the same facts and circumstances occurring at the same time and the same place. Her actions as they related to each victim occurred simultaneously and contemporaneously, and were therefore a single episode of criminal conduct. Held, judgment reversed and remand for resentencing with instructions for the trial court to limit the aggregate term of imprisonment to not more than 42 years.

*Hobbs v. State*, (12/23/2020) 161 N.E.3d 380 (Ind. Ct. App.) **Following grant of PCR, trial court had authority to order consecutive sentences**

Following grant of Defendant's petition for post-conviction relief and remand for new sentencing hearing, trial court had authority to order his sentence to run consecutively to his sentences in the other causes and that it did not violate ex post facto prohibitions. In 1994, Defendant was convicted and sentenced to an aggregate 120 years for rape, criminal deviate conduct and burglary. He unsuccessfully challenged his convictions and sentence on direct appeal, but successfully claimed on post-conviction that his appellate counsel provided ineffective assistance by failing to argue on direct appeal that Defendant should have been sentenced under a newly amended version of I.C. 35-50-1-2(a). On remand, trial court resentenced Defendant to an aggregate term of 45 years but ordered his sentence to run consecutive to his sentences in two other causes. On appeal, Defendant argued that the trial court did not have authority to change the part of the original sentencing order requiring his sentence to be served concurrent with the sentences in the other causes because that aspect of the order was not illegal, and the trial court was permitted on remand to change only the illegal portion of his sentence. Distinguishing *Lane v. State*, 727 N.E.2d 454 (Ind. Ct. App. 2000), Court disagreed, noting that trial court was merely following the mandate of the postconviction court to resentence Defendant pursuant to the amended version of I.C. 35-50-1-2(a). The Court cited *Gootee v. State*, 942 N.E.2d 111 (Ind. Ct. App. 2011), *Greer v. State*, 680 N.E.2d 526 (Ind. 1997) and *Coble v. State*, 523 N.E.2d 228 (Ind. 1988), as cases that illustrate the dimensions of the trial court's authority to resentence on remand. There was no ex post facto violation here because Defendant's crimes in this case received no punishment in addition to what was permitted under the prior version of subsection (a).

## D. Court Fees and Restitution

*Ross v. State*, (06/17/2020) 150 N.E.3d 233 (Ind. Ct. App.) **Erroneous imposition of probation fees based upon post-sentencing probation department memo without notice to probationer or inquiry into ability to pay**

Trial court erred in imposing post-sentencing probation fees based upon probation department memo. Court of Appeals finds that practice of probation department submitting a memo to the trial court post-sentencing and without notice to the defendant requesting imposition of probation fees impedes the interest of criminal defendants in the transparency of judicial proceedings. Accordingly, Court vacated the probation fees and remanded for further proceedings. In so holding, Court notes that at time the fees are imposed, a defendant's ability to pay should be assessed and trial court is to assess probation fees, not the probation department.

## E. Appropriateness Review

*Hubbert v. State*, (03/05/2021) 163 N.E.3d 958 (Ind. Ct. App.) **18-year executed sentence for dealing methamphetamine inappropriate**

18-year executed sentence for dealing in methamphetamine was inappropriate in light of nature of offense and character of the offender. After being charged in connection with three controlled buys,

Defendant agreed to plead guilty to Level 2 felony dealing in meth in exchange for dismissal of two other charges against him in the instant case as well as charges filed in a separate cause. At his sentencing hearing, Defendant testified that he got into dealing to support his habit and that he was visually impaired. He requested that a portion of sentence by assigned to community corrections or another addiction treatment program. In a presentence investigation report, the local probation department likewise recommended community corrections and substance abuse treatment. The prosecutor, however, said Defendant's visual impairment should not be a "get out of jail free card" and urged the trial court to impose a fully executed sentence. Agreeing with the prosecutor, the trial court sentenced Defendant to 18 years executed in the Indiana Department of Correction. The court recognized Defendant's visual impairment as a "significant" mitigator but identified multiple aggravators, including his prior criminal history and his previous unsuccessful stints on probation and in treatment.

The Court of Appeals agreed with Defendant and ordered all but four years of the sentence be served on probation with substance-abuse counseling and placement in community corrections. Regarding the nature of the offense, Court was "obviously troubled" that Defendant conducted a drug deal in a public library, although the amount of methamphetamine sold was only a small amount over what was needed to constitute a Level 2 felony. But as to Defendant's character, the record supports his contention that his addiction is the underlying source of his criminal behavior. Defendant is considered at a low risk to reoffend according to the Indiana Risk Assessment System. And although he previously had one opportunity to receive substance-abuse treatment while on probation and failed, Court did not believe one such failure should preclude future opportunities to reform," Vaidik continued. Finally, Court found Defendant's visual impairment to be a "significant" mitigator that substantially affects his opportunities while incarcerated.

*Mullins v. State*, (07/06/2020) 148 N.E.3d 986 (Ind.) **24 1/2 year- sentence for drug crimes inappropriate for young defendant with difficult upbringing and limited criminal history**

In a Per Curiam opinion, Indiana Supreme Court reduced sentence from 24 1/2 years to 18 years exercising discretion under Indiana Appellate Rule 7(B) review. Trial court did not abuse its discretion, but Court considered Defendant's relative youth at 21 years old, limited non-violent criminal history and significant mitigating circumstances stemming from an abusive childhood and untreated mental health issues to warrant a lesser sentence, stating exercising 7(B) discretion "boils down to our collective sense of what is appropriate." Justice Slaughter dissented, believing transfer should be denied.

*Smith v. State*, (08/208/2020) 154 N.E.3d 838 (Ind. Ct. App.) **Partially-executed 365-day sentence inappropriate for 65-year-old Defendant in declining health**

Ordering 65-year-old Defendant in poor physical health to serve 180 days of a 365-day sentence for Class A misdemeanor resisting law enforcement was inappropriate based on Defendant's character and the nature of his offense. Defendant's offense was relatively minor on the spectrum of resisting law enforcement in that he led officers on a short foot pursuit, was quickly apprehended and he did not injure anyone or damage any property. His lengthy sentencing testimony included ramblings on aliens, the Bible, Revelations, and other irrelevant and sometimes incoherent thoughts. This evidence led Court

to believe Defendant's recent criminal acts are just as much the result of deteriorating mental health as they are of genuine criminal intent. Furthermore, the record does not suggest that Defendant is a person of poor character. His physically disabled wife relies on him as her primary caretaker. And despite Defendant's troubling behavior over the past two years, he was a law-abiding citizen until age sixty-four, when he began committing a series of misdemeanor offenses. For these reasons, a 365-day sentence, with 185 suspended to probation and 180 days to serve consecutive to the 277 days for a probation violation, was inappropriate. Court reversed and remand to the trial court to impose a sentence of 365 days, with 20 days to serve and 345 days suspended to probation. Defendant will be on probation for 345 days and, as already ordered by the trial court, will be required to undergo a mental-health evaluation and follow all recommendations.

*Turkette v. State*, (07/22/2020) 151 N.E.3d 782 (Ind. Ct. App.) **Appellate sentence review does not include assessment of aggravators and mitigators & appropriateness challenge can be brought under either nature of offense or character of the offender prong**

Defendant appealed her 10-year aggregate sentence following her guilty plea to level 4 felony dealing in a narcotic drug, level 5 felony dealing in a narcotic drug, level 6 felony possession of a narcotic drug and possession of syringe. Defendant argued her sentence was inappropriate in light of the nature of the offense and the character of the offender under Indiana Appellate Rule 7(B) review. Court of Appeals affirmed the sentence but in two lengthy footnotes discussed the correct standard of review when making a sentencing argument under Indiana Appellate Rule 7(B) review. Citing *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified* on reh'g 875 N.E.2d 218, Court noted it did not believe that a Rule 7(B) analysis should begin with an assessment of the trial court's recognition or non-recognition of aggravators and mitigators. In a concurring opinion, Judge Bailey expressed his belief that under Anglemyer, the Court of Appeals will give "due consideration" to the trial court's decision but will not conduct a line-item review of the articulated aggravators and mitigators found by the trial court. Judge Bailey noted the a split of opinion among Court of Appeals panels as to whether sentence revision may be obtained only upon showing inappropriateness under both prongs of Rule 7(B). Although Court must consider the evidence relative to each prong, Defendant "need not necessarily prove inappropriateness as to each prong. Indeed, the statutory definition of certain offenses (such as simple possession) may not allow for portrayal of the offense in a positive light. That said, we await and invite further guidance from our Supreme Court."

**See also**: *Scott v. State*, 20A-CR-1131, Ind.Ct.App., 1/27/2021 (noting split among panels as to whether defendants must argue both the "character" and "nature of offense" prongs to avoid waiver of their Appellate Rule 7(B) claims. The Court chose to follow the Indiana Supreme Court's example in *Shoun v. State*, 67 N.E.3d 635 (Ind. 2017), declining to find waiver where a defendant exclusively challenged his sentence under the character prong. Court rejected appropriateness challenge to D's 14-year sentence for robbery despite her history of being trafficked).

*MacFarland v. State*, (09/17/2020) 153 N.E.3d 369 (Ind. Ct. App.), **15-year sentence for resisting law enforcement not inappropriate**

After a guilty plea, the trial court sentenced Defendant to concurrent fifteen-year terms on three counts of Level 3 felony resisting law enforcement and concurrent to those sentences a five-year term on the count of Level 5 felony resisting law enforcement, for an aggregate sentence of fifteen years. The Court of Appeals held that the sentence was not inappropriate in light of the offense and Defendant's character. As to the nature of the offense, the Court found that Defendant's offense was sufficiently egregious to justify a deviation from the "typical" offenses of resisting law enforcement. Defendant sped away from officers who had attempted to initiate a traffic stop, disregarded stop signs, and collided with a vehicle containing two adults and two children. Both children died immediately, the children's father later died as a result of his injuries, and the children's pregnant mother also suffered injuries. It was also later determined Defendant had cannabinoids in his system at the time of the offense. Regarding the character of the Defendant, the Court noted that notwithstanding his "profound remorse, Defendant's criminal history is extensive and includes three prior felony convictions along with numerous misdemeanor convictions. At the time of the offense, Defendant was out on bond for carrying a handgun without a license and dealing in marijuana, both as Level 5 felonies, had failed other community corrections programs, and had prior convictions for the same offenses.

*Prince v. State*, (06/17/2020) 150 N.E.3d 233 (Ind. Ct. App.) **Three-year commitment to DOC for driving in violation of lifetime license forfeiture not inappropriate**

After pleading guilty to Level 5 felony driving after license forfeiture for life, trial court sentenced Defendant to three-year advisory sentence to be served in the Department of Correction, consecutive to sentences in three other cases. On appeal, Defendant argued that this sentence was inappropriate in light of her character under Indiana Appellate Rule 7(B) because she had four dependent children and had taken steps to address her substance abuse. She also argued there was nothing inherently aggravating as to the nature of the offense, as police pulled her over for an improper lane change. Court rejected Defendant's appropriateness challenge to her sentence, finding she had a criminal history that reflected negatively on her character and continuing to drive showed no regard for the law.

Gerber v. State, (04/13/2021) 20A-CR-1771 (Ind. Ct. App.) **Sentence for domestic battery not inappropriate, no abuse of discretion in maximum sentence for contempt**

After pleading guilty to Level 6 felony domestic battery and contempt of court for calling the complaining witness (C.W.) hundreds of times in violation of a no-contact order, trial court imposed a two-and-one-half year sentence for the felony and 180 days for the contempt finding. The Court of Appeals noted that the nature of the offense, included slapping C.W., holding her down, and punching her in the head multiple times with a closed fist. Regarding Defendant's character, the Court noted that he has seven prior felony convictions and two prior misdemeanors and, while this case was pending, he was twice charged with invasion of privacy for going to C.W.'s house in violation of the no-contact order

and made hundreds of other calls to her by phone and by tablet. The Court held the two-and-one-half year sentence is not inappropriate. Additionally, the trial court did not abuse its discretion in sentencing Defendant to 180 days for indirect criminal contempt for his violations of the no-contact order.

*Skeens v. State*, (07/23/2020) 151 N.E.3d 1248 (Ind. Ct. App.) **41-year sentence for neglect of dependent causing death affirmed**

Defendant consumed alcohol and smoked marijuana before driving with her four children in her van. During a fight with her boyfriend while driving, Defendant lost control of the vehicle and her six-year-old daughter was partially ejected and died from her injuries. The Court of Appeals rejected Defendant's appropriateness challenge to her forty-one-year aggregate sentence under Appellate Rule 7(B). Regarding the nature of the offense, the court stated, "the scale of [Defendant's] neglect cannot be overstated." And, although she had no criminal history, she admitted to having a long history of substance abuse and to driving her children while under the influence on other occasions, which the Court concluded reflected poorly on her character.

**See also:** *Elliott v. State*, 19A-CR-2498 (Ind. Ct. App. 7/17/2020) (75-year sentence for murder enhanced because committed by use of a firearm affirmed and not inappropriate under Indiana 7(B) review); *Flowers v. State*, 19A-CR-322 (Ind. Ct. App. 9/23/2020) (Court rejected D's appropriateness challenge to his aggregate 85-year sentence based on the nature of the offense (shooting victim in the face at a party) and his character).

## F. Sentence Enhancements/Habitual Offender

*State v. Vande Brake*, (08/04/2020) 150 N.E.3d 595 (Ind.) **State waived its discretion to seek a firearm enhancement by failing to act to pursue it or object when the trial court dismissed it**

After filing a "use of firearm" sentence enhancement against Defendant, the State failed to raise the issue at any of the nine pretrial conferences, inform the court the CCS omitted listing it as a charged offense, propose any preliminary or final jury instructions relating to the enhancement, alert the court to the need for a bifurcated jury trial at any time before the court excused the jury, or object to the dismissal of the enhancement while the jury remained in the building. Under these circumstance, the Indiana Supreme Court found clear waiver of the discretion to seek a firearm enhancement and found the State failed to meet its burden to show the trial court's implied finding of waiver and subsequent sua sponte dismissal of the enhancement were contrary to law.

*Parrish v. State*, (03/30/2021) 20A-CR-1487 (Ind. Ct. App.) **Statutory factors to support criminal-organization enhancement are not mandatory or exclusive**

A CVS was robbed by two men and during the robbery employees were ordered to lay face down on the floor. The two men were apprehended shortly after the robbery. Police later received information that a third man was involved, and a police dash camera video showed three men fleeing the CVS. Further investigation indicated that Defendant knew one robber arrested at the scene and had been with that person shortly before the robbery and driving that person's mother's car. Defendant was

charged as an accomplice to Level 2 felony robbery, three counts of Level 3 felony confinement, habitual offender and enhancement of being a member of a criminal organization. The Court of Appeals upheld the convictions under an accomplice liability theory, stating that even though Defendant had not entered the store, he had knowingly or intentionally aided the two men in the robbery. The criminal-organization statute enhances penal consequences for committing one or more felony offenses in connection with a criminal organization. A "criminal organization" is defined as a formal or informal group with at least three members that assists in or participates in the commission of a felony. The Court of Appeals found sufficient evidence to support the criminal-organization enhancement, relying on the plain meaning of the word "member." The Court stated that even though the statute is intended to apply to gang related activity and that the criminal organization enhancement statute lists ten factors which may be used as evidence that a person was a member of a criminal organization and that none of the factors apply, those factors are neither mandatory nor exclusive. The Court was bound by the decision of the trier of fact because the legislature has provided that an informal group of people who assist or participate in a felony is a criminal organization. The Court found it "concerning" that such a harsh sentencing enhancement can be imposed on a defendant with none of the statutory factors present, but that is a concern for the legislature and not the court. The Court found the criminal-organization enhancement was based upon attendant circumstances, did not violate double jeopardy and Defendant's resulting 52-year sentence was not inappropriate.

## G. Credit Time

*Temme v. State*, (10/20/2020) 158 N.E.3d 423 (Ind. Ct. App.), *TRANSFER PENDING -- oral argument 4/8/21* **Doctrine of credit for time erroneously at liberty rejected under Indiana law**

The doctrine of credit for time erroneously at liberty is an equitable doctrine with strong roots in federal jurisprudence and has been adopted in many states. The doctrine allows that a prisoner who is released through no fault of his own may have his sentence continue to run while he is at liberty. Here, Defendant was sentenced to serve a misdemeanor sentence at the local jail, as well as a felony sentence in the DOC. DOC officials erroneously applied 450 days of credit time to both his felony and misdemeanor sentences, which led to his mistaken early release. Defendant notified DOC officials and his lawyer of the mistake but was released anyway. He moved back in with his parents, resumed his prior employment, and led a law-abiding life. The Court of Appeals rejected the argument that Defendant should be granted credit time for the days he was erroneously at liberty through no fault of his own, noting that the award of credit time is covered by statute in Indiana and the type of credit sought by Defendant is not authorized by the General Assembly. The Court of Appeals further held that Defendant failed to show the government's actions rose beyond mere negligence and so declined to find any violation of due process.

*Bonds v. State*, (03/31/2021) 20A-CR-1449 (Ind. Ct. App.) **Sentencing judgment must reflect time spent in confinement prior to sentencing**

Defendant was sentenced after conviction for two counts of Class A felony child molesting. His abstract of judgment reflected 777 days pre-trial confinement, but his sentencing judgment did not reflect the 777 days of pre-trial confinement. Defendant filed a motion to correct erroneous sentence, asking that the sentencing judgment reflect the 777 days of pre-trial confinement. The trial court denied the motion to correct erroneous sentence, but the Court of Appeals reversed, citing *Robinson v. State*, 805 N.E.2d 783 (Ind. 2004), which held that I.C. 35-38-3-2 requires a sentencing judgment to include credit time earned for time spent in confinement before sentencing.

## H. Double Jeopardy/Double Enhancements

*Wadle v. State*, (08/18/2020) 151 N.E.3d 227 (Ind.) ***Richardson* actual evidence test expressly overruled in favor of a new analytical framework for substantive double jeopardy claims**

In expressly *overruling* the constitutional tests formulated in *Richardson*, the Indiana Supreme Court set forth the following test: When multiple convictions for a single act or transaction implicate two or more statutes with common elements, a court first looks to the statutes themselves. If the language of either statute clearly permits multiple punishment, either expressly or by unmistakable implication, the court's inquiry comes to an end and there is no violation of substantive double jeopardy. But if the statutory language is not clear, then a court must apply Indiana's included offense statutes, I.C. 35-38-1-6 and 35-31.5-2-168 to determine whether the charged offenses are the same. If neither offense is included in the other (either inherently or as charged), there is no violation of double jeopardy. But if one offense is included in the other (either inherently or as charged), then the court must examine the facts underlying those offenses, as presented in the charging instrument and as adduced at trial. They key question of that examination is whether the defendant's actions were "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction." If the factual analysis reveals two separate and distinct crimes, there is no violation of substantive double jeopardy even if one statutory offense is included in the other. But if the analysis shows a single continuous crime with one statutory offense included in the other, then the prosecutor may charge these offenses only in the alternative, not cumulative sanctions. The State can rebut this presumption only by showing that the statute--either in express terms or by unmistakable implication, clearly permits multiple punishment. Finally, the court emphasized that supplemental Indiana constitutional provisions work in harminy with the substantive double-jeopardy protections discussed above to ba multiple punishments in a single trial. Article 1, Section 16 of the Indiana Constitution requires that all penalties be "proportioned to the nature of the offense," the protections in Article 1, Section 13 entitle the defendant to clear notice of the charge or charges against him which operates to bar a conviction of a lesser included offense unless the charging instrument alleges all of the essential elements of that offense, and Article 7, sections 4 and 6, which through Ind. Appellate Rule 7(B), permit a criminal offender to challenge the trial court's sentence as "inappropriate in light of the nature of the offense and the character of the offender." Here, Defendant was convicted of four offenses. The State conceded and the Court agreed that under the new framework, two of them--OWI endangering a person and OWI with a blood-alcohol concentration of 0.08 or more--violate double jeopardy. Neither statute clearly permits cumulative punishment, and the latter offense is an included offense of the former. The remaining two convictions were leaving the scene of an accident and OWI causing serious

bodily injury. Neither statute clearly permits multiple punishments, either expressly or by unmistakable implication, so the Court proceeded to analyze the offenses charged under Indiana's included-offense statutes. The Court concluded that Level 5 felony OWI-SBI is included in the offense of Level 3 felony leaving the scene of an accident and found that because Defendant's actions were so compressed in terms of time, place, singleness of purpose, and continuity of action, they were one continuous transaction. As a result, the Court concluded that the separate statutory offenses present alternative (rather than cumulative) offenses and vacated the level 5 felony offense.

**SEE ALSO:**

*Johnston v. State*, 164 N.E.3d 817, (Ind. Ct. App. March 2, 2021) (new double jeopardy framework does not apply retroactively on PCR; *Richardson* 'actual evidence' test applies); *Barrozo v. State*, 156 N.E.3d 718 (Ind. Ct. App. Sept. 24, 2020) (declining to definitively decide whether the *Wadle* analysis is to be applied retroactively).

*Wisdom v. State*, No. 162 N.E.3d 489, (Ind. Ct. App. Dec. 22, 2020) (sucessive prosecution/procedural double jeopardy claim. Court rejected defendant's claim of procedural or successive prosecution double jeopardy, that the "State should not have been allowed to go forward on the gang enhancement in the second phase of the trial because he was acquitted of criminal-organization activity in the first phase of the trial." The Court relied on a footnote in *Wadle* in which the justices left open the issue of additional Section 14 protection in the successive prosecution context of double jeopardy).

*Diaz v. State*, 158 N.E.3d 363 (Ind.Ct.App. 2020) (murder and Level 5 felony robbery convictions did not violate double jeopardy under old law or *Wadle* analysis because they are two distinct chargeable crimes and continuous crime doctrine did not apply).

*Thurman v. State*, 158 N.E.3d 372 (Ind. Ct. App. 2020) (pointing a firearm and criminal recklessness convictions vacated as lesser included offenses of attempted murder).

*Hendricks v. State,* (01/14/2021) 162 N.E.3d 1123 (Ind. Ct. App.) (after first determining "the offense of conspiracy to commit robbery could be an included offense of the felony murder, as charged in this case" and then reviewing the evidence presented at trial, the court held "under these facts" the defendant's criminal acts were a single transaction not subject to multiple punishments and remanded with instructions to vacate the robbery conviction).

*Madden v. State*, (01/12/2021) 162 N.E.3d 549, (Ind. App.) (under *Wadle* analysis, Court found that "because criminal confinement is included in kidnapping" and the defendant's actions were so "compressed in time, place, singleness of purpose, and continuity of action that his convictions for both crimes violate double jeopardy"; further, under test in *Powell* (see below), the Court also held, as the State conceded, that only the Level 2 felony kidnapping may stand but Defendant's Level 5 felony kidnapping conviction must be vacated; however, Defendant's two convictions for aggravated battery were affirmed. Noting that "[b]ecause the gravamen of this offense is the injury of another person, it is a result-based statute" the court continued to the second step in Powell and held that since "the two batteries were separated by time, place, and purpose, they were not part of a single transaction.").

*Jones v. State*, (10/29/2020) 159 N.E.3d 55 (Ind. Ct. App.) (Defendant was convicted of two counts of Level 3 felony aggravated battery, one count of Level 2 felony criminal confinement and two counts of kidnapping – one as a Level 2 felony and one as a Level 5; Court held that under both the old continuous crime doctrine test and the new uniform substantive double jeopardy test found in *Wadle*, Defendant's battery convictions survive, but his Level 5 felony kidnapping and Level 2 felony criminal confinement convictions must fall).

*Brown v. State*, (11/19/2020) 160 N.E.3d205 (Ind. Ct. App.) (Court found no double jeopardy violation from dual convictions for reckless homicide and dangerous possession of a firearm when "the State used different, unrelated facts to support each of the charges." "Reckless homicide was supported by Brown pulling the trigger of the firearm" while dangerous possession "was supported by facts related to Brown's actions with the firearm before the shooting." His actions were not "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction.").

*Jarrett v. State*, (11/30/2020) 160 N.E.3d 526 (Ind. Ct. App.) (neither the attempted robbery nor murder was an offense included in the other and therefore did not violate double jeopardy; Judge Weissmann wrote separately to address "a practical dilemma facing appellate courts, lawyers and litigants" after the recent revision of long-standing double jeopardy caselaw. Appellate counsel could not have anticipated *Wadle* and may have opted to argue double jeopardy instead of an Appellate Rule 7(B) argument on appeal. But even so, Judge Weissmann stated the Court of Appeals could not sua sponte review Defendant's sentence under 7(B), citing *Wilson v. State*, 19S-PC-548 (Ind. Nov. 17, 2020)).

*Demby v. State*, 20A-CR-1012 (Ind. Ct. App. Feb. 16, 2021) (Defendant's burglary conviction was not an included offense of aggravated battery or attempted murder, thus his burglary conviction did not violate double jeopardy; however, while aggravated battery is not an inherently included lesser offense of attempted murder, it may become a lesser-included offense depending on how it is charged. Pursuant to *Wadle*, if as here the factual circumstances and charging information render aggravated battery a lesser-included offense of attempted murder, the aggravated battery conviction would violate against double jeopardy.).

*Powell v. State*, (08/18/2020) 151 N.E.3d 256 (Ind.) **While attempted-murder statute contains no clear unit of prosecution, the multiple shots defendant fired—despite their proximity in space and time—amount to two chargeable offenses based on his dual purpose of intent to kill both victims**

Defendant's actions of firing multiple shots in rapid succession at two men seated in a car, despite their proximity in space and time, amounted to two distinct, chargeable acts of attempted murder. In reaching its conclusion, the Indiana Supreme Court described and applied its framework for analyzing claims of multiplicity, a branch of substantive double jeopardy based on the charging of a single offense in several counts. The Court framed the key question as whether the same act may be punished as two counts of the same offense and its task as determining whether the statute permits punishment for a single course of criminal conduct or for certain discrete acts within that course of conduct. The inquiry involves a two-step process: first, a review of the text of the statute to discern whether expressly or by judicial construction it indicates a unit of prosecution and then, if the statute is

ambiguous, determining whether the facts indicate a single offense or distinguishable offenses. Any doubt counsels against turning a single transaction into multiple offenses.

Here, while the attempted murder statute does not contain a clear unit of prosecution, Defendant's criminal acts indicate distinguishable offenses. First, the Court considered the attempted murder statute and concluded that alternative readings of it reveal equally legitimate ways of thinking about the statute's unit of prosecution: ether by conduct or by result. Given the ambiguity, the Court then examined the facts to conclude that the multiple shots Defendant fired--despite their proximity in space and time--amount to two chargeable offenses based on Defendant's dual purpose of intent to kill both men.

**SEE ALSO**: *Hill v. State*, 157 N.E.3d 1225 (Ind. Ct. App. 2020) (two reckless homicide convictions arising from two fatalities did not violate double jeopardy under either old law or recently-adopted *Powell* test, because reckless homicide is a "result-based" statute that creates a separate "unit of prosecution" for each death caused by a defendant's reckless act; Court also held that the only common-law rule that survived *Wadle* and *Powell* is the continuous-crime doctrine, though only as part of the new tests, not as a separately enforceable double-jeopardy standard."); *SEE ALSO Woodcock v. State*, (01/28/2021) 163 N.E.3d 863 (Ind. Ct. App.) (noting split, Court held that common law principles of substantive double jeopardy no longer exist independently post-*Wadle*).

**BUT SEE:** *Shepherd v. State*, (09/14/2020) 155 N.E.3d 1227 (Ind.Ct.App.); and *Rowland v. State,* (09/08/2020) 155 N.E.3d 637 (Ind.Ct.App.) (leaving "undisturbed" the five categories of common-law protections identified by Justice Sullivan's concurring opinion in *Richardson* and later adopted by the full court in *Guyton v. State*, 771 N.E.2d 1141 (Ind. 2002)).

*Koetter v. State*, 158 N.E.3d 820, 825–26 (Ind. Ct. App. 2020) (finding no double jeopardy protection for multiple (6) counts of possession of child pornography and noting "the legislature defined the crime of possession of child pornography listing objects in the singular, *e.g.*, 'a photograph', 'a digitized image', etc. This conveys the legislature's clear intent to make the possession of each photograph or digitized image a distinct occurrence of offensive conduct in violation of the statute.").

*Morales v. State*, No. 20A-CR-913 (Ind. Ct. App. March 25, 2021) (convictions for two counts of arson for setting a series of fires within same building during a 30-minute period violated the statutory prohibition on substantive double jeopardy).

*Barrozo v. State*, (09/24/2020) 156 N.E.3d 718 (Ind. Ct. App.) (one of two reckless driving convictions resulting from fatal car crash violated double jeopardy; but under *Wadle* analysis, there was no double jeopardy violation stemming from the convictions for reckless homicide, reckless driving and leaving the scene of an accident).

## I. Sentence Modification

*Sargent v. State*, (10/21/2020) 158 N.E.3d 783 (Ind. Ct. App.) **Motion to participate in Purposeful Incarceration Program does not count as a request for sentence modification under statute's two-motion limit**

Defendant's pro se motion to participate in the Purposeful Incarceration Program does not count as a request for sentence modification under Ind. Code § 35-38-1-17(j), which limits the filing of sentence modification petitions to one per year and no more than two during any consecutive period of incarceration without the consent of the prosecuting attorney. Here, Defendant filed a pro se motion to participate in Purposeful Incarceration Program and then subsequently filed two motions for sentence modification. The trial court erroneously concluded that it lacked statutory authority to consider the merits of Defendant's current petition for modification because he had already filed two such petitions during his consecutive period of incarceration. Because Defendant's pro se request to participate in in the Purposeful Incarceration Program was not a request for sentence modification, Defendant had only made one prior motion to modify his sentence.

*Mance v. State*, (02/17/2021) 163 N.E.3d 367 (Ind. Ct. App.) **Lack of response from prosecutor does not constitute consent to modify sentence absent indication prosecutor's office received letter**

Petitioner was convicted and sentenced in 2004 for two murders. In 2020, Petitioner filed for sentence modification under I.C. 35-38-1-17(k) which states (after 365 days) a petitioner convicted of a crime of violence must get prosecutor's consent prior to filing a motion for sentence modification. Petitioner wrote a letter to the person who had been the trial court prosecutor in his case and said if he did not get a response from the trial court prosecutor in thirty days, he would consider the lack of response as prosecutor consent to filing his petition for sentence modification. Petitioner did not hear from the prosecutor and filed his petition for sentence modification, which was denied. Court of Appeals found no indication the prosecutor's office received the request for consent and the lack of response to a letter was not the equivalent of prosecutor consent. Court distinguished *State v. Harper*, 8 N.E.3d 694 (Ind. 2014), where it was clear the prosecutor's office was aware of the request for modification but did not object. Helf, denial of sentence modification affirmed.

*Merkel v. State*, (12/14/2020) 160 N.E.3d 1139 (Ind. Ct. App.) **Authority to review placement of non-violent offenders due to Covid-19 does not override substantive Indiana law on sentence modifications**

Defendant pleaded guilty to being a serious violent felon in exchange for the State's agreement to dismiss the habitual offender enhancement. 366 days after the guilty plea, Defendant filed an emergency petition for release from custody based on the Covid-19 pandemic and motion to modify sentence. The State filed an objection, and the trial court denied the petition. The Court of Appeals held that under Indiana Code 35-38-1-17(d)(14), the trial court's authority to consider a modification without the consent of the prosecutor ended on day 365 and the trial court was without the authority to

consider the petition. Even though Defendant is older and has diabetes, which places him in a high-risk category for contracting COVID-19, he would still be high risk if released to the community. Also, the Indiana Supreme Court's Administrative Rule 17 Emergency Relief order dated April 3, 2020, gave authority to trial courts to review county-jail and direct placement community corrections sentences of non-violent inmates, but it did not override substantive Indiana law on sentence modifications and was inapplicable to Defendant because he was not placed in a county jail and was convicted of a violent offense.

# VI. PROBATION/COMMUNITY CORRECTIONS REVOCATION

## A. Conditions

*Coleman v. State*, (02/11/2021) 162 N.E.3d 1184 (Ind. Ct. App.) **No abuse of discretion to add condition of probation not specified in plea agreement**

After Defendant pleaded guilty to Level 6 felony strangulation, trial court did not abuse its discretion in ordering that he attend and complete classes in anger management or conflict resolution, even though plea agreement did not include any conditions of probation. First, the court addressed a motion Defendant filed to strike a portion of the State's brief that cited to information contained in the probable cause affidavit. Noting that the strict rules of evidence do not apply to sentencing hearings and that the review of his sentence does not rely on any facts he disputes, the court denied the motion. Next, the court found that the requirement to attend anger management or conflict resolution classes as a condition of probation is an administrative or ministerial condition. It is an obligation that is rehabilitative in nature and does not materially add to the punitive obligation of his sentence. Held, no abuse of discretion.

*Salhab v. State*, (08/10/2020) 153 N.E.3d 297 (Ind. Ct. App.) **Probation condition barring probationer from "businesses that sell sexual devices or aids" unconstitutionally overbroad**

Defendant was convicted of three counts of Level 3 felony rape, as well as Level 5 felony counts of child seduction, criminal confinement and Level 6 felony child seduction. At sentencing, the trial court vacated the Level 5 felony counts over concerns about double jeopardy violations. Defendant was sentenced to eight years for each of the rape convictions, with two years suspended from each of those individual sentences, and to one year for his Level 6 felony child seduction conviction. He was ordered to serve his three rape sentences consecutively because the trial court believed the evidence showed each charge constituted a distinct act, and there was a "significant" aggravating circumstance of his having care, custody and control over the victim. Defendant was also sentenced to three years' probation. The Court of Appeals affirmed Defendant's sentence but reversed a condition of Defendant's probation barring him from "businesses that sell sexual devices or aids." The Court noted that identical parole and probation conditions were struck as unconstitutionally overbroad in *Bleeke v. Lemmon*, 6 N.E.3d 907, 921 n.8 (Ind. 2014); *Custance v. State*, 128 N.E.3d 8, 12 (Ind. Ct. App. 2019); and *Collins v. State*, 911 N.E.2d 700, 714 (Ind. Ct. App. 2009), *trans. denied*.

*Brown v. State*, (02/05/2021) 162 N.E.3d 1179 (Ind. Ct. App.) **Abuse of discretion to order execution of entire remaining suspended sentence for technical violation of probation**

After revoking Defendant's probation, trial court abused its discretion in ordering Defendant to serve more than sixteen years of his previously suspended 20-year sentence when the evidence before the court showed only that Defendant had missed an undetermined number of meetings with his probation officer. While it is correct that probation may be revoked on evidence of violation of a single condition, the selection of an appropriate sanction will depend upon the severity of the defendant's probation violation. *Heaton v. State*, 984 N.E.2d 614, 618 (Ind. 2013). Held, judgment remanded to resentence Defendant "in a manner commensurate with the severity of missed appointments with his probation officer, the only violation the State established on this record."

## B. Revocation; Procedure and Hearing

*Mosley v. State*, (05/21/2021), 20A-CR-2094 (Ind. Ct. App.), **Probation revocation reversed -void no-contact order issued to protect a dead person**

Because a no-contact order cannot be issued to protect a dead person, trial court abused its discretion for revoking Defendant's probation based on violation of that void order. Six months after Defendant was imprisoned for fraud, he sent an apology letter to one of his victims. A no-contact order imposed as a condition of his probation barred that contact. Unbeknownst to the parties, the victim had died about two years before Defendant's sentencing, when the trial court entered the no-contact order. Nonetheless, the trial court found Defendant violated the terms of his probation by writing to the deceased woman, consequently revoked three years of Defendant's probation, and ordered him to spend those years in prison. Court of Appeals held that the no-contact order was void and could not support either a prosecution for attempted invasion of privacy or a probation revocation based on Defendant's commission of that offense. The purpose of a no-contact order imposed as a condition of probation pursuant to Ind. Code § 35-38-2-2.3(a)(18)-- to protect the victim of an offense from the perpetrator-- is not served where, as here, the victim already has died. The only reasonable interpretation of "individual" in that statutory context is "a living person." Reading "individual" to include dead people would be illogical and even absurd, both results to be avoided in statutory construction. As the trial court lacked authority under Indiana Code § 35-38-2-2.3(a)(18) to issue a no-contact order barring Defendant's contact with victim, given her earlier death, the order was void at the outset. Court rejected State's argument based on Indiana's attempt statute (I.C. § 35-41-5-1(b)) that the impossibility defense should be unavailable in this context, noting that the State is requesting revocation for attempting to violate a no-contact order that the State should never have sought and the trial court should never have entered as to a victim who no longer needed protection. Regardless, a probation revocation cannot be based on the violation of a void condition of probation. *See*, *e.g.*, *Foster v. State*, 813 N.E.2d 1236, 1239 (Ind. Ct. App. 2004) (reversing probation revocation based on violation of term of probation void for vagueness). Held, judgment reversed.

*Arrowood v. State*, (08/18/2020) 152 N.E.3d 663 (Ind. Ct. App.) **Defendant not denied right to counsel in community correction revocation hearing; more lenient due process standard applied**

After the State filed a motion to revoke Defendant's placement in community corrections for a violation of its terms, the trial court conducted a hearing on the petition. Defendant did not appear in person but was represented by counsel. The trial court revoked Defendant's placement and ordered her to serve the balance of her sentence in incarceration. The Court of Appeals held that because the revocation of probation or community corrections placement is civil, not criminal, in nature, Article 1, section 13 of the Indiana Constitution is inapplicable. The Court declined to hold that the right to counsel at all criminal prosecutions extends to revocation hearings and instead held such proceedings are governed by principles of due process, citing *Baum v. State*, 533 N.E.3d 1200 (Ind. 1989).

*Mefford v. State*, (02/15/2021) 165 N.E.3d 571 (Ind. Ct. App.) **Termination from drug court program and imposition of agreed-upon sentence affirmed**

Distinguishing *Holsapple v. State*, 148 N.E3d 1035 (Ind. Ct. App. 2020), which invalidated a zero-tolerance punishment resulting from a probation violation, the Court of Appeals affirmed Defendant's termination from participation in a drug court program, the entry of conviction for two Level 6 felonies and his five-year executed sentence. Notwithstanding the COVID-19 pandemic and its unfortunate consequences, the trial court did not have discretion to impose anything less than the executed five years provided in Defendant's plea agreement. Unlike Defendant, Holsapple was not participating in Drug Court through a Section 14 deferral and "must have been referred to [Drug Court] as a condition of probation." Defendant's sentence was not a stayed sentence; it was a conviction and sentence that was deferred while he participated in Drug Court, which would be imposed if he was terminated from the program.

*Knight v. State*, (09/15/2020) 155 N.E.3d 1242 (Ind. Ct. App.) **Trial court followed procedural requirements for probation hearing but lacked discretion to impose additional community service requirements**

Under Ind. Code § 35-38-2-1.8, "probation can be altered at any time, even in the absence of a probation violation. *Collins v. State*, 911 N.E.2d 700, 708 (Ind. Ct. App. 2009). Here, after a senior judge accepted Defendant's plea agreement, the presiding judge scheduled a modification of probation hearing and amended the conditions of probation to include a term requiring Defendant to perform 600 hours of community service and to report his progress to the probation department monthly. The Court of Appeals held that while the trial court complied with the procedural requirements of Ind. Code § 35-38-2-1.8(c) when conducting a new probation hearing, the imposition of the community service condition was beyond the trial court's discretion because that condition was not specified in the plea agreement and the agreement contained language that limited the court's discretion. Although the agreement conferred broad discretion to the trial court to impose probation conditions, the later language providing that Defendant's probation would revert to nonreporting probation ultimately imposed a limitation of the trial court's discretion to order a probation condition that would require

continued reporting. Defendant waived his claimed violation of his right to allocution during the new probation hearing by failing to object.

### C. Parole

*Aguilar v. State*, (12/31/2020) 162 N.E.3d 537 (Ind. Ct. App.) **Plea agreement calling for consecutive sentences in two causes did not prevent Defendant's release to parole while also on probation**

Defendant entered into a plea agreement concerning two separate cause numbers: a single offense under cause FB-10 with a sentence of twenty years in the DOC, and several offenses under FB-12 with a sentence of ten years in the DOC with all the time suspended to probation. The agreement summarized the sentence by specifying the "combined sentence" across both causes was "30 years to the [DOC], 20 served, 10 suspended." After serving time in DOC and accruing credit time in FB-10, Defendant was placed on parole. He was also placed on probation in cause FB-12. A violation of probation led to an agreement that Defendant would serve 2,370 days in the DOC and have no further probationary period in FB-12. After he began serving that sentence, the parole board held a hearing and revoked ten years of Defendant's credit time in FB-10, arranged so he would serve the balance of his sentence in FB-10 before that in FB-12. Defendant filed a petition for post-conviction relief that the trial court denied. On appeal, Defendant argued he should have bypassed parole in FB-10 and moved straight to his term of probation in FB-12, citing Ind. Code 35-50-6-1(a).

The Court of Appeals concluded because it is not possible under Indiana's sentencing scheme to receive a single "sentence" across counts, let alone across causes, Defendant cannot demonstrate he was improperly placed on parole in FB-10 because of a suspended sentence in FB-12. Even if it were possible to negotiate a plea agreement that calls for bypassing parole, the instant plea agreement did not do so and calls for a standard sentencing scheme which did nothing to prohibit the parole board from placing Defendant on parole under FB-10. The court further noted that even if the Defendant should not have been on both probation in FB-12 and parole in FB-10, the trial court still had the authority to revoke his probation at any time after sentencing. Held, no error in granting summary disposition of PCR petition to the State.

## VII. SUBSTANTIVE OFFENSES

### A. Offenses against the Person

*Coleman v. State*, (06/30/2020) 149 N.E.3d 313 (Ind. Ct. App.) **Battery by bodily fluid statute not unconstitutionally vague and saliva is considered a bodily fluid under the statute**

Defendant, an inmate at Wabash Valley Correctional Facility, spit on a corrections officer. He was charged with battery by bodily fluid against a public safety official and convicted by a jury. On appeal Defendant argued "bodily fluid" is not defined in the statute and therefore the statute was unconstitutionally vague as applied to him. Court of Appeals looked to the dictionary definition to find that a person of ordinary intelligence would know that the term bodily fluid would include saliva.

*Gibbs v. State*, (10/29/2020) 157 N.E.3d 562 (Ind. Ct. App.) **Insufficient evidence to support domestic battery enhancement-- no evidence CW was in care of Defendant**

Defendant was convicted of domestic battery, elevated to a Level 5 felony because it resulted in bodily injury to a family or household member who has a mental or physical disability and who is in the care of the defendant. The complaining witness (C.W.) was obese, had bad knees, struggled to stand, and used an electric scooter. The Court of Appeals found insufficient evidence to support a conclusion Defendant voluntarily assumed care of C.W. First, there was no evidence C.W. was in anyone's care or that she needed or wanted care. Second, even if she did need some level of care because of her disability, there is no authority to support the proposition that anybody who enters a romantic relationship with such a person necessarily assumes the care of that person. The Court of Appeals remanded the case to the trial court for the entry of a conviction for a Class A misdemeanor.

*Jackson v. State*, (03/19/2021) 165 N.E.3d 641 (Ind. Ct. App.) **"Dated or has dated" language in statutory definition of "family or household member" is not unconstitutionally vague**

The term "family or household member" for purposes of Indiana's domestic battery statute has been defined in Indiana Code § 35-31.5-2-128(a)(1)-(3) to mean an individual who "is a current or former spouse of the other person," a person who "is dating or has dated the other person," and a person who "is or was engaged in a sexual relationship with the other person." Ind. Code § 35-31.5-2-128(a)(1)-(3). On appeal of his domestic battery conviction, Defendant argued that the phrase "dated or has dated" as contained in the statutory definition of "family or household member" is unconstitutionally vague because it "encompasses the mundane to the intimate." Court disagreed, concluding that "dating" is within the range of activities included in the statute, which as applied to the totality of the facts and circumstances of this case is sufficiently clear to have informed Defendant of the conduct that is prohibited. And there are at least two subsections under which the trial court as trier of fact could have found that the complaining witness was a "family or household member" in relation to Defendant, whom she met online through RoseBride.com, visited several times and legally married in Kentucky. Held, judgment affirmed.

*Smith v. State*, (04/30/2021) 20A-CR-206 (Ind. Ct. App.) **Sufficient evidence of "moderate bodily injury"**

In prosecution for Level 6 felony domestic battery resulting in moderate bodily injury, State presented sufficient evidence of probative value from which a reasonable jury could find beyond a reasonable doubt that the complaining witness (C.W.) suffered an impairment of physical condition that included substantial pain amounting to moderate bodily injury. When C.W. informed Defendant she wanted a divorce, Defendant used her "as a battering ram" and repeatedly kicked her and hit her head against a door frame. C.W. declined to go to the hospital but said she suffered from "massive migraines" and other related pain and illness after the attacks. She suffered various injuries including lumps, scratches and redness on her head as well as scratches and bruises on other parts of her body. In the week following her attack, C.W. could not move her neck quickly without pain or vomiting and continued to see stars. Also, the doorframe was dented from the attack and a piece of siding had come loose after Defendant hit C.W.'s head against it. "While there may be no bright line to differentiate

levels of pain, the State's evidence demonstrated that C.W.'s pain was above the threshold to show bodily injury and enough to show that the result of Defendant's attack on C.W. was "an impairment of physical condition that include[d] substantial pain." Ind. Code § 35-31.5-2-204.5.

*Tate v. State*, (01/28/2021) 161 N.E.3d 1225 (Ind. Ct. App.) **LWOP – Sufficient Evidence of Torture and Molest Aggravators**

Affirming Defendant's sentence of life without parole, Court found sufficient evidence to support the statutory aggravating circumstances that Defendant killed the victim while committing or attempting child molest, and torture. The jury reasonably relied on the number and nature of the victim's injuries in finding the torture aggravator. And the significant rectal injuries that occurred while Defendant was alone with the victim was substantial probative evidence from which the jury could reasonably infer that Defendant intentionally killed the victim while molesting him. Court concluded that any error concerning the torture and child-molest aggravators was harmless because the jury would have been just as likely to recommend a life-without-parole sentence had it considered only the murder-of-a-child aggravator. Held, judgment affirmed.

*Perkins v. State*, (11/30/2020) 158 N.E.3d 1274 (Ind. Ct. App.) **Sufficient evidence to support attempted murder based on accomplice liability**

The Court rejected Defendant's sufficiency challenge to his attempted murder conviction. Defendant was among a group of armed, masked people who invaded a home at 3:00 a.m. which led to a fatal gun battle. Although the plan of attacking and stealing from the attempted murder victim was not Defendant's plan, his course of conduct, before, during, and after the occurrence of the crimes showed that he actively participated in the attempted murder.

## B. Sex Offenses

*Brown v. State*, (07/02/2020) 149 N.E.3d 322 (Ind. Ct. App.) **Circumstantial testimonial evidence sufficient to prove age**

In trial for child molesting, the State failed to present direct evidence that Defendant was at least twenty-one years old when he committed the offense. However, testimony established that Defendant was "bald in the middle at the top and hair in the back with a white beard," he owned three cars, worked as a handyman, had a house, and cared for six to ten children at a time. The court held the jury could use its common sense to determine from the evidence that Defendant was at least twenty-one years old when he committed the offense.

*Cutshall v. State*, (03/25/2021) 20A-CR-1866 (Ind. Ct. App.) **Circumstantial evidence of penetration sufficient in child molesting case**

In prosecution for Level 1 felony child molesting, evidence was sufficient to show penetration without testimony from the child complaining witness (C.W.), who was too young to speak in full sentences, because penetration can be inferred from circumstantial evidence. An eyewitness testified

Defendant and C.W. were in bed under the covers, but their crotches were together, C.W. legs were in the air and Defendant's penis was exposed and erect. C.W. was also examined by a nurse who documented injuries to C.W.'s genitalia and testified that they were likely caused by blunt force trauma and that it was not a common injury for a child of her age. Noting that it cannot reweigh evidence, Court found that from the evidence presented, the trier of fact could have inferred Defendant committed child molesting by penetration.

*Smith v. State*, (02/11/2021) 163 N.E.3d 925 (Ind. Ct. App.) **Sufficient evidence for child molesting -- child witness's testimony not incredibly dubious**

On appeal from his Level 4 felony child molesting conviction, Defendant challenged the sufficiency of the evidence under the incredible dubiosity rule, which allows the reviewing court to judge the credibility of witnesses when certain conditions are met. The rule is applied in limited circumstances, namely where there is: "[(1)]a sole testifying witness; [(2)]testimony that is inherently contradictory, equivocal, or the result of coercion; and [(3)]a complete absence of circumstantial evidence." *Moore v. State*, 27 N.E.3d 749, 756 (Ind. 2015). The complaining witness (CW), her mother, and a detective all testified, but the CW was the sole testifying witness who could establish the elements of the offense. However, her testimony was not inherently contradictory and equivocal and her testimony on the important facts regarding the molestation was consistent. Also, the fact there was no physical evidence to corroborate her testimony does not render it incredibly dubious. Held, conviction affirmed.

*Cutshall v. State*, (12/23/2020) 160 N.E.3d 247 (Ind. Ct. App.) **Sufficiency and vagueness challenges to possession of child pornography conviction rejected**

State presented circumstantial evidence to prove that Defendant knowingly possessed two digital images of child pornography on his wife's cellphone, even though the forensic analysis of the LG phone did not reveal who had downloaded the images. Court rejected Defendant's suggestion that there was insufficient evidence that the girls in the digital images appeared to be less than eighteen years old. The detective who conducted the forensic analysis testified that the girls in the images were "prepubescent" females. Additionally, "an assessment as to the girl's age is not only a matter of common sense but also the trier of fact may take into account her overall appearance, including the developmental stage of the girl based upon her breasts, body hair, and other anatomical features." *Bone v. State*, 771 N.E.2d 710, 717 (Ind. Ct. App. 2002). Defendant also waived his argument that the child pornography statute was unconstitutionally vague because he did not raise the claim before the trial court. Waiver notwithstanding, the Court held that Indiana's child pornography statute is not unconstitutionally vague. Given the precise circumstances of this case, a person of ordinary intelligence would, from the phrase "appears to be less than eighteen years of age" as used in Indiana's possession of child pornography statute, know that having digital images of prepubescent females engaged in sexual intercourse and oral sex was included in the proscribed conduct of possessing a digital image that depicts sexual conduct by a child who appears to be less than eighteen (18) years of age. Accordingly, Defendant failed to meet his burden of showing that Ind. Code § 35-42-4-4(d) is unconstitutionally vague.

*Koetter v. State*, (11/19/2020) 158 N.E.3d 820 (Ind. Ct. App.) **Evidence sufficient for child pornography convictions**

Defendant was convicted of six counts of possession of child pornography based on uploads of files from an email account. The Court of Appeals found sufficient evidence established that Defendant was present at the location associated with the upload IP address and that Defendant owned the email account in question. Emails from the account were linked to Defendant's phone and social media account, the account contained pictures of Defendant including his driver's license, purchases from the account were delivered to his BMV-listed address, and there was no evidence indicating anyone else was using the account.

## C. Sex Offender Registry/Sexually Violent Predator Finding

*Mehringer v. State*, (08/24/2020) 152 N.E.3d 667 (Ind. Ct. App.) **Sexual Violent Predator (SVP) finding does not violate separation of powers or due process**

Under Ind. Code § 35-38-1-7.5(2014) ("SVP Statute"), a person is an SVP by operation of law if he, being at least eighteen years of age, commits one of several enumerated offenses. An SVP is subject to additional restrictions beyond those imposed on non-SVP sex offenders. Here, Defendant received a sentence of nine years with seven years executed in the Department of Correction for his Level 3 felony child molesting conviction. Defendant's conviction is one of the enumerated offenses that automatically renders a person an SVP. Defendant argued the SVP Statute is unconstitutional because it violates the principle of separation of powers and that his due process rights were violated because he was deemed an SVP by operation of law and could not rebut the statutory presumption that he is likely to reoffend. He framed his argument as a challenge to the SVP statute on vagueness grounds. The Court of Appeals rejected Defendant's arguments and affirmed his SVP status.

*Spencer v. State*, (08/03/2020) 153 N.E.3d 289 (Ind. Ct. App.) **Sexually violent predator registry requirement -- exhaustion of administrative remedies and improper use of out-of-state convictions**

When Defendant moved to Indiana from Florida in 2016, he had a criminal history of two separate convictions from 1996 and 1997 which occurred when he was eighteen years old and required him to register in Florida for life as a sex offender. In 2016, as required by Indiana law, Defendant registered as a sex offender in Indiana. In 2018, the Sheriff's office telephoned Defendant and informed him that he was being designated as a sexually violent predator (SVP) but never gave him written notice of the change of his designation. Defendant filed a petition in the trial court to remove his designation as an SVP which was denied after a hearing. On appeal, the State argued Defendant failed to exhaust the administrative remedies that were available to him, specifically the "DOC Appeal Procedure". The DOC Appeal Procedure sets forth the manner in which a local law enforcement authority may implement a proposed change to information regarding a local registrant in the Indiana Sex and Violent Offender Registry. It also sets forth the administrative procedure by which the registrant can protest any

proposed change and, if necessary, appeal the decision to the DOC. However, the DOC Appeal Procedure states that the right of protest arises only when the local law enforcement authority notifies a registrant of a proposed change in writing.

Here, because the Sheriff's office never gave Defendant written notice that he would be designated as an SVP, Defendant did not fail to exhaust his administrative remedies. The Court also found that Defendant's Florida convictions were not substantially equivalent to the crimes of Class A or Class B felony child molesting as defined in Indiana to require that he register as a SVP in Indiana. And the law in effect in 2016 when Defendant moved to Indiana provided that, to be an SVP, he must have committed a crime substantially equivalent to child molesting as a Level 4 felony "for crimes committed after June 30, 2014." Defendant's crimes occurred in 1995 and he is therefore not required to register as an SVP under the statute that existed at the time Defendant moved to Indiana. Held, registration as an SVP reversed.

## D. Drug Offenses

*Dowell v. State*, (10/23/2020) 155 N.E.3d 1284 (Ind. Ct. App.) **Maintaining common nuisance - insufficient evidence**

Where State presented only evidence of one drug transaction involving Defendant's car, that single instance of use is not sufficient to prove Defendant committed Level 6 felony maintaining a common nuisance. *See Leatherman v. State*, 101 N.E.3d 879, 884 (Ind. Ct. App. 2018) (noting the Legislature intended by removal of the "one or more times" language to restore prior common law and statutory requirement that a common nuisance is one in which continuous or recurrent prohibited activity takes place). While text messages suggested that Defendant participated in multiple drug transactions, it is not clear from those messages what vehicle, if any, she was driving to complete those transactions. Held, judgment reversed and remanded with instructions to vacate maintaining common nuisance conviction.

*Sutton v. State*, (05/07/2021), 20A-CR-2213 (Ind. Ct. App.) **Insufficient evidence to support conviction for possession of narcotic drug where Defendant possessed stimulant**

Because the drug Lisdexamfetamine found in Defendant's backpack is a stimulant and not a narcotic drug listed in Indiana Code § 35-48-2-6(b), evidence was insufficient to prove that Defendant knowingly or intentionally possessed a narcotic drug. Although Lisdexamfetamine is not included in Indiana Code § 35-48-2-6(b), which identifies narcotics that qualify as controlled substances, it is listed under Ind. Code § 35-48-2-6(d), which identifies stimulants that qualify as controlled substances. Defendant raised this as a defense at trial, thereby alerting the State and the trial court to the problem; however, neither the trial court nor the State moved to amend the charging information at that time or enter judgment of conviction for the lesser offense of possession of a controlled substance, which was the crime actually committed by Defendant. Held, conviction vacated.

## E. Offenses against Property

*Williams v. State*, (11/12/2020) 158 N.E.3d 817 (Ind. Ct. App.) **Indiana's theft statute does not criminalize the taking of lost or mislaid property**

Defendant was convicted of theft for taking the change a previous customer accidentally left behind in a grocery-store self-checkout station. The State did not establish the identity of the man who left the money at the self-checkout station. The Court of Appeals found that it could reverse Defendant's conviction for that reason alone but also that the more fundamental problem with the conviction is that Indiana's theft statute does not criminalize the taking of lost or mislaid property. The Court noted that Indiana used to have a statute that criminalized failing to take reasonable measures to restore mislaid property to its owner, but that statute was repealed over forty years ago. Held, conviction reversed.

## F. Driving Offenses; Specialized Driving Permits

*King v. State*, (08/13/2020) 158 N.E.3d 1274 (Ind. Ct. App.) **Insufficient evidence D's license was still suspended at time of traffic stop**

After pulling Defendant over at 11:30 a.m. on October 24, 2018, trooper ran driver's license through the dispatch database and received a report that Defendant's driver's license was suspended for failure to pay child support. At trial, the State presented a certified copy of Defendant's driving record which indicated a license suspension effective on "8/30/2018" with an expiration date of "10/24/2018," the date of Defendant's late morning traffic stop. Relying on the BMV's manual (which was not sufficiently instructive), *Vogel v. State es rel Laud*, 107 Ind. 374, 8 N.E. 164 (1886), the general rule for computation of days in various legal contexts, and the persuasive guidance of an out-of-state case, the Court held that Defendant's license suspension ended at midnight of October 24. As a result, the Court found insufficient evidence that Defendant's driver's license was suspended when he was pulled over at 11:30 a.m. on October 24 and reversed his conviction for class A misdemeanor driving while suspended.

## G. Miscellaneous Offenses

*Harris v. State*, (02/23/2021) 163 N.E.3d 938 (Ind. Ct. App.) **Neglect resulting in death conviction and maximum sentence affirmed**

State presented sufficient evidence to support Defendant's conviction for Level 1 felony neglect of a dependent resulting in death. Last month, the Indiana Supreme Court affirmed the murder/LWOP conviction for Defendant's boyfriend, Dylan Tate. Two months before Tate beat the toddler (H.H.) to death, Defendant twice took H.H. to the emergency room because of swelling injuries to his head and face. At the end of December 2017, H.H.'s primary care provider suspected that H.H. was the victim of child abuse and referred him to the Riley Hospital emergency room, which has a Team to investigate such abuse. The ER physician clearly told Defendant that H.H., who had two black eyes, an internal ear injury, and a broken leg, was being abused. The physician was so concerned about H.H.'s injuries that she wanted him admitted to the hospital that day. In addition, Defendant knew that Tate was volatile.

Tate kicked her out of the house in January 2018 because, as Defendant told [a relative], "he was still angry over the broken leg incident." But a few weeks later, Defendant had moved back in with Tate and wanted H.H. to return home. Defendant also knew that Tate was both taking and selling drugs and had, as she told a detective, "been getting angrier and angrier" around the time that he brutally beat H.H. This evidence established that Defendant knowingly placed H.H. in a dangerous situation and was sufficient to support her conviction. The Court found that, by itself, Defendant's abuse of her position of trust with H.H. was a sufficient aggravating factor to support her 40-year sentence. The Court likewise rejected Defendant's claim that her maximum sentence was inappropriate, finding that "her violation of her position of trust with her 18-month-old son reflects very poorly on her character."

*Skeens v. State*, (07/23/2020) 151 N.E.3d 1248 (Ind. Ct. App.) **Evidence sufficient to support conviction for neglect of a dependent causing death**

Defendant consumed alcohol and smoked marijuana before driving with her four children in her van. During a fight with her boyfriend while driving, Defendant lost control of the vehicle and her six-year-old daughter was partially ejected and died from her injuries. The Court found sufficient evidence and that because the case presented no medical or scientific issues with respect to causation, no medical or scientific expert testimony was required. Further, the court found no abuse of discretion in the trial court's instruction to the jury regarding causation. The Court noted that proximate cause was determined to be the proper standard in both *Patel v. State*, 60 N.E.3d 1041 (Ind. Ct. App. 2016), and *Abney v. State*, 766 N.E.2d 1175 (Ind. 2002), and Defendant failed to establish an abuse of discretion.

## H. Firearm Offenses

*B.R. v. State*, (01/28/2021) 162 N.E.3d 1173 (Ind. Ct. App.) **Juvenile adjudication for carrying a handgun without a license reversed for insufficient evidence**

State failed to prove that juvenile Respondent constructively possessed a handgun without a license. Respondent was driving an intoxicated friend home in a vehicle belonging to the friend's parent when he was pulled over for failing to properly signal a turn and to fully stop at a stop sign. A police officer commenced a search of the vehicle based on the smell of marijuana he detected. The officer removed an intact piece of the dashboard to the left of the steering wheel and discovered a handgun concealed behind it. The Court of Appeals found that because Respondent was seated close to the hidden compartment and could have reduced the gun to his possession, the State presented evidence of his capability to maintain dominion and control over the handgun. However, the State failed to provide any "additional circumstances" to determine beyond a reasonable doubt that Respondent knew of the concealed handgun. Accordingly, the evidence was insufficient to sustain Respondent's delinquency adjudication.

*McCoy v. State*, (09/10/2020) 153 N.E.3d 363 (Ind. Ct. App.) **Evidence sufficient to support conviction for unlawful possession of a firearm by a serious violent felon**

Defendant's out-of-state conviction for robbery was substantially similar to the serious violent felony of robbery in Indiana and could be relied upon to support his conviction unlawful possession of a firearm by a serious violent felon. The Court noted that as the serious violent felon statute requires the elements of the underlying conviction be substantially similar, but not perfectly congruent, the Michigan statute and the Indiana statute satisfy that requirement with respect to robbery in the two jurisdictions. Based on video evidence from inside a grocery store, Court also found sufficient evidence Defendant had actual possession of the firearm he discarded in a shopping basket after police officers arrived.

*Campbell v. State*, (12/21/2020) 161 N.E.3d 371 (Ind. Ct. App.) **Sufficiency challenge to SVF conviction rejected**

The Court found sufficient evidence to support the charge of unlawful possession of a firearm by a SVF because the State was required to prove only that Defendant knowingly possessed a firearm after being convicted of a serious violent felony and did not need to prove the Defendant knew he was a serious violent felon. In *Rehaif v. United States*, 139 S.Ct. 2191(2019), the U.S. Supreme Court held that under two federal statutes which prohibit an individual from possessing firearms, the government had to prove the defendant knew he belonged to a category that barred him from possessing a firearm and that he knew he possessed a firearm. Distinguishing *Rehaif*, the Court of Appeals found that Indiana's statute SVF statute is different from the federal statute and does not require the State to prove that Defendant knew he was a serious violent felon when he unlawfully possessed a firearm having a prior conviction for a serious violent felony.

## I. Interference with Government Operations

**Felony escape conviction relating to pretrial home detention upheld but Court of Appeals encourages legislature to reconsider penalties**

*Giden v. State*, (06/24/2020) 150 N.E.3d 654, (Ind. Ct. App.), *Transfer Pending*

Defendant was placed on pretrial home detention after being charged with Level 5 and Level 6 felonies. He was subsequently charged and convicted of two counts of Level 6 felony escape. Evidence to support the escape charges was that GPS showed he left his residence. On appeal, Defendant argued the escape statute under which he was convicted, I.C. 35-44.1-3-4(b), violates the Proportionality Clause of Article 1, Section 16 of the Indiana Constitution. That statute, which makes the violation of a home detention order a Level 6 felony, runs afoul of the Proportionality Clause because the unauthorized absence statute, I.C. 35-38-2.5-13, provides that the unauthorized absence from home detention is a Class A misdemeanor. Defendant argued “common sense and sound logic dictate that (the unauthorized absence statute) should apply equally to a person placed on home detention as a condition of pre-trial release” in order to comply with Indiana’s Proportionality Clause. He pointed out a “presumptively innocent defendant” placed on home detention as a condition of pretrial release “can received a harsher penalty” than an already-convicted offender. The Court of Appeals found the unauthorized absence statute “applies only to cases where the offender has been placed on home detention as a condition of probation.” Since Defendant was on home detention as a condition of pretrial release and

not because he was on probation, the unauthorized absence statute is not applicable. In a footnote, the Court of Appeals expressed concern that Defendant now had two felony convictions for relatively minor violations and encouraged the legislature to amend the escape statute to include staggered penalties based upon type of violation. Held, convictions affirmed.

*Jackson v. State*, (11/19/2020) 156 N.E.3d 1286 (Ind. Ct. App.) **Conviction for forcibly resisting law enforcement reversed due to insufficient evidence of physical resistance**

Defendant was convicted of Class A misdemeanor forcibly resisting law enforcement based on evidence he refused to comply with a police officer's command to remove his hands from his pockets and sit down, causing the officer to remove Defendant's hands from his pockets and handcuff him. The Court of Appeals found no evidence Defendant physically resisted, such as by pulling away or stiffening his arms, when the officer grabbed his hands and handcuffed him. Thus, the Court reversed Defendant's conviction, finding insufficient evidence to support the "forcibly" element of the offense.

*Jacobs v. State*, (07/07/2020) 148 N.E.3d 1175 (Ind. Ct. App.) **Assisting a criminal -- lying to provide false alibi was sufficient evidence of intent to hinder punishment**

In contrast to Class A misdemeanor false informing, the offense of assisting a criminal requires the State to prove Defendant's action of lying to police assisted a criminal and was done with intent to hinder the suspect's apprehension or punishment *See* Ind. Code § 35-44.1-2-5. Here, Court found sufficient evidence that Defendant lied to police by providing a false alibi for a murder suspect with the intention of hindering the suspect's punishment and was therefore sufficient to support her conviction for assisting a criminal as a Level 5 felony rather than false informing.

## J. Offenses against Public Health, Order and Decency

*McCoy v. State*, (10/21/2020) 157 N.E.3d 28 (Ind. Ct. App.) **Disorderly conduct -- yelling at police as they intervened in domestic disturbance constituted political speech**

Absent evidence that comments rose to the level of unreasonable noise, loud criticism of government action does not constitute disorderly conduct. Here, police arrived at a domestic disturbance and Defendant, a neighbor, was arrested and convicted of disorderly conduct after yelling at police officers. The Court of Appeals found evidence insufficient to support a conviction that would be consistent with article 1, section 9 of the Indiana Constitution, because Defendant demonstrated both that the State restricted her political expression and that she had not abuse the right to speak. Defendant's extremely brief interaction with police where she clearly expressed her political speech did not infringe upon the peace and tranquility of her neighbors and evidence was insufficient to support her disorderly conduct conviction.

*Estes v. State*, (03/29/2021) 20A-CR-1921 (Ind. Ct. App.) **Walking in public road way at 2:00 a.m. sufficient to find actual endangerment to life and not merely speculative under public intoxication statute**

Defendant was walking on public road at 2:00 a.m. and cars had to swerve to avoid hitting him. Court of Appeals finds that this conduct plus signs of intoxication were sufficient to demonstrate that Defendant met the statutory definition of endangerment to life and that his conduct was more than speculative danger. Held, Public Intoxication conviction affirmed.

# VIII. ETHICS

*Matter of Blickman*, (12/09/2020) 164 N.E.3d 708 (Ind.) **Ethics - balancing duty to report child abuse with duty to client confidentiality**

Per Curiam. A short delay which allowed Respondent to do some research before advising his client (Park Tudor School) to report sexual abuse of a child to the DCS did not result in incompetence on Respondent's part under Prof. Cond. R. 1.1, or in counseling or assisting a criminal act, Prof. Cond. R. 1.2(d). The requirement to "immediately" report abuse under Ind. Code § 31-35-5-1 is a case-specific and fact-specific requirement, and the length of delay is not the only thing that matters. Other considerations include "the urgency with which the person files the report, the primacy of the action, and the absence of an unrelated and intervening cause for delay." *C.S. v. State*, 8 N.E.3d 668 (Ind. 2014) (four-hour delay of rape report not "immediate" where principal declined to contact police who were stationed in the school). Court noted that its decision in C.S. "does not demand perfection or even specialized expertise from attorneys."

As for the attorney's decision to not report himself, Ind. Code § 31-35-5-1 requires anyone who becomes aware of possible child abuse to report the matter to the DCS or local law enforcement. However, multiple authorities opine that attorneys may choose to not report evidence of child abuse or neglect protected by client confidentiality, except that attorneys must report suspected child abuse if the attorney believes it necessary to prevent reasonably certain death or substantial bodily harm. The Court refused to resolve the issue, because the lawyer's failure to report had no nexus with the lawyer's fitness under Rule 8.4. Digital images collected of a 15-year-old girl was child pornography and the "best course of action for all who took possession of these materials [] would have been to promptly involve law enforcement." However, Respondent's act of taking possession of the images and not immediately contacting law enforcement did not reflect adversely upon the lawyer's fitness.

But the Court found Respondent violated Rule 1.1 and 8.4(d) for drafting and including a confidentiality provision in the proposed settlement agreement at the mutual wish of both school and student-victim's family. "If Respondent believed that full disclosure already had occurred, it is difficult to conceive what legitimate objective might be gained from preventing Park Tudor personnel or the Student's family from speaking with DCS or law enforcement during any follow-up on the initial report." Court thus cited Respondent's efforts to "silence a fifteen-year-old crime victim and frustrate law enforcement" as aggravators supporting a public reprimand. Justice Slaughter dissented from Court's

finding re: Resondent's use of confidentiality clause, believing that Respondent did not violate either rule.

*Matter of Greenaway*, (12/04/2020) 19S-JD-165 (Ind.) **Judge convicted after meth sting permanently barred from bench, suspended**

A Hamilton County magistrate who purchased meth from an informant in a sting operation then bit the thumb of an officer who tried to stop the judge from swallowing the evidence violated Indiana Code of Judicial Conduct Rules 1.1 (failing to respect and comply with the law) and 1.2 (failing to avoid impropriety and act at all times in a manner that promotes public confidence in the integrity, independence and impartiality of the judiciary). Repondent's acts also violated Indiana Professional Conduct Rule 8.4(b) (committing a criminal act that reflects adversely on the attorney's honesty, trustworthiness or fitness as a lawyer in other respects). Following his arrest for Level 6 felonies, Respondent pleaded guilty to misdemeanor charges of possession of methamphetamine and obstruction of justice. As an aggravating factor, the parties cited "the adverse impact Respondent's misconduct had on the public's confidence in the integrity of the judiciary and its respect for the Indiana judiciary. In mitigation, Respondent has no prior discipline as a judge or a lawyer, has cooperated with the disciplinary process, and has taken several proactive steps to address factors contributing to his misconduct." Held, Respondent permanently barred from holding judicial office but may continue to conditionally practice law after a 90-day suspension.

*Matter of Cooper*, (02/03/2021) 161 N.E.3d 362 (Ind.) **Four-year suspension without automatic reinstatement for long-serving elected prosecutor convicted of domestic battery and confinement**

In 2019, Respondent pleaded guilty to criminal confinement, indentity deception, and official misconduct as Level 6 felonies. The charges stemmed from a domestic dispute with Respondent's then-fiancee. The hearing officer recommended disbarment, *citing* a prior reprimand for critical comments Respondent made about a judge's ruling in a case he had prosecuted and that the prior misconduct did not prompt Respondent to address his underlying concerns of alcohol use disorder and anger management issues. Indiana Supreme Court stopped short of disbarment, instead issuing a four-year suspension without automatic reinstatement given fact Respondent accepted responsibility for his deplorable acts and has taken meaningful and substantial steps to address his alcohol use disorder and anger management issues. "While these after-the-fact measures do not mitigate the misconduct itself, which was reprehensible, they do point to Respondent's potential for rehabilitation and narrowly persuade us that the door to Respondent's legal career should not be permanently and irrevocably closed."

*State v. Herrmann*, (07/29/2020) 151 N.E.3d 1256 (Ind. Ct. App.) **Part-time deputy prosecutor with conflict of interest in criminal case, who was one of three deputy prosecutors in small prosecutor's office, did not cause entire prosecutor's office to be in conflict.**

Trial court erred in disqualifying entire prosecutor's office and appointing a special prosecutor.Defendant was indicted by a grand jury for theft and forgery, after which she filed a petition to appoint a special prosecutor, alleging that one of the three deputy prosecutors in the Franklin County Prosecutor's Office had a conflict of interest and therefore the whole office should be disqualified. The trial court granted the petition and appointed a special prosecutor. The State then filed an interlocutory appeal. Court of Appeals finds that it is well settled that if the elected prosecutor has a conflict of interest, the whole prosecutor's office is disqualified. However, it is not necessary to disqualify the whole office if one deputy has a conflict of interest. Court of Appeals held it is not necessary to disqualify the whole office, since the deputy prosecutor who has the conflict is a part-time deputy who primarily handles child-support matters and has had no involvement in the criminal case even though it is a small office with only three deputy prosecutors. Trial court's order disqualifying entire office and appointing special prosecutor reversed.

# IX. EVIDENCE

## A. Relevancy/404(b)

*Killian v. State*, (06/03/2020) 149 N.E.3d 1189 (Ind. Ct. App.) **Witness's prior conviction for similar crime properly excluded under Rape Shield Rule**

In a criminal case involving alleged sexual misconduct, evidence of specific instances of a victim's or witness's sexual behavior is admissible under Indiana Evidence Rule 412(b)(1)(A) if offered to prove that someone other than the defendant was the source of the semen, injury, or other physical evidence. Here, Defendant convicted of sexual misconduct with a minor after impregnating his granddaughter wanted to introduce evidence at trial that his son was convicted of sexual misconduct with a minor in 1994, arguing it should be introduced under Rule 412 (b)(1)(A). But trial court did not err in excluding this evidence because the 1994 conviction could not have been the "source" of the victim's current pregnancy and was being introduced merely to add speculation that because the son had a prior conviction for the same offense he may have been the perpetrator here.

*Stewart v. State*, (04/09/2021) 20A-CR-180 (Ind. Ct. App.) **Erroneous exclusion of victim's statements in murder case - rejection of self-defense affirmed**

Statements made by a victim which are offered to show the reasons why Defendant acted in the way he or she did are relevant and not hearsay. *Sylvester v. State*, 698 N.E.2d 1126, 1129 (Ind. 1998). Here, in murder prosecution, trial court erred in excluding Defendant's testimony recounting "very aggressive" statements that victim made to her at a party before she shot him. Defendant argued that, by excluding the statements as hearsay, the trial court denied the jury information regarding her fearful state of mind as it related to her self-defense claim. But Defendant waived this issue because she failed to make an offer of proof at trial. Waiver notwithstanding, Court held that the erroneous exclusion of victim's statements was harmless given other evidence admitted at trial of his aggressive behavior

toward Defendant. Additionally, during Stewart's testimony, she stated that the victim displayed ongoing aggression toward her and eventually struck her face after she rejected his sexual advances. Court also rejected Defendant's challenge to the admission of surveillance videos, which had "some relevancy despite their quality and limited depictions." Finally, Court found that State presented sufficient evidence to rebut Defendant's self-defense claim. Despite victim's "reprehensible" behavior, Defendant was no longer under physical threat or reasonable fear of danger when she left the porch, retrieved her gun from her car and then approached the victim. Under the circumstances of this case, Defendant did not act without fault and was not justified in her use of deadly force.

*Cutshall v. State*, (03/25/2021) 20A-CR-1866 (Ind. Ct. App.) **Erroneous admission of testimony regarding adult pornography in child molest case**

In prosecution for Level 1 felony child molesting, Court found harmless error in the admission of evidence that Defendant accessed adult pornography on the night of the incident. Defendant's browsing history and pornography at issue was irrelevant, but there was no substantial likelihood the erroneous admission of this evidence contributed to the conviction given the substantial independent evidence of guilt.

*Schnitzmeyer v. State*, (05/05/2021), 20A-CR-1311 (Ind. Ct. App.) **Text messages spanning time period prior to charges admissible to show intent to deal drugs and not unfairly prejudicial**

In prosecution for Level 3 felony dealing in methamphetamine, trial court did not abuse its discretion in admitting incriminating text messages from Defendant prior to date of arrest, which police testified were slang indicative of drug dealing. Citing Ind. Evidence Rule 403, Defendant argued the text messages were not relevant and any probative value gleaned was outweighed by their prejudicial effect. The Court of Appeals held the text messages were properly admitted over objection because they were highly probative. There was no objection based upon Ind. Evidence Rule 404, but on appeal Defendant argued the text messages were admitted in violation of Indiana Evidence 404(B). The Court found the risk of unfair prejudice did not outweigh the highly probative value and the text messages were both relevant and admissible to establish Defendant's intent to deal and his identity.

## B. Hearsay/Confrontation

*Shepard v. State*, (09/30/2020) 157 N.E.3d 1209 (Ind. Ct. App.) **Video interview of child witness inadmissible where D effectively cross examined witness at trial**

In aggravated battery and voluntary manslaughter prosecution, Defendant's right to confrontation and cross-examination was not infringed when the trial court excluded video recordings of the police interview with Defendant's son. Indiana Evidence Rule 613(a) provides that a witness may be examined about a prior statement. However, a prior inconsistent statement is not admissible under Rule 613 if the witness has already acknowledged the prior inconsistent statement on cross-examination because impeachment is complete after such an acknowledgment. *Dixon v. State*, 967 N.E.2d 1090,

1092 (Ind. Ct. App. 2012). Here, Defendant was able to call the son as a witness in order to impeach him with inconsistent statements regarding the time he woke his father, what he knew about the victim's condition when he wrote an essay at school, and his initial false claim he attempted CPR. Further, a small portion of the video was played for the jury, allowing it an opportunity to observe the child's demeanor and physical size at the time of the events.

*Gorby v. State*, (08/06/2020) 152 N.E.3d 649 (Ind. Ct. App.) **Video of forensic interview admissible as "recorded recollection" exception to hearsay rule**

During Defendant's jury trial on child molesting charges, the complaining witness (C.W.) testified that Defendant had her "play the copycat game" wherein "you have to copy" things that cartoon characters were doing. Previously, during a forensic interview, C.W. had specified what the characters were doing and that the "copycat game" included Defendant putting his "peeing thing" in her mouth. However, during C.W.'s trial testimony she stated the characters were doing something that was "not okay" but she did not "remember" or did not "know" exactly what it was. During a break, she watched the video of her interview and afterward testified that she still did not remember what the characters were doing or what she and Defendant did but she twice stated that everything she told the interviewer was "the truth." The trial court allowed the jury to view the video of the forensic interview over Defendant's objection. The Court of Appeals held that the video of the interview fell under the "recorded recollection" exception to the rule against hearsay. Although C.W. gave conflicting answers that may have indicated she did not want to talk about the copycat game rather than being unable to remember it as the rule requires, the Court deferred to the trial court's conclusion that C.W. could not remember the events and found that Evidence Rule 803(5)(A) was therefore satisfied. Similarly, although C.W. at one point testified she did not talk to the interviewer about the copycat game, the Court noted that on other occasions she said she told the interviewer the truth and again deferred to the trial court's finding that Evidence Rule 803(5)(C) was satisfied. The Court found no abuse of discretion in admitting the forensic interview into evidence.

*Robey v. State*, (05/20/2021) 20A-CR-2187 **Any error in playing video recording of forensic interview harmless**

In prosecution for child molesting, the Complaining Witness (C.W.) was able to testify fully and accurately about the essential elements of the crime. However, the trial court also permitted the publication of the C.W.'s forensic interview as a recorded recollection pursuant to Indiana Evidence Rule 803(5). The Court of Appeals held that the video recording was merely cumulative of C.W.'s testimony, and any error in its publication was harmless.

*Williams v. State*, (03/12/2021), 20A-CR-865 (Ind. Ct. App.) **Out-of-court forensic interview admissible under Protected Person statute**

In child molesting prosecution, trial court did not abuse its discretion by admitting a recorded out-of-court forensic interview of complaining witness (C.W.), who testified at trial but refused to talk

about what Defendant had done to her because she had already told forensic interviewer and sexual assault nurse. Thus, C.W. did not testify live to the facts underlying the charges against Defendant, which eliminates the concern expressed in *Tyler v. State*, 903 N.E.2d 463 (Ind. 2009) about repetition of testimony from a live witness and a videotaped statement. In addition, the State attempted to take the "clearly preferable" path of having C.W. testify live, but she refused to talk about the molestations while on the stand. The trial court had already determined that C.W.'s out-of-court statements were reliable and admissible under the requirements of Indiana's Protected Person Statute (Ind. Code § 35-37-4-6).

*Garber v. State*, (08/04/2020) 152 N.E.3d 642 (Ind. Ct. App.) **Trial court's admission of out-of-court statements and other testimony affirmed**

In Defendant's trial for rape and battery, trial court did not abuse its discretion in admitting testimony regarding out-of-court statements made by complaining witness (C.W.), who also testified. The evidence at issue was bodycam footage of C.W.'s statement to police at the scene and testimony from one of the officers that C.W. yelled she had been raped as well as emergency room physician's testimony that C.W. told her she was digitally penetrated. The physician additionally testified that she believed people seeking medical care were honest for the most part and did not really have a reason to lie. In *Modesitt v. State*, 578 N.E.2d 649 (Ind. 1991), the Indiana Supreme Court surveyed law from other states and Federal Rule of Evidence 801(d)(1) to hold that a prior statement of a testifying declarant is admissible under a few specified circumstances and also clarified its decision "did not affect the existing, recognized hearsay rule and its exception." The Court of Appeals held that because C.W.'s statements were admitted as excited utterances, they do not qualify for any of the hearsay exclusions mentioned in *Modesitt* and Evidence Rule 801(d) and there was no harmful or fundamental error in that regard. The Court further held that while the emergency-room physician's testimony came close to crossing the line into impermissible vouching, it did not quite rise to that level because rather than specifically opining that C.W. was telling the truth, she offered only a general observation on how emergency room patients behave based on her experience.

*Webb v. State*, (07/09/2020) 149 N.E.3d 1234 (Ind. Ct. App.) **Defendant's self-serving hearsay properly excluded**

In burglary prosecution, trial court did not abuse its discretion in excluding an affidavit by investigating officer containing statements Defendant had made to him during the search of her apartment. Specifically, Defendant told officer she had permission from her employer's ex-boyfriend to take personal items from the employer's home as compensation for lost wages resulting from the employer's failed business. Defendant argued she was unavailable under Indiana Evidence Rule 804(a) because she exercised her right not to testify at trial. Additionally, she alleged she was entitled to present her statement from the affidavit under Evidence Rule 804(b)(3)' statements against interest hearsay exception because the statement was inculpatory and exculpatory — *i.e.*, she admitted she "was there, but [she] had permission." Trial court properly excluded the hearsay, finding it was not against her interest and thus was not admissible under Evidence Rule 804. The Court of Appeals agreed with the State's argument that Defendant "is attempting to have her cake and eat it too," because her

supposed statement against interest balances farther towards purely exculpatory rather than evenly exculpatory and inculpatory, and because she wishes to introduce an unsubstantiated hearsay claim without allowing the State a fair opportunity to cross-examine her about her claim of consent."

*Hurt v. State*, (08/21/2020) 151 N.E.3d 1256 (Ind. Ct. App.) **Erroneous admission of victim's hearsay statement in domestic violence case**

In domestic battery prosecution, trial court erred in admitting complaining witness's (C.W.'s) hearsay statements which were used to prove the truth of the matter asserted, *i.e.*, that Defendant struck C.W. and caused her injuries. The State argued C.W.'s statement was admissible under the three hearsay exceptions listed in Ind. Evidence Rule 803: recorded recollection, excited utterance, and/or present sense impression. C.W.'s statement to police was recorded on the officer's body cam. At trial, C.W. did not vouch for the accuracy of her statement to police. She was heavily intoxicated when she gave the statement and could not recall speaking to the officer. For these reasons, the admission of C.W.'s statement was not permissible under the recorded recollection exception. Although C.W. suffered a startling or stressful event, she was not under stress from that event when she spoke to police and therefore the statement was not admissible under the excited utterance exception. At least fifteen minutes had elapsed between the 911 call and C.W.'s statements to police and she made the statement to the officer in response to his questioning. Court noted that C.W. was deliberating—albeit drunkenly—about how to respond to repeated questioning over the course of several minutes. C.W.'s hearsay statement was also inadmissible under the exception for present sense impressions, which permits "[a] statement describing or explaining an event, condition or transaction, made while or immediately after the declarant perceived it." In order for a statement to fall under the present sense impression exception, three requirements must be met: (1) it must describe or explain an event or condition; (2) during or immediately after its occurrence; and (3) it must be based upon the declarant's perception of the event or condition. C.W. did not make her statements to police either during or immediately after she was injured, and given her multiple explanations for how she suffered the injuries to her nose and mouth, C.W. had time to deliberate before she spoke to police. Her ability to deliberate was hindered by her state of intoxication, but the record establishes that she was still able to consider her responses to the officer's questions. Held, conviction reversed and remanded for new trial.

*Hackner v. State*, (01/12/2021) 161 N.E.3d 1287 (Ind. Ct. App.) **No abuse of discretion to admit officer's testimony a head movement was a "yes" in response to his question**

A dying victim's non-verbal identification of the perpetrator, in response to an officer's question, is a question of credibility and not admissibility. An officer at the scene of a shooting asked the victim, who later died of his injuries, if it was Defendant who shot him and the victim nodded his head in response. The nonverbal conduct was not captured by the officer's bodycam, but the trial court allowed the testimony describing the nod and the officer's interpretation that it was intended as a "yes" to his question. The Court of Appeals rejected the argument the nod was too ambiguous to be considered a nonverbal dying declaration under Evid. R. 804(b)(2). Rather, the Court found the officer's interpretation

of the alleged nonverbal act was not a question of admissibility but bears more on the officer's credibility, a question solely for the finder of fact. Held, no abuse of discretion in admitting the evidence.

*Lancaster v. State*, (08/14/2020) 153 N.E.3d 1144 (Ind. Ct. App.) **Witness's testimony admissible as adoptive admission and statement made by a party opponent**

In murder prosecution, trial court did not err in permitting witness to testify about the conversation he overheard between Defendant and Defendant's brother about the need to kill all three victims before the murders occurred. After Defendant's brother stated that they needed to "smoke Jessica," meaning to kill her, Defendant did not deny, disagree with, or refute the statement, and even went a step further, saying that they would "have to do them all." Defendant's brother's first statement was not hearsay, but was admissible as an adoptive admission, which is a statement offered against an opposing party that "the party manifested that it adopted or believed to be true[.]" Ind. Evid. R. 801(d)(2)(B). Defendant's statement was plainly admissible pursuant to Ind. Evid. Rule 801(d)(2)(A) as a statement made by a party opponent (Defendant) and was offered by the State against that party. Therefore, the trial court did not err by admitting this portion of the witness's testimony. *Bell v. State*, 29 N.E.3d 137, 143 (Ind. Ct. App. 2015) (holding that it was not error to admit into evidence defendant's out-of-court statement).

*A.B. and J.R. v. DCS*, (10/15/2020) 154 N.E.3d 818 (Ind.) **Parent's drug test results in TPR case admissible under business records hearsay exception**

Drug test records are exceptions to the hearsay rule under the records of a regularly conducted business activity (Ind. Rule Evid. 803(6)). The Indiana Supreme Court, addressing an issue that had resulted in conflicting decisions in the Court of Appeals, held a parent's drug test results were properly admitted into evidence under Indiana Evidence Rule 803(b), business records exception to hearsay in a Termination of Parental Rights (TPR) case (see full review under CHINS/TPR section, below).

*McGill v. State*, (12/10/2020) 160 N.E.3d 239 (Ind. Ct. App.) **No abuse of discretion to exclude IQ assessment offered under business record exception**

Trial court did not abuse its discretion in excluding the results of Defendant's IQ assessment from evidence. Defendant attempted to introduce the psychological assessment without the testimony of the psychologist who administered the test by using the business record exception to the hearsay rule. The Court of Appeals found the authentication affidavit did not identify a business entity or detail what routine business activity required performing psychological assessments and also did not explain how the maintenance of psychological records is necessary for a business purpose. Allowing the admission of the assessment into evidence without allowing the State to examine the psychologist regarding her qualifications and methodology would sidestep the safeguards set out in Ind. Evid. R. 702, which requires expert opinion testimony to be rendered by a qualified individual relying on established scientific principles.

## C. Witnesses, Privileges & Opinion Testimony

*Tate v. State*, (01/28/2021) 161 N.E.3d 1225 (Ind. Ct. App.) **Fundamental error claims rejected in LWOP case**

In murder and LWOP prosecution, trial court did not commit fundamental error in allowing detective and medical provider's testimony regarding the underlying incident and investigation, including the investigatory tactics used by police and the impressions of medical providers about what happened once Defendant and the child victim arrived at the hospital. Defendant failed to explain how the testimony was improper character evidence contrary to Indiana Rule of Evidence 404(a)(1) or how it was used impermissibly to establish Defendant's propensity to molest and kill children. Even had Defendant developed this argument, Rule 404(a)(1) does not prohibit eyewitnesses from describing their perceptions of a defendant's demeanor and behavior during the events giving rise to the charged conduct. Next, Court found no fundamental in allowing the medical providers to testify about the stages of the victim's bruising and their opinions about the victim's injuries and their source. Defendant waived his undeveloped argument that the witnesses were unqualified to give expert testimony and that their testimony did not rest on reliable scientific data under Evidence Rule 702(b). Waiver notwithstanding, Court discerned no violation of this rule, let alone one that should have been obvious to the trial court. Finally, Court rejected Defendant's argument that the State impermissibly referred to its medical witness as an "expert" during her direct examination. Distinguishing *Farmer v. State*, 908 N.E.2d 1192, 1199 (Ind. Ct. App. 2009), which prohibits only trial judges from calling witnesses "experts" in front of the jury, Court noted that no rule prohibits the State from asking a witness about her history testifying as an expert witness.

*Elliott v. State*, (07/17/2020) 152 N.E.3d 27 (Ind. Ct. App.) **Clergy privilege did not apply where church did not have formal obligation of confession of sin or need for confidentiality**

The clergyman privilege applies only to confidential communications made to a clergyman in the clergyman's professional character as a spiritual adviser or counselor and confessions or admissions made to a clergyman in the course of discipline enjoined by the clergyman's church. Here, Court of Appeals finds that statements Defendant made to his Pastor who visited him in the jail did not fall within privilege and were properly admitted at trial. Defendant told the Pastor that he planted a knife to make it look as if his wife had attacked him before he shot and killed her. The Court of Appeals found the statements made by Defendant to the Pastor were not made in the course of discipline nor were they confidential based in part upon the statements by the Pastor in deposition that his church recognized the need for discretion and but not confidentiality and their church did not recognize a formal confession of sin. Therefore the statement by Defendant to his Pastor did not fall under section A or B of the statute.

*Skeens v. State*, (07/23/2020) 151 N.E.3d 1248 (Ind. Ct. App.) **No error in admitting accident reconstruction testimony**

Defendant consumed alcohol and smoked marijuana before driving with her four children in her van. During a fight with her boyfriend while driving, Defendant lost control of the vehicle and her six-year-old daughter was partially ejected and died from her injuries. At trial, a forensic toxicologist testified that Defendant was impaired at the time of the crash because the "combined impairment increas[ed] the overall impairment of each [substance] individually." A state trooper testified that the child "should have been in some form of booster seat" and that she "could have come out of the base of [her] seatbelt" because her shoulder belt had not been properly secured. Another trooper, who was a certified accident reconstructionist, testified over objection that Defendant was impaired at the time of the crash and that the child's death resulted from her not being "properly restrained in a car seat at the time." The Court of Appeals found that Defendant waived her argument regarding the accident reconstructionist's testimony because basis for her objection in trial court was lack of pretrial notice of the trooper's opinions and on appeal she argued the trooper was not qualified to render them. The Court further found any error to be harmless because the testimony was largely cumulative of the testimony from the other trooper and the toxicologist.

## D. Authentication; Evidentiary Foundations

*Parker v. State*, (07/30/2020) 151 N.E.3d 1269 (Ind. Ct. App.) **Facebook messages properly authenticated and admitted**

After learning that Defendant, who was wanted on a warrant, was possibly in the area, a police officer obtained a BMV photo of Defendant and used it to find a profile on Facebook which also matched Defendant's name and date of birth. Using a fictitious profile, the officer contacted Defendant about a vehicle sale and eventually made plans to meet at a gas station to purchase methamphetamine. The trial court admitted the Facebook messages over objection and made a finding the photo on the Facebook profile was similar to the BMV photo of Defendant and appeared to be the same person. The profile under Defendant's name sent a message stating he lived on the same street that law enforcement identified as Defendant's street. The messages discussed methamphetamine and meeting at a particular gas station, and Defendant appeared at that gas station with methamphetamine. After Defendant was arrested, the officer also made a phone call to the Facebook profile and the phone found in Defendant's possession rang. Following *Pavlovich v. State*, 6 N.E.3d 969 (Ind. Ct. App. 2014), *trans. denied*, the Court noted authentication of an exhibit can be established by either direct or circumstantial evidence and concluded the evidence was sufficient to authenticate the messages as being authored by Defendant. Even if the evidence was not indisputable proof he wrote the messages, such proof was not required and the Court held the trial court did not abuse its discretion in admitting the messages.

*Wisdom v. State*, (12/22/2020) 162 N.E.3d 489 (Ind. Ct. App.) **Social media posts properly admitted**

Trial court did not abuse its discretion by admitting posts from Instagram and Facebook because they were properly authenticated under Evidence Rule 901(a). The trial court allowed the State to admit photographs taken from a Facebook and Instagram account showing photos and videos of Defendant. Noting that the admissibility of photos or videos taken from such online social media platforms has not been specifically addressed in Indiana, the Court of Appeals concluded the authentication of social-media evidence turns on whether there is sufficient evidence to support a finding it is what the claimant purports it to be. And while the source of the evidence may sometimes be needed, authentication depends on context. Here, the exhibits were used by the State to show Defendant was affiliated with other gang members. A detective testified she recognized Defendant in the photos and believed other individuals in the photos were gang members who had been convicted of gang-related activities, one of the accounts was registered in Defendant's name, had a gang-related nickname as a username, and photos and videos referred to gang activity. Held, no abuse of discretion to admit the exhibits.

*Flowers v. State*, (09/23/2020) 154 N.E.3d 854 (Ind. Ct. App.) **Police officer's testimony sufficient to admit surveillance video under silent witness theory**

In murder prosecution, trial court did not abuse its discretion in admitting apartment complex's video surveillance footage as well as police sergeant's testimony about the videos. The surveillance footage was admissible as substantive rather than merely demonstrative evidence under the silent witness theory, which holds that the trial court must be persuaded of the authenticity and competency of the evidence by relative certainty. As in *McAllister v. State*, 91 N.E.3d 554 (Ind. 2018), the police officer testified about what he knew regarding the security cameras at the apartment complex where he worked part-time security, and his testimony provided sufficient grounds to admit the surveillance video. The officer's opinion testimony regarding the contents and identity of the person in the video was not an abuse of discretion because Defendant opened the door to the testimony when cross-examining the police officer. Although Defendant filed pro se motions for speedy trial while represented by counsel, the trial court did not abuse its discretion by taking no action on the pro se pleadings and in granting the State's motion for continuance because defense counsel did not object to the motion and stated that significant investigation was needed to prepare for trial.

*Martin v. State*, (9/8/20) 20A-CR-228 (Ind. Ct. App.) **Nurse's testimony laid a sufficient foundation for admission of the blood draw evidence**

On appeal of his conviction for Level 5 felony operating while intoxicated, Defendant argued that because the State relied solely on testimony of nurse, it failed to show that the nurse conducted Defendant's blood draw pursuant to "a protocol prepared by a physician" pursuant to Ind. Code § 9-30-6-6(a). Court disagreed, noting that nurse's testimony that she was trained in legal blood draws, that her hospital had a protocol for legal blood draws, that a physician approved that protocol, and that she followed that protocol was sufficient for the trial court to find that the State laid the proper foundation for the blood draw evidence.

# X. JUVENILE

*Harris v. State*, (03/24/2021) 165 N.E.3d 91 (Ind.) **Parent of a child defendant can remain in courtroom despite a witness separation order if shown to be essential**

Children being tried for a crime as an adult do not have an automatic right to have a parent with them during the trial. Where the parent is subject to a witness separation order, the child defendant can identify the parent's presence as "essential" to presentation of the child's defense pursuant to Evidence Rule 615(c) to allow the parent to remain in the courtroom despite a witness-separation order. To prove that the parent is "essential," the child can offer any number of reasons, such as the child's special needs, that the child is struggling with communicating with counsel, or that the child needs parental guidance when making life-altering decisions, like whether to pursue a line of questioning, take the stand, or accept a plea agreement. However, Defendant did not make that showing here by stating that his parent would like to remain in the courtroom "as much as possible" because of his age and the seriousness of the offense. "In fact, there was no mention that Harris himself wanted his mother present." Therefore, the issue of whether Defendant's mother was essential to his defense, pursuant to Evid. R. 615(c), was waived. Likewise, Defendant did not argue to the trial court that he had a due process right to the presence of his mother during his trial. Certain rights held by children in the juvenile system do not carry over when children find themselves in adult court. With that said, because Defendant did not raise the issue of a due process right to parental presence before the trial court, the argument that due process provided a right to parental presence was waived.

Further, the trial court did not abuse its discretion by not ordering alternative sentencing under I.C. 31-30-4-2. The alternative sentencing statute does not provide factors for the court to consider, but the factors in determining whether to waive a child are instructive, including: the severity of the act and whether it is part of a pattern of repetitive acts; whether the child is beyond rehabilitation under the juvenile justice system; and whether it is in the best interests of the community that the child be tried as an adult. Because Defendant's crime was serious (attempted murder), part of a pattern of repetitive acts, and he had failed many rehabilitative programs previously, the trial court did not abuse its discretion by declining to sentence him under the alternative sentencing scheme. Finally, Defendant's 37-year sentence was not inappropriate under Appellate Rule 7(B) analysis. While Defendant was only fifteen at the time of the crime, he already had accumulated a history of delinquent adjudications, some of which were for violent offenses involving weapons. Defendant had a history of mental health problems but did not explain why those affected his behavior or his propensity for breaking the law.

*D.P. v. State and State v. N.B.*, (09/08/2020) 151 N.E.3d 1210 (Ind.) **Juvenile court does not have subject matter jurisdiction to waive an alleged delinquent offender into adult criminal court if the individual is no longer a "child"**

In a pair of consolidated cases, the Indiana Supreme Court held that a juvenile court does not have subject matter jurisdiction to waive an alleged delinquent into adult criminal court if the individual is no longer a "child." In both cases, Respondents were over the age of twenty-one when the State filed delinquency petitions based on allegations of conduct that occurred when they were juveniles. The

Court considered the statute conferring juvenile jurisdiction, Ind. Code 31-30-1-1, and the statutory definition of "child" in Ind. Code 31-9-2-13(d), to conclude a juvenile court does not have jurisdiction to adjudicate individuals over the age of twenty-one delinquent. The Court further considered the waiver of jurisdiction statutes--Indiana Code sections 31-30-3- 5 and 31-30-3- 6—to hold the juvenile court does not have the authority to waive Respondents into adult criminal court. Under the plain language of the relevant statutes, a juvenile court does not have subject matter jurisdiction to waive an alleged delinquent offender into adult criminal court if the individual is no longer a "child."

*K.C.G. v. State*, (11/16/2020) 156 N.E.3d 1281 (Ind. S. Ct.) **Juvenile courts lack subject matter jurisdiction of juveniles charged with dangerous possession of a firearm because the offense is not a crime if committed by an adult**

Under Indiana law, only juvenile courts have power to adjudicate a child a delinquent. The delinquency alleged here was that respondent, K.C.G., age 16, committed the offense of dangerous possession of a firearm. However, by the statute's plain terms, an adult can never commit the offense of dangerous possession of a firearm. Thus, the juvenile court lacked subject-matter jurisdiction because juvenile courts have "exclusive original jurisdiction" to hear proceedings in which the State alleges that a child committed "an act that would be an offense"—a crime—"if committed by an adult." I.C. 31-37-1-2 and I.C. 31-30-1-1(1). Because this offense can never be committed by an adult, a juvenile cannot be adjudicated delinquent for committing it. Here, the statute defines the offense solely in terms of a "child" with an unauthorized firearm. The Court acknowledged this might not have been the legislature's intent, but the plain language of I.C. 35-47-10-5 and the juvenile jurisdiction statutes mandate this result. Also, the Court concluded that a delinquency proceeding for violating I.C. 35-47-10-5 could not be considered another "proceeding[] specified by law" over which a juvenile court could have jurisdiction under I.C. 31-30-1-1(14). Held, delinquency adjudication vacated and juvenile's probation modified based on the adjudication.

*State v. Stidham*, (11/17/2020) 157 N.E.3d 1185 (Ind.) **Extraordinary circumstances warranted revision of juvenile's maximum 138-year sentence for murder and other crimes**

Doctrine of res judicata did not prohibit Court from reconsidering the appropriateness of Defendant's 138-year sentence for murder committed in 1991 when he was 17 years old. In 1994, a narrow majority of Indiana Supreme Court affirmed the appropriateness of the sentence on appeal and declined to exercise the Court's constitutional autority to review and revise sentences. But the Indiana Supreme Court found two "major shifts in the law" allowed them to revisit their prior decision about the appropriateness of Defendant's sentence. The first shift occurred when the Supreme Court eased the standard under which it could review and revise sentences that were determined to be "manifestly unreasonable." As a result, the Supreme Court revised Appellate Rule 7(B) to allow state courts to revise a sentence if the sentence is "inappropriate in light of the nature of the offense and the character of the offender." The second major shift came when the U.S. Supreme Court began limiting when juveniles could be sentenced to harsher punishments. These two major shifts presented "extraordinary

circumstances" warranting reconsideration of Court's prior decision in Defendant's case. Although Defendant's crimes were brutal and horrific, Court acknowledged his abusive childhood and steps toward rehabilitation including completing his high school education and participating in substance abuse counseling. Although maximum possible sentences are generally most appropriate for the worst offenders, Defendant received the maximum possible term-of-years sentence for crimes he committed as a juvenile. As Indiana Supreme Court and U.S. Supreme Court has held before, Defendant's juvenile status weighs against a maximum sentence. Held, transfer granted, Court of Appeals' opinion at 110 N.E. 410 vacated, grant of postconviction relief affirmed, and sentence revised to 88 years. David, J., concurring in result; Slaughter, J., dissenting, noting that the majority based its decision on a claim Defendant did not raise and expressly disavowed at oral argument.

*Wilson v. State*, (11/17/2020) 157 N.E.3d 1163 (Ind.) **On post-conviction review, aggregate sentence for crimes committed when Defendant was sixteen reduced to 100 years under Appellate Rule 7(B)**

On post-conviction review, the Court found that the enhanced protections for juveniles under *Miller v. Alabama*, 567 U.S. 460 (2012), "do not currently apply" to Defendant's 181-year sentence for two counts of murder, robbery, and a criminal gang enhancement for crimes committed when he was sixteen. This lengthy sentence does not violate the Eighth Amendment because Miller and related cases expressly indicate their holdings apply only to life-without-parole sentences. Even assuming the standards apply to a de facto life sentence, the trial court in this case adequately considered Defendant's youth and attendant circumstances during sentencing. Trial counsel was not ineffective, but Defendant was provided ineffective assistance of appellate counsel when his attorney failed to seek relief under Indiana Appellate Rule 7(B). Rather than remanding for consideration and in the interest of judicial economy, the Court conducted a review of the sentence under Appellate Rule 7(B). Examining only the facts available on direct appeal, the Court concluded a downward adjustment of Defendant's sentence to 100 years was appropriate after reviewing Defendant's character and the nature of the offense. Chief Justice Rush concurred in result and Justice Slaughter concurred in part and dissented in part, stating he would hold as a matter of law that counsel is never deficient for failing to argue a sentence is inappropriate under Rule 7(B).

*Jones v. Mississippi*, (04/23/2021) No. 18-1259, (U.S.) **Life without parole sentence for juvenile upheld – findings as to why defendant was incorrigible or irredeemable not constitutionally required**

Under the Eighth Amendment, at a sentencing hearing for a homicide committed by a person who was under eighteen (18) years of age at the time of the offense, the trial court need not make any findings, explicit or implicit, as to why the defendant was incorrigible or irredeemable before imposing a life without parole sentence. The Eighth Amendment only requires discretion on the trial court's part: "a State's discretionary sentencing system is both constitutionally necessary *and constitutionally sufficient*." Slip op. at 5 (emphasis added).

The dissent contended that by holding that the court need not, even implicitly, find that the youthful offender is one of the rare children whose crimes reflect irreparable corruption, the majority "guts *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016)."

**Practice Pointer:** Despite the result in *Jones*, Indiana law should still require an explicit finding as to whether youth was a mitigating factor, and how it weighed against any aggravating factors before imposing life without parole. Indiana Code § 30-50-2-9(c)(7), "Death Sentence; Life Without Parole," explicitly provides the fact that the defendant was less than eighteen (18) at the time the murder was committed is a potential mitigator. Further, subsection (l) of the statute requires that before a death sentence or life without parole may be imposed, the jury or trial court must find that the State proved at least one aggravating factor beyond a reasonable doubt, and that it outweighed "any mitigating circumstances that exist . . . ." Practitioners should use the considerations of *Miller v. Alabama*, 567 U.S. 460 (2012); and *Montgomery v. Louisiana*, 577 U.S. 190 (2016) to frame the argument as to why and how youth is a significant mitigating factor, and outweighs other aggravating factors, and the trial court must respond with an explicit finding. Even for *defacto* life without parole sentences, this should be the strategy, and trial courts will most often be required to address youth as mitigation by explicit fingings. *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007), requires a sentencing statement by the trial court articulating all of the aggravating factors and mitigating factors supported by the record. This is only unnecessary where the sentence imposed is the advisory (Ind. Code § 35-38-1-1.3), but in reality most *defacto* life sentences are going to be enhanced beyond the advisory sentence for whatever offense, or a combination of consecutive sentences. Again, practitioners should use the considerations of *Miller* and *Montgomery*, as well as applicable Indiana sentencing considerations as to why youth mitigates against extremely long sentences for youthful offenders. *See, e.g., Fuller v. State*, 9 N.E.3d 653 (Ind. 2014); *Brown v. State*, 10 N.E.3d 1 (Ind. 2014); and *Stidham v. State*, 157 N.E.3d 1185 (Ind. 2020).

# XI. FORFEITURE

*Brown v. Eaton, Hancock Co. Prosecutor*, (02/10/2021) 164 N.E.3d 153 (Ind. Ct. App.) **Insufficient evidence to support civil forfeiture**

State failed to put forth sufficient evidence to sustain the forfeiture order because it did not establish a nexus between the $32,000 found in Defendant's pocket and the illegal activity because Defendant had only a small amount of marijuana in his possession, which without more is not enough to support the inference that drug dealing occurred, much less activity to yield or require over $30,000. The State did not present evidence regarding the quantity of illegal drugs allegedly being trafficked, the number of drug transactions the money allegedly facilitated, the identity of any drug purchasers or suppliers, or the location where any transaction occurred or was intended to occur.

*Abbott v. State*, (02/15/2021) 164 N.E.3d 736 (Ind. Ct. App.) **Owners may used seized cash for defense-related expenses in civil forfeiture actions**

In civil forfeiture cases, owners may use seized cash for defense-related expenses. Here, the State moved to forfeit four firearms and more than $9,000 in cash from Defendant that was found during a search warrant. Defendant was suspected of dealing drugs and the State designated evidence that he had sold methamphetamine and other narcotics to undercover law enforcement during two controlled buys. Defendant unsuccessfully requested the appointment of counsel at public expense for the forfeiture proceeding, as well as a transcript of proceedings on appeal. During a hearing on State's motion for summary judgment, Defendant claimed the money found in his pocket was lawfully obtained and was set aside to purchase a motorcycle the same day he was arrested. The sale had been postponed, he said, and he simply had not taken the cash out of his pocket. Also, he said, he was employed leading up to his arrest, and his 2015 tax documents showed two sources of lawful wages collectively exceeding $20,000. The trial court entered summary judgment for the State, finding that the "overwhelming designated evidence" indicated the cash in Defendant's pocket was related to criminal conduct. The Court of Appeals concluded that Defendant created a genuine issue of material fact as to the State's entitlement to the *res and* therefore the trial court improperly granted summary judgment. In so holding, the Court expressed concern that the trial court characterized the State's designated evidence as "overwhelming," reminding trial courts that forfeitures "are not favored" and that "'weighing [evidence] – no matter how decisively the scales may seem to tip – [is] is a matter for trial, not summary judgment.'" Addressing Defendant's appellate challenge to the denial of his request for counsel, the Court also held that he was not entitled to counsel at public expense, but because the money in the *res'* still his, he has the means to fund his own defense. Vaidik, J., dissenting on this issue, believes that allowing Defendant to use seized cash to pay for an attorney exceeds statutory limits.

# XII. CHINS/TERMINATION OF PARENTAL RIGHTS

## A. CHINS

*A.P. v. DCS*, (07/15/2020) 150 N.E.3d 292 (Ind. Ct. App.) **CHINS reversed because there was no showing that the coercive intervention of the Court was required despite Mother's admitted drug use, DCS did not present any evidence that Mother used marijuana while the Child was in the home or that DCS had ever perceived Mother to be under the influence of drugs.**

CHINS adjudication under Indiana code section 31-34-1-1 requires proof of three basic elements: the parent's actions or inactions have seriously endangered the child; the child's needs are unmet; and "perhaps most critically," those needs are unlikely to be met unless the State intervenes. It is the last element that guards against unwarranted State interference in family life. State intrusion is warranted only when parents lack the ability to provide for their children. In other words, the focus is on the best interests of the child and whether the child needs help that the parent will not be willing or able to provide. Here, the evidence reflects that Mother admitted to having a substance abuse problem,

especially when she felt stressed or overwhelmed and although Mother agreed to participate in services through an Informal Adjustment—which was extended once—she failed to submit consistently to drug screens and conceded to using marijuana on several occasions. Despite Mother's admitted drug use, DCS did not present any evidence that Mother used marijuana while the Child was in the home or that DCS had ever perceived Mother to be under the influence of drugs. The DCS conceded that "the basic needs of the [Child] are being met" and a safety plan was in effect that placed the Child with Maternal Grandmother if Mother felt overwhelmed and in need of marijuana. The DCS concern, without more, that "[i]llegal substance use impairs your thinking, your response, . . . your normal thought processes and action" is not sufficient to support a CHINS determination. CHINS reversed.

*In the Matter of J.N (child) CHINS and J.N. (father). v. DCS*, (04/29/2021) 20A-JC-2116 (Ind. Ct. App.)
**CHINS finding reversed where record shows no need for further State intervention**

The CHINS court found that an intense and escalating legal dispute between the parents created a highly contentious domestic relationship and that the child's mental condition was seriously impaired or endangered in her parents' care. The Court of Appeals found that neither finding was supported by the evidence. The record shows legal disagreements between the parties, but not the intense, escalating battle the CHINS court described. And while there were three reports of molestation of the child by the father made to DCS, and found to be unsubstantiated, the identity of the reporter was not disclosed. DCS offered no evidence the child's mental or physical health was endangered. DCS did not request the child receive any services except for a therapeutic evaluation, which resulted in no further referrals or services. DCS failed to establish by a preponderance of the evidence the child needs care, rehabilitation, or treatment she is not receiving and would be unlikely to be provided without the coercive intervention of the state. Held, judgment reversed.

*K.S. v. DCS*, (03/15/2021) 164 N.E.3d 834 (Ind. Ct. App.) **Children placed in relative's care may still need coercive intervention of the court through CHINS finding to provide the legal authority for relative to care for children absent guardianship, custody or power of attorney.**

DCS opened a CHINS case *citing* neglect and domestic violence between parents. Mother had left the children in Father's care and Mother's Mother (Grandmother) then moved the children into her home. Mother appealed the CHINS finding, arguing because the children were safely with their grandmother there was no evidence she had endangered the children or that the coercive intervention of the State was needed. Court of Appeals held that coercive intervention of the Court was needed because Mother had abandoned the children, which did endanger them, and that the CHINS finding should continue to provide legal authority for Grandmother to care for the children because there was no guardianship, power of attorney or custody agreement in place.

*Matter of E.T. v. Ind. Dept. of Child Services*, 07/31/2020) 152 N.E.3d 634 (Ind. Ct. App.) **CHINS - separate factfinding hearings did not violate due process**

Trial court did not violate Father's due process rights by adjudicating child a CHINS in mother's case without giving him an opportunity to be heard. Father had been twice convicted of criminal charges related to domestic violence episodes against Mother. As a result of Mother's protective order and fear of Father, trial court granted DCS's motion for separate fact finding hearings. The separate hearings were unavoidable because both parents could not be present at the same fact finding hearing, Father received the due process to which he was entitled because he had the opportunity to be heard at a meaningful time and in a meaningful manner Father had the opportunity to be heard, the trial court did not violate Father's due process rights. The Court of Appeals also found no error in holding Father's fact finding and disposition hearings outside the statutory time frames, which Father waived.

*M.P. and J.P. v. DCS*, (01/27/2021) 162 N.E.3d 585 (Ind. Ct. App.) **CHINS finding reversed -- insufficient evidence coercive intervention of court was necessary**

DCS did not prove by a preponderance of the evidence that the coercive intervention of the court was necessary to ensure the children's care, thus the juvenile court clearly erred in adjudicating the Children to be CHINS. Mother 's admission at the fact-finding hearing that the children were CHINS is not dispositive. The record revealed Father maintained a positive relationship with the children from the moment he re-obtained contact with them and that they spoke on the phone regularly, often daily. The older child was adamant she wanted to be placed with Father, Father voluntarily provided $400 a month in child support and had already taken steps to secure a larger residence by the date of the fact-finding hearing. Every worker or therapist who had contact with Father agreed he had been compliant and willing to do whatever is required to take care of the Children. The Court concluded the evidence strongly suggests that, at the relevant time, Father was willing to provide a safe and stable living environment. Held, CHINS finding reversed and remanded.

## B. Termination of Parental Rights

**Parent's drug test results in TPR case admissible under business records hearsay exception**

*A.B. and J.R. v. DCS*, (10/15/2020) 154 N.E.3d 818 (Ind.)

Drug test records are exceptions to the hearsay rule under the records of a regularly conducted business activity (Ind. Rule Evid. 803(6)). The Indiana Supreme Court, addressing an issue that had resulted in conflicting decisions in the Court of Appeals, held a parent's drug test results were properly admitted into evidence under Indiana Evidence Rule 803(b), business records exception to hearsay in a Termination of Parental Rights (TPR) case. At TPR hearing parents objected as hearsay to the admission of their drug test results from Forensic Fluids Laboratories. The TPR court allowed the results to be admitted and, on appeal, the Indiana Court of Appeals found the tests were property admitted as an exception to hearsay under the records of regularly conducted activity exception. Affirming as correct

the trial court's decision to admit the drug test results into evidence over objection as hearsay, the Indiana Supreme Court found the laboratory depends on the records to operate and there was evidence presented to establish the records as sufficiently reliable and therefore the drug test results were properly admitted, as an exception to hearsay, under the regularly conducted activity exception, Indiana Evidence Rule 803(b)(business records exception) to hearsay.

*In RE C.C. and B.C.*, (08/25/2020) 153 N.E.3d 340 (Ind. Ct. App.) **Termination of parental rights affirmed for Father's refusal to complete court-ordered services and drug screens**

Child was removed from Mother's home due to her substance abuse and placed with Father. The juvenile court adjudicated Child as a CHINS and ordered Father to maintain contact with the DCS and, among multiple other orders, submit to random drug screens. A few months later, Father left Child with a relative, which led to Child's placement in foster care. The juvenile court ordered Father's parental rights to Child to be terminated and issued a detailed statement of findings. The Court of Appeals held Father's refusal to complete court-ordered services and drug screens was a blatant disregard for the juvenile court's authority, thus the juvenile court was "justified in its decision" to terminate his parental rights. Judge Pyle dissented, believing that there were other measures available, short of termination, to convince Father to comply with order to submit to drug screens. After a detailed recitation of facts regarding Father's interaction with DCS, including the removal of the first case manager for "inappropriate conduct" and Father's progress in individual therapy, Judge Pyle concluded that the apparent reason for the Child's removal from Father's care was not drug related, thus he would find the DCS failed to meet its burden and termination is not warranted at this time.

*K.E. and A.C. v. DCS*, (01/13/2021) 162 N.E.3d 565 (Ind. Ct. App.) **Voluntary relinquishment of parental rights reversed and remanded when form mother signed did not include statutorily required language**

Mother signed a form voluntarily relinquishing her parental rights. In a belated appeal, the Court of Appeals reversed the voluntary relinquishment of parental rights and remanded for further fact-finding to determine whether she received an advisement required under Indiana Code Section 31-35-1-12(9). Indiana Code 31-35-1-6 states that before a parent may consent to voluntary termination of their parental rights, they must give their consent in writing and be advised in accordance with Indiana Code section 31-35-1-12. However, in this case the voluntary termination of parental rights form lacked the required advisement of Indiana Code Section 31-35-1-12(9). Where a statutory requirement protecting the fundamental right of parents is absent, it takes on particular importance requiring reversal and remand in this case. In a footnote, the Court of Appeals cited *In Re O.R.*, 16 N.E.3d 965, 971 (Ind. 2014), finding that the Fourteenth Amendment right to establish a home and raise children is an extraordinary compelling reason to find that a forfeited appeal right should be restored. (There appears to be a six-month delay between the final appealable Order and the filing of the Notice of Appeal in this case.)

*K.T. v. DCS*, (10/21/2020) 159 N.E.3d 36 (Ind. Ct. App.) **Termination of parental rights reversed for second time where DCS made no effort to repair bond between mother and child that it had wrongly severed an emotional and behavioral problems child developed as a result of termination proceedings was not a reason to terminate the parental rights of a fit parent**

This case began in May 2011, when the child was removed from the parents' home and later found to be a child in need of services due to their drug use and domestic violence issues. DCS later moved to terminate the parent-child relationship in May 2015, which was granted in April 2016. But both parents successfully appealed, with Court of Appeals finding that DCS had exhibited an "extraordinarily troubling pattern of behavior." However, the trial court again terminated their parental rights in January 2020 after finding the relationships were not in the child's best interests, among other things. The Court of Appeals affirmed the termination of father's parental rights, concluding that he failed to complete DCS services, cannot provide a safe environment for the child, has not communicated with the child since 2013 and is consistently incarcerated for violent crimes. But the Court of Appeals reversed the termination of mother's parental rights, finding her to be a fit and available parent. Instead of finding mother unfit, the trial court erroneously focused on the behavioral problems the child experienced throughout the proceeding. The emotional and behavioral problems of the child were not a result of Mother's actions or inactions but were instead compounded by DCS's lackluster attempts at reunification. The Court also found as erroneous that DCS had made reasonable efforts toward reunification, stating "We acknowledge the importance of permanency and stability in a child's life. But this alone cannot trump the fundamental and constitutional right parents have to the care and custody of their children. Essentially, the trial court terminated Mother's parental rights because — in the four non-consecutive months she was allowed to attempt parenting time — she was 'unable to build a bond with [Child.]' " However, Mother and Child previously had a strong bond, a bond DCS wrongly severed years ago and made no true attempt to repair. Allowing DCS to remove a child from its fit parent, stall reunification until there is no relationship left, and then claim reunification cannot occur because of the lack of relationship would set a terrifying precedent." Acknowledging that "reunification could have serious psychological and emotional ramifications for Child," the Court concluded that the alternative is worse. "DCS cannot be allowed to wrongly withhold a child from a fit, loving, and available parent for years and then ask this Court to affirm that injustice in the name of the child's happiness. This is a painful decision, and there is no happy outcome. We cannot give Mother and Child back the relationship they once had or the years they have lost together. We cannot give Child the future he wants with his foster family. We can only follow the law which requires us to reinstate the parental rights of Mother, a willing and able natural parent."

*T.J. and D.C. v. DCS*, (06/10/2020) 149 N.E.3d 1222 (Ind. Ct. App.) **Inadequate consent advisement required reversal of termination of parental rights**

Mother was not at the termination of parental rights hearing. Her attorney was present and advised the court that mother had been advised of her rights and after being advised she signed a consent to termination of her parental rights. Termination of parental rights was granted based upon mother's signed consent. It was clear Mother received eight of nine statutory advisements before signing the consent. However, there was inadequate evidence that mother received the ninth statutory

advisement and TPR was reversed for further factfinding into whether mother received the ninth advisement.

*T.L. v. DCS*, (10/20/2020) 158 N.E.3d 432 (Ind. Ct. App.) **TPR affirmed, no violation of due process to deny Father's motion to continue**

When Father failed to appear for the fact-finding hearing regarding the termination of his parental rights, his counsel requested a continuance. The trial court denied his request, and during the hearing the parties and the trial court used language that resulted in significant confusion as to whether Father was defaulted for failure to appear or whether the trial court issued a judgment on the merits. After DCS presented family case manager's testimony, Father's drug screen and criminal court records, the trial court ultimately terminated Father's parental rights. The trial court did not change the date of the hearing, there was no emergency motion for a continuance, and Father's counsel was present at the hearing and cross-examined the DCS witnesses. The Court of Appeals held that the trial court's judgment was a judgment on the merits with sufficient evidence to support it and that the trial court did not violate Father's due process rights when it denied his motion for a continuance.

*C. W. v. DCS*, (05/19/2021) 20A-JT-1999 (Ind. Ct. App.) **Mother not entitled to remand in termination case to challenge possible fraudulent drug screens when she had other positive screens beyond the ones she proposed to challenge**

Mother suffers from drug use disorder and has difficulty caring for a special needs child. Mother failed to appear for her termination of parental rights fact-finding hearing. On appeal, Mother argued she failed to receive sufficient notice of the fact-finding hearing, she was denied Due Process in the denial of her continuance of the fact-finding hearing and she was entitled to a remand of her case to challenge potentially fraudulent drugs screens. Court of Appeals finds there was sufficient notice of the fact-finding hearing and no due process violation because: 1) Mother was represented by counsel who appeared at the hearing and in her absence made argument and cross-examined witnesses; 2) Mother and her counsel received actual notice of the hearings from the court; and 3) the notice issue was waived for not being raised in the trial court. Further, the trial court did not abuse its discretion in denying a continuance absent a showing of good cause. Mother filed a motion for remand to challenge potential fraudulent drug screens through TOMO lab. The motions panel of the Court of Appeals denied the motion for remand, and Court found Mother was not entitled to remand. Although she was challenging two potentially fraudulent lab results from TOMO lab, there were other unchallenged lab test results from other labs that found Mother tested positive for a variety of illegal substances. Held, termination of parental rights affirmed.

# XIII. APPEALS/POST-CONVICTION RELIEF/EXPUNGEMENT

## A. Appeals/Belated Appeals

*Yost v. State*, (06/29/2020) 150 N.E.3d 610 (Ind. Ct. App.) **Defendant could not direcly appeal convictions resulting from "open" plea**

It is well-settled that a conviction based on a guilty plea may not be challenged by direct appeal. *Tumulty v. State*, 666 N.E.2d 394, 395 (Ind. 1996); rather, it must be challenged through a petition for post-conviction relief. Here, after entering an open guilty plea to five criminal recklessness convictions, Defendant was prohibited from raising a double jeopardy challenge to the convictions on direct appeal. To the extent cases cited by Defendant allow direct appeals from "open" guilty pleas, Court noted they are inconsistent with *Tumulty and Hayes v. State*, 906 N.E.2d 819, 821 n.1 (Ind. 2009), both of which involved "open" guilty pleas. Moreover, cases cited by Defendant all involved open pleas from which the defendants received no benefit, yet here Defendant clearly received a benefit from his open guilty plea to duplicative charges (*i.e.*, avoiding additional charge of attempted murder). Thus, the Court dismissed Defendant's appeal of without prejudice as to his ability to present his claim in a petition for post-conviction relief.

*State v. Diego*, (11/05/2020) 150 N.E.3d 715 (Ind. Ct. App.) *TRANSFER PENDING* **Rehearing to clarify State's interlocutory appeal of suppression order was a discretionary appeal**

The Court of Appeals granted the State's motion for rehearing to clarify that the State's appeal is a discretionary interlocutory appeal brought pursuant to subsection 6 of Ind. Code sec. 35-38-4-2 and affirmed its initial opinion in all other respects. The Court of Appeals found that if the State intended to appeal the suppression order under subsection (6), it was required to clearly state as much in its Notice of Appeal and its failure to do so made it deficient. The Court noted the motions panel arguably erred when it granted the motion for interlocutory appeal and admonished the State to state the specific statutory basis for its appeal in future criminal appeals. Concurring in result, Judge Vaidik wrote separately and noted whether made in an appeal under subsection (5) or (6), a representation by the State that a suppression issue precludes further prosecution would constitute a judicial admission. While highly doubtful the State would make such a representation under subsection (6), it will be bound by it and in the event the State loses an appeal after such an admission, the charges at issue would have to be dismissed.

*Toles v. State*, (08/18/2020) 151 N.E.3d 805 (Ind. Ct. App.) **No separate "reliability" or "unreliability" test as an alternative to the incredible-dubiosity doctrine**

During attempted murder trial, complaining witness (C.W.) testified she had no doubt Defendant was the one who shot her. Citing *Moore v. State*, 27 N.E.3d 749 (Ind. 2015), the Court of Appeals noted that appellate courts do not judge witness credibility unless the incredible-dubiosity doctrine applies, which requires that there be: 1) a sole testifing witness; 2) testimony that is inherently contradictory,

equivocal, or the result of coercion; and 3) a complete absence of circumstantial evidence. The Court declined to adopt a separate "reliability" test in addition to that doctrine and applied the incredible-dubiosity standard to hold that C.W.'s testimony was not incredibly dubious. Thus, there was sufficient evidence to affirm Defendant's conviction.

## B. Post-conviction Relief

*Kinman v. State*, (09/28/2020) 152 N.E.3d 1060 (Ind.) **Post-sentencing motion to withdraw guilty plea treated as petition for post-conviction relief**

Per Curiam. On transfer, Supreme Court agreed with Court of Appeals that because Defendant's post-sentencing motion to vacate judgment and withdraw his guilty plea was written and verified, as required by I.C. 35-35-1-4(b), it is governed by Indiana's Post-Conviction Rules and treated as a petition for post-conviction relief (PCR). Indiana Post-Conviction Rule 1(6) provides that the trial court "shall make specific findings of fact, and conclusions of law on all issues presented, whether or not a hearing is held." But trial court here erroneously failed to include in its summary order any findings or conclusions on the issues Defendant raised in his de facto petition for PCR. Held, transfer granted, Court of Appeals opinion at 149 N.E.3d 619 vacated, remanded to make specific findings of fact and conclusions of law on all issues presented as required by Indiana's Post-Conviction Rules, including Rule 1(6).

*Willett v. State*, (07/31/2020) 151 N.E.3d 1274 (Ind. Ct. App.) **Pro Se D's Motion to Dismiss Sentence Time Served treated as habeas corpus motion rather than PCR petition**

Where record revealed on its face that Defendant was not entitled to release because his 15-year sentence had not expired, trial court did not err in summarily denying his Motion to Dismiss Sentence Time Served, which Court of Appeals treated as a petition for habeas corpus. Construing Defendant's motion as a petition for post-conviction relief was problematic because the proper procedure in post-conviction proceedings was not followed in this case. Judge Vaidik issued a concurring opinion to express her belief that the matter should have been treated as petition for post-conviction relief, as the State argued, rather than as a petition for habeas corpus. A claim that a sentence has expired is explicitly authorized by Post-Conviction Rule 1(1)(a)(5) and can be instituted at any time to secure relief.

*State v. Royer*, (04/08/2021) 20A-PC-955 (Ind. Ct. App.) **Newly discovered evidence leads to grant of new trial in successive PCR**

The Court of Appeals affirmed the post-conviction court's grant of Defendant's successive petition for post-conviction relief. In 2005, Defendant was convicted of the murder of an elderly woman in her Elkhart apartment. He was convicted along with a co-defendant on the theory she was the "brains" of the plan while Defendant was the "brawn." Elkhart Police asked forensic specialist Dennis Chapman to review latent fingerprints found at the murder scene, and Chapman said one of the prints belonged to the co-defendant. Chapman also testified at the murder trial, but it was later discovered that he had no experience with latent prints. At the successive post-conviction hearing, law

enforcement testified that the interrogating detective, Conway, had been removed from the homicide unit before Defendant went to trial because he gave false information to an attorney in another murder investigation. His removal was not disclosed to the defense before the trial. A key witness also recanted her testimony, claiming she implicated the co-defendant because Conway threatened her with prison time and the removal of her children. She also said Conway fed her information about the homicide during an unrecorded portion of her interview. Also, the witness was paid $2,000 for her testimony, a fact the State did not disclose. Finally, Conway testified that he "suggested" certain details about the murder to Defendant during the interrogation and that he was aware that details Royer provided did not match physical evidence. Another detective had watched part of Conway's interrogation through closed-circuit video and testified that it was "super leading" and "[p]robably one of the most difficult" interrogations he had seen.

The State referred to the misidentified latent fingerprint as the 'most important piece of evidence in this case' and used the fingerprint to place the co-defendant inside the victim's apartment, and it argued Defendant was also in the apartment because the co-defendant exerted substantial influence over him. The State used the key witness's testimony to exemplify the influence the co-defendant exerted over Defendant and to indicate that the co-defendant had told others about her involvement in the crime. The Court of Appeals agreed with the post-conviction court's determination that the misidentified latent fingerprint, the witness's recantation of her testimony, and receipt of a reward that was not disclosed during trial constitute newly discovered evidence that undermines the State's case against Defendant and produces a reasonable probability of a different result on retrial.

Similarly, the Court affirmed the finding that Conway's removal from the homicide unit was newly discovered evidence that should have been disclosed. The prosecutor knew at the time of the 2005 trial that Conway had been removed based on concerns about his credibility in future trials due to misconduct. Conway's credibility was "integral" to the case against Defendant, especially because no physical evidence linked him to the crime. The jury had to rely on Conway's accounts of the interrogations given that no portions were video recorded and large portions weren't audio recorded. As a result, the Court held the State's failure to disclose Detective Conway's removal from the homicide unit calls into question the integrity of Defendants' conviction and requires a new trial.

As for Conway's interrogation tactics, the panel noted the other detective "intentionally concealed" his observations about Conway's "super-leading" style, thus undermining the jury's evaluation of Conway's testimony. Further, Conway contradicted himself by claiming at trial that he did not give Defendant details about the murder then claiming the opposite at the successive PCR hearing. Finally, the Court held that Defendant was entitled to a new trial because "Detective Conway's testimony at trial left the jury with the impression that he took Royer's mental disabilities into account and took protective measures before interrogating [Defendant]; whereas, Detective Conway's testimony during the successive post-conviction evidentiary hearing reveals he cavalierly dismissed such concerns."

*Hamilton v. State*, (12/09/2020) 159 N.E.3d 998, *Transfer Pending* (oral argument held 1/7/21) (Ind. Ct. App.) **Ineffective assistance of counsel -- failure to investigate the extent of client's credit-restricted exposure at sentencing or develop a factual record to potentially limit that exposure**

A sentencing court is to determine eligibility for a credit restriction based upon the nature and date of the offense. Here, Defendant pleaded guilty to a Class A felony child molesting charge. At the conclusion of the guilty plea hearing, the State observed an error as to the date in the charging information. Defense counsel took no action to narrow the time frame to determine Defendant's credit restriction eligibility and potentially avoid ex post facto punishment. Court of Appeals finds counsel was ineffective and client was prejudiced. Held, denial of post-conviction relief reversed with remand for a new sentencing hearing.

*Bradbury v. State*, (12/23/2020) 160 N.E.3d 256 (Ind. Ct. App.) **Ineffective assistance of counsel - stipulating to disputed element of crime and failing to seek lesser included offense instructions**

In murder prosecution, trial counsel were ineffective for failing to request a jury instruction on the lesser-included offense of reckless homicide and in stipulating to the fact that the co-defendant had been convicted of murder. Counsel indicated that he entered into the stipulation because he believed the jury was less likely to convict Defendant if it knew "justice had been done to the actual shooter." But counsel admitted at the PCR hearing that acknowledging co-defendant's intent was not a trial strategy. Moreover, counsel specifically raised the issue of co-defendant's intent in a pretrial motion to dismiss, during pretrial hearings, in opening argument, during discussions of instructions, in his motion for a directed verdict, and during closing argument. The co-defendant's intent was as central to Defendant's prosecution as it was to co-defendant's. The primary issue in both prosecutions was whether co-defendant intended to kill his rival, L.B., or just frighten L.B. by recklessly firing in his general direction when the stray bullet from his gun fatally struck a toddler. Defendant's jury was not bound by the verdict of co-defendant's jury. Yet, informing Defendant's jury of that verdict sent the opposite message: another jury had found beyond a reasonable doubt co-defendant fired with the intent to kill, so Defendant's jury must follow suit. Trial counsel's stipulation to elements of the offense which he thought the State would have had difficulty proving cannot be deemed reasonable. Moreover, the stipulation wholly undercut trial counsel's litigation strategy of establishing co-defendant did not act with specific intent to kill. The evidence did not support the post-conviction court's finding that the decision to omit lesser-included offense instructions was strategic. Defendant could have been convicted as an accomplice to reckless homicide, a lesser offense than murder, but counsel's stipulation that co-defendant was convicted of murder effectively foreclosed that defense. But for counsel's deficient performance, there was a reasonable probability that the result of the proceeding would have been different. Held, denial of post-conviction relief reversed and remanded for further proceedings. Vaidik, J., dissenting, believes that counsel engaged in a proper strategy because acknowledging the co-defendant committed murder demonstrated that the toddler victim's death would not go unpunished.

*Jones v. State*,(07/31/2020) 151 N.E.3d 790 (Ind. Ct. App.) **Denial of PCR petition in meth manufacturing case affirmed - claim of conflict from joint representation**

Following Defendant's guilty plea to Level 2 felony dealing in methamphetamine, Court of Appeals affirmed the denial of his petition for post-conviction relief, which alleged that guilty plea counsel provided ineffective assistance by representing both Defendant and his wife. Defendant failed to carry his burden to show that the joint representation resulted in an actual conflict of interest that adversely affected counsel's performance. The couple both consented to trial counsel's joint representation and signed a written waiver of any conflict of interest. Although Defendant contended that trial counsel's loyalty to his wife prevented counsel from arguing to the prosecutor that Defendant did not have more culpability than his wife, that would have been contrary to Defendant's express wishes to protect his wife. Defendant also failed to show or waived his claims that his attorney provided ineffective assistance by advising him to plead guilty and failing to file a motion to suppress a search warrant.

*Back v. State*, (01/27/2021) 162 N.E.3d 593 (Ind. Ct. App.) **Denial of post-conviction relief affirmed**

Trial counsel did not render ineffective assistance by failing to communicate the State's offer to plead guilty to Level 3 felony attempted aggravated battery. Defense counsel testified that he communicated the Level 3 felony attempted aggravated battery plea offer to Defendant and his family prior to Defendant signing the final plea, but Defendant had consistently indicated he would not admit he intended to harm his ex-girlfriend, something the Level 3 offer would require him to do. The Court of Appeals noted it cannot reweigh evidence or witness credibility and found no error. Further, the post-conviction court had the authority to correct the transcript of the guilty plea hearing and ensured the preservation of an accurate record in doing so. The transcript contained a clerical error inserting the word "not" into the factual basis, which was in conflict with what the prosecutor actually said in the recording. Held, denial of post-conviction relief affirmed.

*Conley v. State*, (02/23/2021) 164 N.E.3d 787 (Ind. Ct. App.) **LWOP sentencing hearing inadequately accounted for Defendant's age and mental health**

Defendant was a deeply troubled seventeen-year-old when he killed his ten-year-old brother. He pleaded guilty and the trial court imposed the maximum sentence of life without the possibility of parole. The Court of Appeals reversed the post-conviction court in part, concluding defendant's trial counsel was deficient and that the sum of the errors adds up to significant prejudice. Specifically, Defendant was prejudiced by trial counsel's failure to fully investigate and present mitigating factors, failure to effectively cross examine the State's expert witnesses, and failure to advance the prevailing mitigating theory of diminished juvenile culpability per *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005) and *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011 (2010). "A reasonable probability exists that, but for defense counsel's errors, the proceedings…would have resulted in the imposition of less than the maximum LWOP sentence especially in light of the substantial mitigating factors: [Defendant's] age, the fact that [Defendant] did not have a juvenile or criminal record, and [Defendant's] undisputed, severe

mental health issues." The Court of Appeals held the post-conviction court's denial of the remainder of Defendant's claims was not clearly erroneous and remanded with instructions to conduct a new sentencing hearing.

*Absher v. State*, (01/24/2021) 162 N.E.3d 1141 (Ind. Ct. App.) **Ineffective assistance of trial and appellate counsel - failure to object to amendment of charges & to challenge sufficiency of evidence on appeal**

In child molesting prosecution, trial counsel was ineffective for failing to object to the State's untimely motion to amend the charging information three days before trial. Based on the clear language of Indiana Code § 35-34-1-5(b) in effect at time of trial and supreme court's decision in *Haak v. State*, 695 N.E.2d 944 (Ind. 1998), trial counsel had a firm basis to object to the prosecutor's amendment to add two new counts and he performed deficiently by failing to object to the amendment as one of substance that was untimely pursuant to the statute. But for trial counsel's failure to object, the appellate court would have vacated the convictions for the two new counts added by the amendment pursuant to *Fajardo v. State*, 859 N.E.2d 1201 (Ind. 2007). Thus, there is a reasonable probability that, but for trial counsel's deficient performance, the result of the proceeding would have been different. Court noted that its decision in this case "will likely be an outlier" because Indiana Code § 35-34-1-5 was amended shortly after Fajardo was decided, "such that amendments of substance are permitted any time before trial so long as the defendant's substantial rights are not prejudiced." Though a number of Court of Appeals cases found the amendment to be constitutionally retroactive, Defendant's case was distinguishable because the Court on Defendant's direct appeal determined on the merits that the amendment here was prohibited by the statute. Court also found appellate counsel ineffective for failing to argue insufficient evidence supporting the amended Class A felony count, which alleged that Defendant placed his mouth on complaining witness's (C.W.'s) sex organ. The State's forensic expert testified that amylase, an enzyme found in saliva, was found in C.W.'s underwear, which the State argued was sufficient evidence. But according to the State's expert, one cannot make the leap to conclude that the amylase came from Defendant's saliva. Thus, appellate counsel was deficient in failing to raise the sufficiency issue and the deficiency was prejudicial because it is clearly more likely that the Court of Appeals would have reversed Defendant's conviction on that count.
The Court upheld the denial of post-conviction relief as to the other Class A felony charge, rejecting Defendant's claim that trial counsel was ineffective for failing to object to inflammatory comments the prosecutor made on rebuttal during closing arguments. Trial counsel reasonably and strategically chose not to object to the remarks and therefore did not provide ineffective assistance. Held, denial of postconviction relief reversed and remanded with instructions to vacate Defendant's convictions and sentences for one Class A felony child molesting count and the Class C felony count.

*Williams v. State*, (12/21/2020) 160 N.E.3d 563 (Ind. Ct. App.) **Trial counsel not ineffective for opening the door for inculpatory evidence**

In murder, attempted murder and carjacking prosecution, trial counsel was not ineffective for opening the door to the admission of handgun evidence, and appellate counsel was not ineffective for

failing to raise the issue on direct appeal. Prior to trial, defense counsel reached an agreement with the State that evidence of a handgun recovered from Defendant's hotel room would not be admitted. A first trial resulted in a mistrial due to a deadlocked jury. At Petitioner's second trial, defense counsel pursued a strategy of questioning the attempted murder victim's credibility, highlighting the incomplete and ineffective investigation by police and suggesting that others had been the shooter. Counsel's cross examination of a police officer opened the door to admission of the handgun evidence, as trial court agreed with the State that defense counsel's questioning created a false impression about the investigation specific to the gun. In post-conviction relief proceedings, Defendant argued trial counsel's opening the door to the handgun evidence constituted deficient performance and prejudice because the first trial, without the gun evidence, had resulted in a mistrial. Before reaching the merits of Petitioner's claim, the Court of Appeals first affirmed the post-conviction court's exclusion of the transcript from the first trial into evidence at the post-conviction relief hearing, finding the transcript from the first trial irrelevant, based on current Indiana state jurisprudence, voicing reluctance to divine the reasons for a jury's verdict and stating without more, the simple fact of a hung jury does not shed light on the jury's reasons for failing to reach a verdict or tend to make any prejudice flowing from a claimed error at a second trial more or less probable. As to the claim of trial counsel's ineffectiveness, the Court found that trial counsel's pursuit of a chosen strategy resulting in the unintended consequence of the admission of evidence previously sought to be suppressed is not per se deficient performance and even if counsel's performance was deficient there was no showing of prejudice due to other significant and substantial evidence of guilt. Turning to the claim of ineffective assistance of appellate counsel, the Court applied the highly deferential standard to appellate counsel's decisions on which issues to raise and found that appellate counsel was not ineffective for failing to challenge the trial court's ruling that the State could introduce the gun and testing of the gun in response to trial counsel opening the door. Even if Court were to have found appellate counsel rendered deficient performance in failing to present this issue on direct appeal, Defendant was not prejudiced because of the considerable independent evidence of Defendant's guilt. There was little probability that the admission of the handgun affected the outcome of Defendant's trial. Held, denial of post-conviction relief affirmed.

## C. Expungement

*Gulzar v. State*, (06/24/2020) 148 N.E.3d 971 (Ind.) **Change in law that makes date of conviction controlling as to expungement eligibility is remedial and applies retroactively**

Indiana Supreme Court finds a new law that eliminates the confusion of date of eligibility for expungement applies retroactively. Senate Enrolled Act 47 makes clear that in cases such as Defendant's, the date of the felony conviction controls expungement eligibility, not any subsequent reduction. The majority of the Indiana Supreme Court agreed that the change in the law should apply retroactively to Defendant's case. While the legislation was not expressly retroactive, the majority read it as such, finding it remedial. “Here, the amendment to the misdemeanor expungement statute is remedial — it cured a defect in the prior law,” “And, given the broad goals behind Indiana’s expungement scheme, coupled with the urgency with which the legislature addressed this issue, we find that applying the remedial law retroactively to Defendant effectuates its purpose.” The change in law,

the majority held, “cured a mischief that existed in the prior statute, namely, confusion on when the waiting period begins for certain ex-offenders seeking expungement. … In short, we find that the remedial amendment is aimed at making expungement immediately available for individuals who (1) successfully petition for conversion of a minor felony to a misdemeanor and (2) wait five years from their felony conviction date before seeking expungement." Justice Slaughter dissented, believing the Court's analysis requires Court to speculate about legislative motives.

*Mishra v. State*, (03/09/2021) 165 N.E.3d 602 (Ind. Ct. App.) **Expunged conviction treated as if it never occurred, even in subsequent expungement proceeding**

The trial court erred in considering Petitioner’s expunged conviction when it denied his expungement on the grounds that he had been convicted of a crime during the previous five years. The prosecutor in Monroe County consented to the filing of an expungement petition before the expiration of the five-year statutory waiting period for a 2016 class A misdemeanor conviction. Petitioner filed to expunge that conviction and to expunge his 2007 class A misdemeanor in this case. Before the Monroe Circuit Court granted that petition, the trial court denied his petition for expungement, finding that Petitioner had failed to meet all the other statutory requirements under Indiana Code section 35-38-9-2(e) because he had been convicted of a crime within the previous five years, namely the 2016 Monroe County conviction. A week after the Monroe Circuit Court granted his petition to expunge the 2016 conviction, Petitioner re-filed his expungement petition, noting the expungement of the 2016 conviction. The trial court again denied the petition on grounds that Petitioner had been convicted of a crime within the previous five years. The Court of Appeals found that because his Monroe County conviction has been expunged, the plain language of the statute commands that he be treated as if that 2016 conviction had never occurred, and he is entitled to expungement of his 2007 conviction. Held, judgment reversed.

*Allen v. State*, (12/22/2020) 159 N.E.3d 580 (Ind.) **Expungement prohibition for those convicted of felonies resulting in serious bodily injury (SBI) only applies if SBI is an element of the offense**

Because Indiana's Permissive Expungement Statute excludes from eligibility persons convicted of certain offenses but vests in the court discretion to either grant or deny a petition, a trial court should engage in a two-step process when considering a petition for expungement. First, trial court must determine whether the conviction is eligible for expungement and the petitioner has met the requirements. Ind. Code §§ 35-38-9-4(b), -4(e). If the conviction is ineligible, the inquiry ends there. But if the court determines that the conviction is eligible for expungement, it must then collect enough information to determine whether it should grant or deny the petition. In issuing its decision, a trial court may consider a broad array of information, including the nature and circumstances of the crime and the character of the offender. Here, Defendant's conviction for Class B felony conspiracy to commit burglary was eligible for expungement even though the facts incidental to his conviction involved serious bodily injury. A person may be eligible for expungement unless the felony for which he stands convicted "resulted in serious bodily injury to another person." I.C. § 35-38-9-4(b)(3). That the facts of

the incident leading to the conviction show serious bodily injury is not enough to exclude a person from eligibility for expungement. *See Trout v. State*, 28 N.E.3d 267 (Ind. Ct. App. 2015).

In this case, significant evidence supported Defendant's expungement petition: testimony about his role as a committed father, husband, and provider; letters of recommendation from family, friends, and coworkers; and support from the victims themselves. But the trial court did not articulate its reasons for denying his expungement petition. It may have entirely failed to consider the evidence favoring expungement based on a mistaken belief that Defendant was ineligible for expungement. Thus, the Court reversed the trial court's order denying the petition for expungement and remanded with instructions for the court to reconsider its decision consistent with this opinion. Held, transfer granted, Court of Appeals' opinion at 142 N.E.3d 488 vacated, judgment reversed and remanded.

*Ball v. State*, (02/23/2021) 165 N.E.3d 130 (Ind. Ct. App.) **Abuse of discretion to deny petition for expungement**

Petitioner committed two felony offenses when he was sixteen years old but has been a law-abiding citizen for the past twenty years. He tendered letters to the trial court attesting to his good character and strong work ethic. He is married and has four children, but his convictions prevented him from volunteering at the children's schools. He has owned a real estate business for eighteen years and a heating and air conditioning business for twelve years, but his convictions prevent him from servicing certain clients. He is also an active volunteer in his community, but certain organizations do not allow him to volunteer because of his convictions. The trial court denied his petition for expungement, relying on the fact the value of the stolen guns was more than $16,000, and the Court of Appeals reversed. Noting that while the trial court had the discretion to consider that fact in determining whether to grant or deny the petition, that fact alone was simply not enough to support the denial of the petition when all the other evidence supported expungement. The court also observed that the expungement statute, IN Code 35-38-9-7, should be liberally construed to advance the remedy for which it was enacted. *Cline v. State*, 61 N.E.3d 360, 363 (Ind. Ct. App. 2016), abrogated in part on other grounds in *Allen*, 159 N.E.2d at 585. Held, judgment reversed and remanded with instructions.

*Kelley v. State*, (03/26/2021) 20A-XP-1413 (Ind. Ct. App.) **Expungement statute prohibits expungement of murder conviction**

Petitioner, incarcerated in another State, filed a petition to expunge his criminal record in Indiana arguing he was eligible for expungement of his Indiana felony convictions because, due to his continuous incarceration, he has not engaged in any criminal activity since his 2011 arrest. Court of Appeals upheld the trial court's denial of expungement because neither I.C. 35-38-9-3 nor I.C. 35-38-9-4 allow murderers to petition for expungement.

**INDIANA PUBLIC DEFENDER COUNCIL LEGISLATIVE UPDATE**

June 18, 2021

Indiana Public Defender Council

Bernice A. N. Corley
*Executive Director*

Michael Moore
*Assistant Executive Director*

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Contents:

**Introduction:**

The Indiana General Assembly convened for business on January 4, 2021. The Public Defender Council staff pursued a legislative agenda adopted by the IPDC Board, specifically:

Adult:

- Require indigent persons to be represented at initial hearing (2nd year pursued)
- Remove Home Detention violations as a basis for an Escape (2nd year pursued)
- Reduce Maintaining a Common Nuisance to a Class A misdemeanor (2nd year pursued)
- Amend Synthetic ID Deception, False ID, and False informing to reduce prosecutorial abuse (1st year pursued)
- Amelioration for pre-2014 convicted and serving a sentence (1st year pursued)
- Restoration of 50% credit time (1st year pursued)

Juvenile:

- End Direct File (1st year pursued)
- Abolish Juvenile Life Without Parole (1st year pursued)
- Minimum ages and statutory guidance for competency determinations (1st year pursued)
- End Jailing of Children in County Jails (1st year pursued)
- Automatic Expungement (1st year pursued)
- Increase Training for School Police Officers (1st year pursued)
- Make possession of Marijuana a status offense (1st year pursued)
- End costs and fees for juvenile prosecution (1st year pursued)

IPDC staff lead the advocacy efforts, seeking legislators to author bills as well as seeking out stakeholders who support each initiative. Chris Bandy is the newest staff member to IPDC and serves as the Legislative Liaison. This year's legislative efforts were aided by board members, chief public defenders, and individual IPDC attorneys who stepped up by providing testimony, contacting legislators, and supporting public defense legislative priorities in coordination with Council staff.

This year was a successful legislative session. IPDC secured funding to continue its juvenile delinquency work. And it's juvenile justice reform bill, the first of future efforts, SEA 368, was signed into law. Additionally, many bills IPDC opposed failed to pass.

**IPDC's Legislative Agenda and the associated bill numbers with authors:**

| IPDC Policy | Bill Number / Author |
|---|---|
| **End Direct File** | HB 1579 – Rep. Hatcher |
| **Abolish Juvenile Life Without Parole** | SB 368 – Sen. Tallian |
| **Statutory Guidance for Juvenile Competency Determinations** | SB 368 – Sen. Tallian |
| **End Jailing of Children in County Jails** | SB 368 – Sen. Tallian |
| **Automatic Expungement** | SB 191 – Sen. Taylor<br>SB 368 – Sen. Tallian |
| **Possession of Marijuana as a Status Offense** | SB 368 – Sen. Tallian |
| **Use of Summons instead of Arrests** | HB 1023 – Rep. Pryor |
| **Legalize Marijuana** | HB 1028 – Rep. Lucas,<br>HB 1117 – Rep. VanNatter<br>HB 1154 – Rep. Summers<br>SB 104 – Sen. Taylor<br>SB 223 – Sen. Tallian |
| **Addressing Police Brutality** | HB 1006 – Rep. Steuerwald<br>HB 1066 – Rep. Bartlett<br>HB 1210 – Rep. Porter<br>HB 1297 – Rep. V. Smith<br>HB 1480 – Rep. Pryor<br>HB 1502 – Rep. Summers<br>SB 308 – Sen. Taylor<br>SB 410 – Sen. J.D. Ford |
| **Credit Time for Pretrial Home Detention** | SB 193 – Sen. Taylor |
| **Restoring 50% Credit** | SB 221 – Sen. Tallian |
| **Abolish of the Death Penalty** | SB 252 – Sen. Boots |
| **Synthetic Identity Deception** | SB 197 – Sen. Young |
| **Reduce Fines, Fees, and Court Costs** | HB 1208 – Rep. Porter |

**Highlights of Legislative Trends**

1. Juvenile offenders and waiver:

   Multiple bills were offered with the goal of severally limiting or abolishing the practice of direct file, and the raise the minimum ages for waiver of children to adult court. The only bill that received a committee hearing was SB 368, authored by Senator Tallian, but the provisions regarding direct file and waiver were stripped out of the bill at the initial hearing. Three bills were authored that would have expanded direct file: HB 1256, which reinstated the pathway to direct file for felony level children and firearms offenses, I.C. 35-47-10; HB 1369, which would have altered direct file as a part of the bills larger objective to remove the requirement of a license to carry a handgun; and HB 1198, which would have added child molest to the list of direct file offenses, but only where the alleged defendant had aged out of juvenile court jurisdiction.

   In response to the Indiana Criminal Justice Institute reports on juveniles under adult court jurisdiction, which show an extreme level of disproportionate number of black male youth who are direct filed into adult court, the Black Legislative Caucus has embraced the issue of ending or severally limiting direct file. Additionally, current juvenile justice system review, conducted under the umbrella of the Commission on Improving the Status of Children, with the aid of the Council for State Governments, has identified the pathways of sending children to adult court as an area in need of attention, and hopefully in turn, revision.

2. Marijuana:

   Several bills were filed in the House and Senate to either decriminalize or legalize small amounts of marijuana for personal use, or to allow medical marijuana prescriptions. This move was opposed by many, including temperance organizations, traffic safety groups, and the Indiana Chamber of Commerce, which sees it as a workplace safety and worker fitness issue. None of those bills received a hearing in committee.

   Currently, 33 states allow for medical use of marijuana, and 11 have legalized it for personal recreational consumption. In the Midwest, Ohio, Illinois and Michigan permit some form of legal marijuana. Federal law continues to prohibit marijuana, designating it as a Schedule I controlled substance.

   In 2019, Operating with any amount of a Schedule I controlled substance, including marijuana, is a *per se* OWI violation in Indiana and many other states. An individual who has no impairment is subject to criminal liability for driving after consuming cannabis products. IPDC, advocated for amending operating while intoxicated law to address this issue. Several bills were introduced to establish a minimum permissible limit for THC in the blood, similar to how alcohol is treated, however, non-prevailed. In 2020, Sen. Mike Young attempted to move this issue forward. He found great resistance in his caucus. While he did not prevail in the language he advanced originally, he was successful in

amending IC 9-30-5-1(c) to provide that the controlled substance or its metabolites must be found in the blood, not just in the body.

This Session, Senator Young was successful in creating a defense to operating a vehicle with a controlled substance in a person's body when that substance is THC or its metabolite and when: (1) the person is not impaired; (2) the person did not cause an accident; and (3) the substance was detected via a chemical test.

**Legislative Issues Expected in Upcoming Sessions:**

Although IPDC was successful in preventing some enactments that could negatively affect criminal defense in Indiana, some defeated initiatives are very likely to return in upcoming sessions:

SB 198 (IPDC opposed). Had this bill passed, it would have given the Attorney General's office concurrent jurisdiction over actions of unlawful gathering. Would have permitted the seizure of real or personal property used to finance or facilitate the financing of an unlawful assembly. Prevented anyone arrested for unlawful assembly from being released on bail until a hearing was held and provided factors for which the court could impose a higher bail amount than the bail schedule.

SB 200 (IPDC opposed). Had this bill passed, it would have given the Attorney General authority to appoint a special prosecutor, at the cost of the county in question, if an elected prosecutor categorically refuses to prosecute certain offenses. The scope of the special prosecuting attorney's authority may be expanded. This is the second session this type of language has been pursued.

HB 1176 (IPDC opposed). This bill sought to define "consent." It also sought to add an element to the offense of rape by fraud.

HB 1198 (IPDC opposed). Introduced in response to D.P., et. al. v. State, 151 N.E.3d 1210 (Ind. 2020), which held that juvenile courts do not possess jurisdiction over adults for the purpose of filing a delinquency petition and seeking waiver of the case to criminal court. HB 1198 was introduced to amend the direct file statute (I.C. 31-30-1-4) to allow for the prosecution of adults for sex offenses that they committed before reaching eighteen (18), but the State did not learn about in time to file on before they reached the age of twenty-one (21). It would have allowed for the resulting sentence to be fully suspended, but all other consequences of the felony level charges would remain the same—such as sex offender registry and sex offender parole requirements.

HB 1200 (IPDC opposed). This bill sought to expand the protected person statute (IC sec. 35-37-4-6) to extend beyond the age of 14. Additionally, it would have created a Level 4 human trafficking offense if the trafficked person is under 18 years of age. Expressly barred as a defense consent by the trafficked person or belief that the person was 18 or older. The topic of human trafficking is being studied during the interim study.

HB 1202 (IPDC supported). This bill sought to give people convicted of non-violent offenses, pre-2014, who are still serving a sentence in DOC the benefit of reduced reform sentences. This ameliorative relieve would have occurred through a review by the parole board. If the person was approved for the relief, the person would have been discharged and able to use DOC re-entry services.

HB 1376 (IPDC opposed). This bill was instigated by the bail industry to end the operation of the Bail Project in Indiana. Had the bill passed, it would have defined "charitable bail organization" and limit the function thereof. The bill failed to receive a committee hearing. When this bill died, the bail industry attempted an amendment to HB 1405 which would have allowed a bail that is set as cash to be treated as a surety bond.

HB 1369 (IPDC opposed). This bill would have repealed laws requiring a person to obtain a license to carry a handgun in Indiana. However, it would have created new offenses prohibiting certain persons from carrying a handgun.

**Interim Study Committees**

During the interim between legislative sessions, the Legislative Council authorizes committees composed of members of both houses and often lay members to examine issues requiring more study than can be conducted during the legislative session. On May 13, the Legislative Council authorized the following topics of interest to public defense:

**INTERIM STUDY COMMITTEE ON CORRECTIONS AND CRIMINAL CODE**

THE COMMITTEE IS CHARGED WITH STUDYING THE FOLLOWING TOPICS:

(A) Human trafficking, including topics specified in HB 1018 (2021). (Source: Letter: Bartlett; HB 1018 (2021))
(B) Assignment of counsel at the initial hearing in criminal cases, the capacity of the public defender system to provide counsel, and the impact of providing counsel on jail overcrowding. (Source: Letter: Steuerwald; Frye)
(C) Jurisdiction over adults for sex offenses committed while a child. (Source: Letter: GiaQuinta)
(D) Juvenile sentencing to life without parole. (Source: Letter: GiaQuinta)
(E) Costs and fees for juvenile prosecution. (Source: Letter: GiaQuinta)
(F) Multi-year review of current trends with respect to criminal behavior, sentencing, incarceration, and treatment. (Source: IC 2-5-1.3-13)

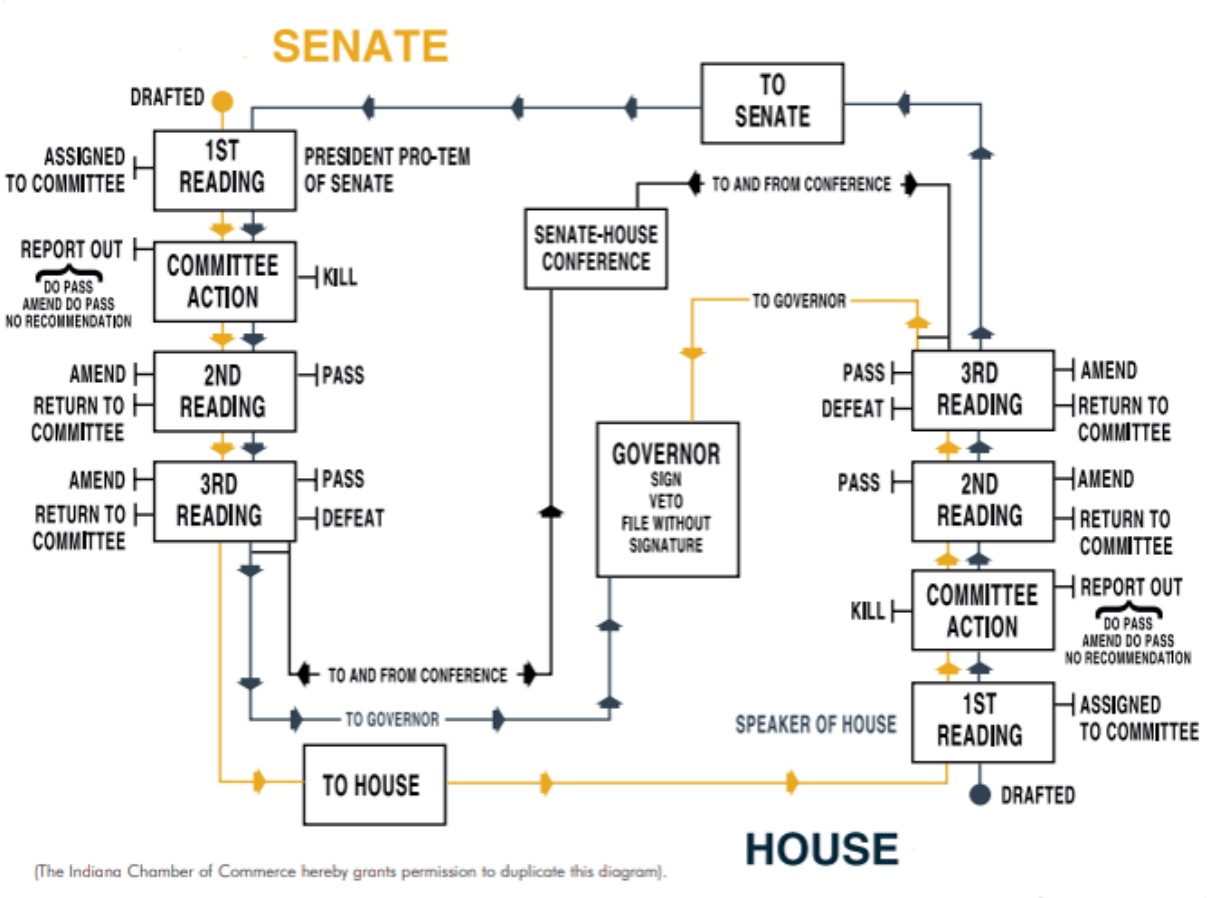
**STATUTORY STUDY COMMITTEES NOT ASSIGNED TOPIC.** No topics are assigned in this Resolution to any of the following study committees established by IC 2-5-1.3-4:

(1) The Interim Study Committee on Agriculture and Natural Resources.
(2) The Interim Study Committee on Commerce and Economic Development.
(3) The Interim Study Committee on Courts and the Judiciary.
(4) The Interim Study Committee on Elections.
(5) The Interim Study Committee on Environmental Affairs.
(6) The Interim Study Committee on Financial Institutions and Insurance.
(7) The Interim Study Committee on Government.
(8) The Interim Study Committee on Public Safety and Military Affairs.

(Source: Legislative Council Resolution 21-01 – adopted May 10, 2021)

## The Legislative Process

How a bill becomes law in Indiana is governed by the Constitution, statutes, and the General Assembly's rules. The Indiana Chamber of Commerce created this graphic depiction of the flow of the legislative process:



## Bills Tracked by IPDC:

**This section includes the bills tracked by IPDC during the legislative session. An additional number of bills were initially tracked at the beginning of the session, but many did not get a hearing in the assigned committee in the first house. Those bills are not included in this report.**

**HB1006** **LAW ENFORCEMENT OFFICERS** (STEUERWALD G) Requires the Indiana law enforcement training board to establish mandatory training in de-escalation as part of the use-of-force curriculum and requires de-escalation training to be provided as a part of: (1) pre-basic training; (2) mandatory in-service training; and (3) the executive training program. Establishes a procedure to allow the Indiana law enforcement training board to decertify an officer who has committed misconduct. Defines "chokehold" and prohibits the use of a chokehold under certain circumstances. Specifies that a law enforcement officer who turns off a body worn camera with the intent to conceal a criminal act commits a Class A misdemeanor. Requires an agency hiring a law enforcement officer to request the officer's employment record and certain other information from previous employing agencies, requires the previous employing agency to provide certain employment information upon request, and provides immunity for disclosure of the employment records. Makes an appropriation to the Indiana law enforcement training academy for making capital improvements.

*Current Status:* 4/1/2021 - Public Law 12

**HB1028** **OPERATING WHILE INTOXICATED** (LUCAS J) Provides a defense to prosecution for a person who operates a vehicle with marijuana or its metabolite in the person's blood under certain conditions.

*Current Status:* 4/13/2021 - DEAD BILL; Fails to advance by Senate 3rd reading deadline for House bills (Rule 79(b))

**HB1032** **NEWBORN SAFETY DEVICES** (FRYE R) Provides for placement of a newborn safety device at any facility that is staffed by an emergency medical services provider on a 24 hour per day, seven day per week basis, provided the newborn safety device: (1) is located in an area that is conspicuous and visible to staff; and (2) includes a dual alarm system that is connected to the facility and is tested at least one time per month to ensure the alarm system is in working order. Provides for placement of a newborn safety device at any fire department, including a volunteer fire department that: (1) meets the minimum response time established by the county, not to exceed four minutes; (2) is located within one mile of a hospital, police station, or emergency medical services station that meets certain requirements; (3) is equipped with an alert system that, when the newborn safety device is opened, automatically connects to the 911 system and transmits a request for immediate dispatch of an emergency medical services provider to the location of the newborn safety device and is tested at least one time per month to ensure the alert

system is in working order; and (4) is equipped with an independent video surveillance system that allows at least two members of a fire department to monitor inside the newborn safety device at all times. Provides that a person who in good faith voluntarily leaves a child in a newborn safety device located at such a facility or fire station is not obligated to disclose the parent's name or the person's name. Makes conforming amendments.

*Current Status:* 4/29/2021 - Public Law 170

**HB1033** **RESIDENCY OF POLICE OFFICERS AND FIREFIGHTERS** (FRYE R) Revises residency requirements for members of police and fire departments to require that members: (1) have adequate means of transportation into the jurisdiction served by the member's department; and (2) maintain telephone service to communicate with the department.

*Current Status:* 4/8/2021 - Public Law 28

**HB1060** **OFFICE OF ADMINISTRATIVE LAW PROCEEDINGS** (STEUERWALD G) Allows a petition for review of an agency administrative action to be filed by mail, personal service, or electronic mail. (Current law requires a petition for review to be filed by mail or personal service.) Provides that the filing of a document in an administrative proceeding is considered complete on the date of electronic submission if the document is sent by electronic mail. Allows the ultimate authority of an agency to request that the office of administrative law proceedings (office) review a motion to disqualify an administrative law judge. Allows the department of child services to request that the office conduct administrative proceedings on certain administrative actions related to child support and certain substantiated reports of child abuse or neglect. Requires the office to maintain confidentiality in administrative proceedings concerning actions by the department of child services.

*Current Status:* 4/1/2021 - Public Law 13

**HB1064** **COURTS AND MAGISTRATES** (CHERRY R) Adds a superior court in Hamilton County. Provides that the first judge of Hamilton superior court No. 7 shall: (1) be elected at the November 2022 general election; (2) take office January 1, 2023; and (3) serve a term of six years. Allows the judges of the Decatur circuit and superior courts to jointly appoint a magistrate to serve the Decatur County courts. Allows the judges of the Huntington circuit and superior courts to jointly appoint a magistrate to serve the Huntington County courts. Allows the judge of the Lake Superior Court Division No. 4 to appoint a magistrate to serve the Lake Superior Court Division No. 4. Allows the Marion County superior courts to appoint 27 full-time magistrates after December 31, 2021, not more than 14 of whom may be from the same political party. Removes the sixth circuit court in Delaware County. Provides a full-time magistrate for Hancock County.

*Current Status:* 4/26/2021 - Public Law 123

**HB1068** **LOCAL OR REGIONAL JUSTICE REINVESTMENT ADVISORY COUNCILS** (FRYE R) Establishes a local or regional justice reinvestment advisory council (local or regional advisory council) in each county in Indiana. Provides that the purpose of a local or regional advisory council is to review local or regional criminal justice systems, policies, and procedures. Provides that the justice reinvestment advisory council shall assist local or regional advisory councils with promoting: (1) the use of evidence-based practices; and (2) certain best practices of community-based alternatives and recidivism reduction programs. Sets forth duties of local or regional advisory councils.

*Current Status:* 4/8/2021 - Public Law 30

**HB1082** **HIGH TECH CRIMES UNIT PROGRAM** (STEUERWALD G) Establishes the high-tech crimes unit fund for the purpose of establishing up to 10 high tech crimes units that collectively represent the north, south, east, west, and central geographic areas of Indiana to enhance the ability of prosecuting attorneys to investigate, collect evidence, and prosecute high tech crimes.

*Current Status:* 4/1/2021 - Public Law 16

**HB1095** **TRESPASSING AND AGGRESSIVE HARASSMENT** (MOED J) Establishes the low barrier homeless task force. Provides that a person commits the offense of criminal trespass if: (1) the person, who does not have a contractual interest in the property, knowingly or intentionally enters or refuses to leave the property of another person after having been prohibited from entering or asked to leave the property by a law enforcement officer when the property is designated by a municipality or county enforcement authority to be an unsafe building or premises; or (2) the person knowingly or intentionally enters the property of another person after being denied entry by a court order that has been issued to the person or issued to the general public by conspicuous posting on or around the premises in areas where a person can observe the order when the property has been designated by a municipality or county enforcement authority to be an unsafe building or premises; unless the person has the written permission of the owner, the owner's agent, an enforcement authority, or a court to come onto the property for purposes of performing maintenance, repair, or demolition. Provides that an individual who harasses another person with the intent to obtain property from the other person commits aggressive harassment, a Class C misdemeanor. Defines "harasses". Repeals the chapter concerning panhandling.

*Current Status:* 4/13/2021 - DEAD BILL; Fails to advance by Senate 3rd reading deadline for House bills (Rule 79(b))

**HB1097** **CRIMINAL PENALTIES** (ABBOTT D) Provides that a person who uses a vehicle to commit the offense of resisting law enforcement or interfering with public safety and has a

prior conviction for either offense that involved the use of a vehicle, commits a Level 5 felony.

*Current Status:* 4/26/2021 - Public Law 124

**HB1115** **INTERFERING WITH PUBLIC SAFETY** (MILLER D) Provides that a person who enters a marked off area after having been denied entry by a firefighter commits interfering with public safety. (Under current law, the offense is committed only if the person is denied entry by an emergency medical services provider or a law enforcement officer.) Increases the penalty for obstruction of traffic under certain circumstances.

*Current Status:* 4/29/2021 - Public Law 174

**HB1120** **JUDICIAL NOMINATING COMMISSION** (STEUERWALD G) Makes certain changes to the election procedures for the attorney commissioners of the judicial nominating commission.

*Current Status:* 4/8/2021 - Public Law 33

**HB1125** **DECEPTIVE LEAD GENERATION** (LEHMAN M) Makes false, misleading, or deceptive advertisements for claims related to medical devices and legend drugs and certain other actions a deceptive act.

*Current Status:* 4/29/2021 - Public Law 176

**HB1127** **MENTAL HEALTH AND ADDICTION FORENSIC TREATMENTS** (STEUERWALD G) Removes a provision that allows a: (1) delinquent child's; or (2) person's; Medicaid participation to be terminated following a two-year suspension due to certain adjudications or incarceration. Adds competency restoration services to the list of treatment and wraparound recovery services made available to certain persons in the criminal justice system. Adds competency restoration services to the list of services that qualify a person for mental health and addiction forensic treatment services. Adds: (1) recovery community organizations; and (2) recovery residences; certified by the division of mental health and addiction (division) or its designee to the list of organizations eligible for certain funds and grants from the division. Requires demographic data concerning race and ethnicity to be included in certain demographic research performed by the division.

*Current Status:* 4/15/2021 - Public Law 57

**HB1156** **PROHIBITION ON MICROCHIPPING EMPLOYEES** (MORRISON A) Provides that the definition of an "employer" subject to the prohibition against requiring the implantation of devices includes the state or any individual, partnership, association, limited liability

company, corporation, business trust, or other governmental entity or political subdivision that has one or more employees.

*Current Status:* 4/8/2021 - Public Law 35

**HB1176** **ELEMENTS OF RAPE** (NEGELE S) Provides that a person commits rape if: (1) the person engages in sexual activity with another person and the other person submits to the sexual activity under the belief that the person committing the act is someone the victim knows, other than the person committing the act, and such belief is intentionally induced by any artifice, pretense, or concealment practiced by the person; or (2) the person engages in sexual activity with another person and the other person has expressed a lack of consent, through words or conduct, to sexual intercourse or other sexual conduct.

*Current Status:* 4/13/2021 - DEAD BILL; Fails to advance by Senate 3rd reading deadline for House bills (Rule 79(b))

**HB1177** **STRATEGIC PLAN ON DEMENTIA** (PORTER G) Requires the division of aging (division) to develop a strategic plan concerning dementia in Indiana. Requires the division to submit an annual report to the general assembly concerning the dementia strategic plan and the outcomes of implementing the dementia strategic plan.

*Current Status:* 4/8/2021 - Public Law 36

**HB1198** **ADULT AND JUVENILE COURT JURISDICTION** (MCNAMARA W) Provides that a complaint, indictment, or information for child molesting shall be filed in adult criminal court if the accused person: (1) was at least 14 years of age but less than 18 years of age at the time of the offense; and (2) is at least 21 years of age at the time of filing the complaint, indictment, or information. Provides that under certain circumstances an adult criminal prosecution for child molesting must be commenced not later than one year after specified information is discovered if: (1) the accused person was less than 18 years of age at the time of the offense; and (2) the evidence was discovered before the accused person becomes 21 years of age. Provides that a court may suspend any part of a sentence for child molesting if the person: (1) was at least 14 years of age but less than 18 years of age at the time of the offense; and (2) was at least 21 years of age at the time of filing the complaint, indictment, or information. Requires a person who: (1) commits child molesting before the age of 18; and (2) who is charged as an adult after reaching the age of 21; to register as a sex offender but permits a court to reconsider requiring the person to register at any time after the person completes court ordered sex offender treatment.

*Current Status:* 4/22/2021 - DEAD BILL: Fails to advance by Spring adjournment of the 2021 legislative session

**HB1199** **DRIVING PRIVILEGES** (MCNAMARA W) Provides that the bureau of motor vehicles (bureau) shall stay a suspension of a person's driving privileges, and terminate that

suspension, upon a showing of proof of future financial responsibility, and provides that an individual whose suspension has been terminated because the individual submitted proof of future financial responsibility is not required to pay a reinstatement fee. Requires that the bureau terminate a suspension of a person's driving privileges if the bureau does not receive proof that financial responsibility is not in effect after 180 days. Provides that a suspension may be stayed and then terminated if a person fails to pay the judgment. Provides that a warrant may be issued for failing to appear in a traffic violation case if the charge is a misdemeanor or a felony. Provides that a person whose support obligation is enforced by the Title IV-D agency may have the obligor's driving privileges reinstated. Provides that the bureau shall place in forbearance license reinstatement fees of individuals who: (1) are nonviolent offenders; (2) have completed a criminal sentence or are serving terms of probation or parole; and (3) are enrolled in job training or maintain consistent employment for at least three years following completion of job training. Provides that the bureau shall waive all reinstatement fees and reinstate the driving privileges of an individual who has had reinstatement fees placed in forbearance after the individual maintains consistent employment for at least three years. Provides that the bureau, in collaboration with the department of correction, shall administer programs and activities to facilitate the reinstatement of driving privileges for convicted offenders not later than July 1, 2021. Extends the traffic amnesty program for one year to permit certain persons owing unpaid traffic fines, or who may be required to pay a fee for reinstatement of driving privileges, to obtain a reduction in the amount owed or amount payable.

*Current Status:* 4/20/2021 - Public Law 86

**HB1200** **HUMAN TRAFFICKING** (MCNAMARA W) Modifies the definition of "protected person" for purposes of the admission of a statement or videotape of an individual who is less than 14 years of age at the time of the offense but less than 18 years of age at the time of trial. Removes the requirement that money paid for a human trafficking victim or for an act performed by a human trafficking victim be paid to a third party and specifies that a person commits the offense if the person knows or reasonably should know that the victim is a human trafficking victim. Increases the penalty if the person knows or reasonably should know that the human trafficking victim is less than 18 years of age. Specifies that consent by the human trafficking victim is not a defense to a prosecution. Requires law enforcement agencies to report human trafficking investigations to the attorney general within 30 days after an investigation begins.

*Current Status:* 4/22/2021 - DEAD BILL: Fails to advance by Spring adjournment of the 2021 legislative session

**HB1202** **SENTENCING** (MCNAMARA W) Establishes a procedure to allows certain inmates in the department of correction (department) an additional opportunity to request sentence modification from the sentencing court if the department has recommended sentence modification. Makes conforming amendments.

*Current Status:* 4/22/2021 - DEAD BILL: Fails to advance by Spring adjournment of the 2021 legislative session

**HB1224** **CRAFT HEMP FLOWER AND HEMP PRODUCTION** (EBERHART S) Excludes craft hemp flower from the definition of "hemp product". Removes references to smokable hemp. Provides that the state seed commissioner may not adopt or enforce a rule that is stricter than required under federal law or regulation. Removes an exemption to a person who knowingly or intentionally grows or handles smokeable hemp without a license from the penalty of growing or handling hemp without a license. Repeals a law that requires that a hemp bud or a hemp flower be sold only to a processor licensed in Indiana. Provides that a food is not considered adulterated for containing low THC hemp extract or craft hemp flower. Creates contaminant testing and packaging requirements for the distribution and sale of craft hemp flower. Establishes penalties for selling or distributing craft hemp flower in violation of the requirements. Makes it a Class C infraction if a person knowingly: (1) sells or distributes craft hemp flower to a person less than 21 years of age; and (2) purchases craft hemp flower for delivery to another person who is less than 21 years of age. Provides that a retail establishment that sells or distributes craft hemp flower to a person less than 21 years of age commits a Class C infraction. Makes it a Class C infraction if a person less than 21 years of age: (1) purchases craft hemp flower; (2) accepts craft hemp flower for personal use; or (3) possesses craft hemp flower on his or her person. Provides that a person who, while a motor vehicle is in operation or located on the right-of-way of a public highway, possesses a container that contains craft hemp flower, and: (1) the container does not have tamper evident packaging; or (2) the tamper evident packaging has a broken seal; commits a Class C infraction. Provides that a violation is not considered a moving violation. Defines "craft hemp flower". Provides that craft hemp flower is not included in the definition of "controlled substance analog", "hashish", "low THC hemp extract", or "marijuana". Repeals the definition of "smokable hemp" and criminal penalties concerning smokable hemp. Makes conforming changes. Makes technical corrections.

*Current Status:* 4/13/2021 - DEAD BILL; Fails to advance by Senate 3rd reading deadline for House bills (Rule 79(b))

**HB1230** **SAFE HAVEN 911** (LAUER R) Provides that due to extenuating circumstances, if a child's parent or a person is unable to give up custody of a child under the procedure set forth in Indiana's safe haven law, the child's parent or the person may request that an emergency medical services provider (provider) take custody of the child by: (1) dialing the 911 emergency call number; and (2) staying with the child until a provider arrives to take custody of the child. Provides that the emergency medical dispatch agency or the provider shall inform the child's parent or the person giving up custody of the child of the ability to remain anonymous. Provides that a provider, shall, without a court order, take custody of a child who is, or who appears to be, not more than 30 days of age if the child is voluntarily left: (1) in a newborn safety device that is located at an emergency medical services station; or (2) with medical staff after delivery in a hospital or other medical facility when the child's parent notifies the medical staff that the parent is voluntarily relinquishing the child. Allows a child's parent to remain anonymous if the child is voluntarily relinquished in a hospital or other medical facility after delivery of the child.

Provides that an emergency medical services station is immune from civil liability for an act or omission relating to the operation of the newborn safety device.

*Current Status:* 4/22/2021 - Public Law 105

**HB1256** **JUVENILE COURT JURISDICTION** (MCNAMARA W) Provides that a child who: (1) commits indecent display by a youth; or (2) commits dangerous possession of a firearm or provides a firearm to another child in certain circumstances; has committed a delinquent act subject to the jurisdiction of a juvenile court.

*Current Status:* 4/19/2021 - Public Law 84

**HB1270** **DEPARTMENT OF HOMELAND SECURITY** (FRYE R) Amends the administrative orders and procedures act to allow for an initial notice of determination to be served by electronic mail or any other method approved by the Indiana Rules of Trial Procedure. (Under current law, the initial notice of determination may be served only by United States mail or personal service.) Repeals provisions concerning the division of planning and assessment, division of preparedness and training, division of emergency response and recovery, and division of fire and building safety (divisions). Assigns all duties of the divisions to the executive director of the department of homeland security (department) or the department generally. Establishes a fire chief executive training program (executive training program). Provides that after January 1, 2022, a newly appointed fire chief of a political subdivision must successfully complete the executive training program within one year of appointment. Provides that a volunteer fire chief is not required to complete the executive training program. Provides that the department of homeland security may allow any of the following individuals to enroll in the executive training program if there is available space in the course: (1) A chief officer. (2) Management level personnel. (3) A volunteer fire chief. (4) A volunteer chief officer. (5) Volunteer management level personnel. Provides that an applicable high school shall comply with all rules of the fire prevention and building safety commission applicable to the primary use of the building. Provides that schools with one or more employees shall create an emergency operations plan regarding unplanned fire alarm activations.

*Current Status:* 4/29/2021 - Public Law 187

**HB1293** **CRIMINAL APPEALS** (JETER C) Provides that an order granting a motion to discharge a defendant before trial may be appealed to the supreme court or the court of appeals. Provides that the state may appeal an interlocutory order if the trial court certifies the appeal and the court on appeal makes certain findings.

*Current Status:* 4/23/2021 - Public Law 112

**HB1369** **FIREARMS MATTERS** (SMALTZ B) Effective March 30, 2022: (1) Repeals the law that requires a person to obtain a license to carry a handgun in Indiana; (2) Specifies that

certain persons who are not otherwise prohibited from carrying or possessing a handgun are not required to obtain or possess a license or permit from the state to carry a handgun in Indiana; (3) Prohibits certain individuals from knowingly or intentionally carrying a handgun; (4) Creates the crime of "unlawful carrying of a handgun"; (5) Provides that a prohibited person who knowingly or intentionally carries a handgun commits a Class A misdemeanor; (6) Specifies that the unlawful carrying of a handgun is a Level 5 felony if a person: (A) is less than 23 years of age; and (B) has an adjudication as a delinquent child for an act described by IC 35-47-4-5 (unlawful possession of a firearm by a serious violent felon); (7) Allows a resident of Indiana who wishes to carry a firearm in another state under a reciprocity agreement entered into by Indiana and the other state to obtain from the superintendent of the state police department a reciprocity license; (8) Requires law enforcement agencies to make use of certain data bases when issuing reciprocity licenses; (9) Specifies the following fees for reciprocity licenses: (A) $0 for five year reciprocity licenses, and (B) $75 for lifetime reciprocity licenses; (10) Provides that a person who knowingly or intentionally exerts unauthorized control over a firearm of another person with the intent to deprive the person of any part of its value or use commits theft, a Level 5 felony; and (11) Allows for the imposition of an additional fixed term of imprisonment when a person knowingly or intentionally: (A) points; or (B) discharges; a firearm at someone the person knew, or reasonably should have known, was a first responder. Effective July 1, 2021: (1) Provides that the following must develop a process that allows law enforcement officers the ability to quickly access information about whether a person is a prohibited person who may not knowingly or intentionally carry a handgun: (A) The state police department; (B) The bureau of motor vehicles; (C) Local law enforcement agencies; and (D) Any other state entity with access to information related to persons who may not knowingly or intentionally carry a handgun; (2) Provides that the information made available to law enforcement officers must meet all state and federal statutory, constitutional, and regulatory requirements; and (3) Allows state entities to enter into a memorandum of understanding to ensure that all legal requirements are met. Defines certain terms. Makes conforming amendments.

*Current Status:* 4/13/2021 - DEAD BILL; Fails to advance by Senate 3rd reading deadline for House bills (Rule 79(b))

**HB1383** **JUDICIAL OFFICERS** (COOK A) Provides that a person commits battery on a public safety official if the offense is committed against a retired judicial officer while the retired judicial officer is serving as a judge and allows a retired judicial officer to carry a handgun in the same manner as a judicial officer while the retired judicial officer is serving as a judge. Adds current and former probation officers and community corrections officers to the list of persons whose residential addresses may not be disclosed on a public property database website operated by a unit.

*Current Status:* 4/23/2021 - Public Law 115

**HB1448** **ADOPTION** (TORR J) Permits an individual who seeks to adopt a child less than 18 years of age to file a petition for adoption in any county in Indiana if either of the following is filed with the petition: (1) A written consent to the adoption from each individual whose

consent to the adoption is required under Indiana law; (2) A certified copy of a court order terminating the parental rights of each parent whose consent to the adoption is required under Indiana law. Requires notice of an adoption petition to be delivered to imprisoned or detained individuals. Specifies certain requirements when delivering notice of a petition for adoption to an individual whose address is unknown. Provides that certain notice requirements concerning petitions for adoption are met even when the recipient of the notice refuses to accept the offer or tender of the notice. Requires that the notice of an adoption must be given to the local office of the department of child services, if the child is the subject of an open or pending child in need of services proceeding. Mandates that the notice of an adoption must be given to the entity, facility, or individual of which the child is a ward if the child is a subject of an open or pending juvenile delinquency proceeding. Specifies certain other requirements concerning notice for petitions for adoption. Requires the setting aside of an adoption decree if notice is not properly effectuated and the adoption decree is challenged within 45 days of when it was entered. Allows the court to set aside a dismissal of a motion to contest under certain circumstances. Allows the court to consider, in the context of a motion to contest, (1) the parent's substance abuse; (2) the parent's voluntary unemployment; or (3) instability in the parent's household, if the parent has made substantial and continuing progress and it appears reasonably likely that progress will continue. Makes conforming amendments.

***Current Status:*** 4/29/2021 - Public Law 203

**HB1453** **JUDICIAL SELECTION IN LAKE AND ST. JOSEPH COUNTIES** (AYLESWORTH M) Provides that the judicial nominating commission (commission) for the Lake and St. Joseph superior courts consists of seven voting members, with three voting members appointed by the governor and three voting members appointed by the county board of commissioners, and the chief justice of Indiana or the chief justice's designee serving ex officio as a voting member only to resolve tie votes and as chairperson of the commission. (Current law provides that the commission for the Lake superior court consists of nine members.) Provides that the governor must appoint to the commission one attorney member, one non-attorney member who has never been licensed to practice law, and one member that is a woman. Provides that the county board of commissioners must appoint to the commission one attorney member, one non-attorney member who has never been licensed to practice law, and one member that is from a minority group. Provides that the chairperson of the commission shall have standing to dispute the validity of an appointed member. Provides that a voting member of the commission for: (1) the Lake superior court shall reside in Lake County; and (2) the St. Joseph superior court shall reside in St. Joseph County. Provides that a voting member may not have a prior felony conviction. Repeals provisions concerning the appointment of non-attorney commissioners and the election of attorney commissioners to the commission. Provides that after the commission has nominated and submitted to the governor the names of five persons to fill a vacancy in the Lake or St. Joseph superior court, the governor shall select the most qualified person to fill the vacancy. (Current law provides that the commission for the Lake superior court nominate and submit to the governor the names of three people to fill a vacancy in the superior court.) Makes conforming changes.

***Current Status:*** 4/29/2021 - Public Law 204

**HB1467** **COMMUNITY MENTAL HEALTH CENTER MATTERS** (DAVISSON S) Requires the office of the secretary of family and social services (office) to apply for a Medicaid state plan amendment or Medicaid waiver for the following: (1) Reimbursement of Medicaid rehabilitation option services for a Medicaid eligible recipient who is undertaking an initial assessment, intake, or counseling in a community mental health center. (2) Reimbursement for Medicaid rehabilitation option services concurrently with reimbursement under the residential addiction treatment program. (3) The inclusion of video conferencing and audio services as telehealth for community mental health centers. Amends the definition of "telehealth services" for the Medicaid program. Requires at least two members of the division of mental health and addiction planning and advisory council to be community mental health center chief executive officers or designees. Requires the department of child services to accept certain criminal history checks and fingerprinting performed by community mental health centers for specified professionals if the process used by the community mental health center at least meets or exceeds the department's procedures. Amends the required graduate level courses and clinical experience that an applicant is required to obtain for a license as a clinical addiction counselor. Adds two members to the justice reinvestment advisory council. Makes a conforming change.

*Current Status:* 4/13/2021 - DEAD BILL; Fails to advance by Senate 3rd reading deadline for House bills (Rule 79(b))

**HB1478** **BATTERY AGAINST EMERGENCY ROOM STAFF** (ENGLEMAN K) Amends the definition of "emergency medical services provider" for the offense of battery to include a staff member in the emergency department of a hospital.

*Current Status:* 4/13/2021 - DEAD BILL; Fails to advance by Senate 3rd reading deadline for House bills (Rule 79(b))

**HB1531** **DCS AND THE EDUCATION COMMUNITY** (DEVON D) Defines "exigent circumstances" for purposes of action taken by the department of child services (DCS) with respect to a child. Allows DCS to interview a child at the child's school, except for at a nonaccredited nonpublic school with less than one employee, without parental consent if: (1) the DCS employee presents their credentials upon arrival at the school; and (2) DCS presents a written statement that DCS has parental consent, a court order, or exigent circumstances. Requires that the written statement shall not be maintained in the child's file and must protect the child's and child's family's confidentiality. Mandates that DCS provide assurances that the child's school, or its representative, has been invited to participate in the case plan process.

*Current Status:* 4/29/2021 - Public Law 213

**HB1558** **INDIANA CRIME GUNS TASK FORCE** (STEUERWALD G) Establishes the Indiana crime guns task force (task force) to address violent crime in Boone, Hamilton, Hancock,

Hendricks, Marion, Morgan, Johnson, and Shelby counties by delivering, in cooperation with state and federal officials, a uniform strategy to trace firearms used to commit crimes. Establishes an executive board to direct and oversee the task force. Requires the Indiana criminal justice institute to establish and administer the task force fund. Makes conforming amendments.

*Current Status:* 4/29/2021 - Public Law 217

**SB8** **TRAFFIC ENFORCEMENT IN RESIDENTIAL COMPLEXES** (BUCHANAN B) Reenacts and extends the ability of a unit to enforce moving traffic ordinances on the property of a residential complex under certain circumstances. (This provision expired December 31, 2020.) Extends the requirement that the office of judicial administration submit reports to the legislative council relating to the enforcement of moving traffic ordinances on the property of residential complexes.

*Current Status:* 4/29/2021 - Public Law 135

**SB19** **REQUIRED INFORMATION ON STUDENT ID CARDS** (FORD J) Requires a public school that issues, after June 30, 2022, a student identification card to a student in grade 6, 7, 8, 9, 10, 11, or 12 to include on the student identification card a local, state, or national: (1) suicide prevention hotline telephone number; and (2) human trafficking hotline telephone number; that provides support 24 hours a day, seven days a week. Provides that the information may be printed on the student identification card or printed on a sticker that is affixed to the student identification card.

*Current Status:* 4/13/2021 - DEAD BILL; Fails to advance by House 3rd reading deadline for Senate bills (Rule 148.1)

**SB28** **TAX SALES** (NIEMEYER R) Prohibits a person who is delinquent in the payment of personal property taxes or is subject to an existing personal property tax judgment from bidding on or purchasing a tract at a tax sale. Prohibits a business entity from bidding on or purchasing a tract at a tax sale when a person who is prohibited from bidding on or purchasing a tract at a tax sale: (1) formed the business entity; (2) joined with another person or party to form the business entity; (3) joined the business entity as a proprietor, incorporator, partner, shareholder, director, employee, or member; (4) becomes an agent, employee, or board member of the business entity; or (5) is not an attorney at law and represents the business entity in a legal matter. Requires a person to acknowledge that providing false information relating to a prohibited bid or purchase is perjury. Creates a new section of code with revised requirements for the forfeiture of a tax sale purchase by an ineligible bidder. Requires a county treasurer, except for in a county containing a consolidated city, to pay all taxes and assessments that accrue on the tract of real estate through the time the record owner is divested of title from the tax sale surplus fund for the tract. Permits a county legislative body to adopt an ordinance prohibiting the assignment of a certificate of sale prior to the issuance of a tax title deed. Adds requirements that

must be met within 150 days of the date a court grants a petition to issue a tax deed before a county auditor can issue or record a tax deed.

*Current Status:* 4/19/2021 - Public Law 66

**SB39** **PRIVATE CARD GAMES** (YOUNG M) Defines "private low stakes card game" and provides a defense to certain gambling crimes if the gambling was a private low stakes card game. Defines "cheating" and makes cheating at gambling a Class A misdemeanor and increases the penalty for the offense based on the gain obtained by cheating. Provides that the definition of "electronic gaming device" does not include an amusement device that rewards a player with a ticket or coupon redeemable for noncash merchandise that has a wholesale value of not more than the greater of 10 times the amount charged to play the amusement device one time or $250. Makes conforming amendments.

*Current Status:* 4/13/2021 - DEAD BILL; Fails to advance by House 3rd reading deadline for Senate bills (Rule 148.1)

**SB63** **MENTAL HEALTH TREATMENT FOR INMATES** (GLICK S) Permits, under certain circumstances, an offender committed to the department of correction to be held within a treatment facility operated by the department for not more than 14 days beyond the offender's mandatory release date if: (1) the offender consents; or (2) a court has ordered the offender to be committed to a treatment setting outside the department.

*Current Status:* 4/1/2021 - Public Law 6

**SB69** **SCHOOL BUS STOP ARM VIOLATION ENFORCEMENT** (NIEMEYER R) Specifies that a registered owner of a motor vehicle commits an infraction if the owner's vehicle is used to violate the school bus stop arm law. Provides a defense for a registered owner who provides certain information to law enforcement and fully cooperates with law enforcement, if: (1) the vehicle was stolen; (2) the registered owner routinely engages in the business of renting the vehicle; or (3) the registered owner provided the vehicle for the use of an employee. Specifies that: (1) the bureau of motor vehicles may not assess points for the infraction; and (2) an adjudication for the infraction does not create a presumption of liability in a civil action.

*Current Status:* 4/13/2021 - DEAD BILL; Fails to advance by House 3rd reading deadline for Senate bills (Rule 148.1)

**SB78** **HOSPITAL POLICE DEPARTMENTS** (CRIDER M) Provides that a police officer of a hospital police department (department) has county wide territorial jurisdiction only while the hospital police officer is on duty and in the performance of or engaged in the officer's normal duties. Provides that the governing board of a hospital may limit the department's jurisdiction. Requires the department to notify certain entities if the governing board of the hospital has limited the department's jurisdiction. Provides public access to certain records

created by the department. Provides certain conditions under which a department officer may act regarding a crime in progress.

*Current Status:* 4/13/2021 - DEAD BILL; Fails to advance by House 3rd reading deadline for Senate bills (Rule 148.1)

**SB79** **PROTECTION ORDERS AND DOMESTIC BATTERY** (CRIDER M) Provides that if a petition for an order for protection is filed by a person or on behalf of an unemancipated minor, the court shall determine, after reviewing the petition or making an inquiry, whether issuing the order for protection may impact a school corporation's ability to provide in-person instruction for the person or the unemancipated minor. Creates a procedure that requires a school corporation to receive notice if the court determines that issuing the order for protection may impact the school corporation's ability to provide in-person instruction for the person or the unemancipated minor. Enhances the penalty for domestic battery to a Level 6 felony if the offense is committed against a family or household member: (1) who has been issued a protection order that protects the family or household member from the person and the protection order was in effect at the time the person committed the offense; or (2) while a no contact order issued by the court directing the person to refrain from having any direct or indirect contact with the family or household member was in effect at the time the person committed the offense. Enhances the penalty for domestic battery to a Level 5 felony when the offender has a prior conviction for strangulation against the same family or household member.

*Current Status:* 4/19/2021 - Public Law 67

**SB81** **TRAINING FOR INVESTIGATORS OF SEXUAL ASSAULT CASES** (CRIDER M) Requires certain training for sexual assault investigators. Mandates that the law enforcement training board set specialized standards for training and investigating sexual assault cases involving adult victims.

*Current Status:* 4/1/2021 - Public Law 8

**SB82** **MENTAL HEALTH DIAGNOSIS** (CRIDER M) Defines "mental health diagnosis" and sets forth requirements that must be met in order for certain licensed professionals to provide a mental health diagnosis. Requires certain mental health professionals who are making a mental health diagnosis and who determine that the patient may have a physical condition that requires medical attention or has not been examined by a physician, an advanced practice registered nurse, or a physician assistant in the preceding 12 months to: (1) advise the patient to schedule, and offer to assist the patient with scheduling, a physical examination for the patient; (2) provide the patient with a list of practitioners and certain information concerning the practitioners; and (3) coordinate patient care with the practitioner as appropriate. Requires documentation of the actions of the licensed professional in the patient's medical record.

*Current Status:* 4/29/2021 - Public Law 138

**SB98** **INTERSTATE COMPACT TRANSPORTATION FUND** (SANDLIN J) Allows a community corrections agency to access funds from the county offender transportation fund to defray the cost of transporting offenders and delinquent children as requested by a court, a probation department, a community corrections agency, or a county sheriff.

*Current Status:* 4/15/2021 - Public Law 47

**SB122** **DRUG SCHEDULES** (YOUNG M) Adds new scheduled drugs to the statutory drug schedules.

*Current Status:* 4/1/2021 - Public Law 10

**SB133** **SENTENCING** (FREEMAN A) Provides that a court may suspend only that part of a sentence that is in excess of the minimum sentence for a person convicted of a Level 2 or Level 3 felony who has a prior unrelated felony conviction, other than a conviction for a felony involving marijuana, hashish, hash oil, or salvia divinorum. (Current law provides that a court may suspend any part of a sentence for certain Level 2 and Level 3 felony convictions, including drug related convictions.)

*Current Status:* 4/26/2021 - Public Law 119

**SB134** **LICENSE SUSPENSION AND TRANSPORT OF PASSENGERS DURING PROBATIONARY PERIOD** (FREEMAN A) Increases the penalty for operating a motor vehicle containing passengers during the initial 180-day probationary period after issuance of a driver's license and permits license suspension for a violation. Allows a court to suspend the license of a person convicted of operating a motor vehicle after failing to take a prescribed medication.

*Current Status:* 4/13/2021 - DEAD BILL; Fails to advance by House 3rd reading deadline for Senate bills (Rule 148.1)

**SB167** **THEFT AND SALE OF CATALYTIC CONVERTERS AND VALUABLE METALS** (SANDLIN J) Provides that the theft of a component part of a motor vehicle, including a catalytic converter, is a Level 6 felony. Expands qualifying prior convictions for Level 6 felony theft to include robbery and burglary. Provides that a valuable metal dealer who: (1) knowingly or intentionally fails to comply with certain statutes regulating the purchase of a valuable metal; and (2) purchases a stolen valuable metal; commits a Level 6 felony.

*Current Status:* 4/19/2021 - Public Law 70

**SB177** **VICTIM'S RIGHTS AND INVESTIGATIONS** (MESSMER M) Establishes a procedure permitting an immediate family member of a deceased individual to request the superintendent of the state police department to conduct a new investigation into the death of the individual if: (1) a local law enforcement agency has determined that the death was not the result of a criminal act by a third party; (2) the individual was not under the care of a physician or the victim of medical malpractice; and (3) the family member has a reasonable suspicion that the death was the result of a criminal act by a third party.

*Current Status:* 4/19/2021 - Public Law 71

**SB186** **PROSECUTING ATTORNEYS** (KOCH E) Permits a prosecuting attorney to purchase a crime insurance policy instead of executing a surety bond. Allows a prosecuting attorney or deputy prosecuting attorney to solemnize a marriage. Permits the department of child services (DCS) or a prosecuting attorney to file a paternity action if the mother, the person with whom the child resides, the alleged father, or DCS has applied for services under Title IV-D of the federal Social Security Act. Requires a prosecuting attorney to investigate information received about the commission of a felony, a misdemeanor, acts of delinquency, or an infraction. Allows a prosecuting attorney to issue subpoenas or ask a court with jurisdiction to issue subpoenas, search warrants, or any other process necessary to support or aid an investigation. Broadens the types of expenses a county auditor pays for in connection with a criminal case. Allows a prosecuting attorney to appoint employees with the approval of the county council. Allows the prosecuting attorneys council of Indiana (council) to call two conferences each year and specifies who may attend the conferences. Requires the council to conduct training for prosecuting attorneys and their staffs. Renames the drug prosecution fund as the substance abuse prosecution fund. Makes other changes and conforming amendments.

*Current Status:* 4/13/2021 - DEAD BILL; Fails to advance by House 3rd reading deadline for Senate bills (Rule 148.1)

**SB187** **PROTECTION OF MONUMENTS, MEMORIALS, AND STATUES** (KOCH E) Requires the state police department to prioritize the investigation and prosecution of persons who destroy, damage, vandalize, or desecrate a monument, memorial, or statue. Requires the state police department to assist political subdivisions in the investigation and prosecution of persons who destroy, damage, vandalize, or desecrate a monument, memorial, or statue. Provides that discretionary funding for a political subdivision may not be withheld from a political subdivision in certain circumstances. Provides that a state agency may provide discretionary funding to a political subdivision for a respective grant program after considering whether the political subdivision has taken all appropriate enforcement actions to protect public monuments, memorials, and statues from destruction or vandalism. Defines "discretionary funding". Adds enhanced penalties to the crime of rioting.

*Current Status:* 4/22/2021 - Public Law 94

**SB194** **OBSTRUCTION OF TRAFFIC** (BALDWIN S) Increases the penalty for obstruction of traffic under certain circumstances.

*Current Status:* 4/13/2021 - DEAD BILL; Fails to advance by House 3rd reading deadline for Senate bills (Rule 148.1)

**SB197** **CRIMINAL LAW ISSUES** (YOUNG M) Specifies that a conviction for certain sex offenses requires mandatory revocation of a teaching license. Provides that bail provisions that apply to persons on probation and parole also apply to persons on community supervision. Removes and replaces certain references to "official investigations", "official proceedings", and methods of reporting. Adds to the crime of resisting law enforcement the act of forcibly resisting, refusing, obstructing, or interfering with a law enforcement officer's lawful: (1) entry into a structure; or (2) order to exit a structure. Provides that all Level 1 and Level 2 felonies may be prosecuted at any time. Repeals synthetic identity deception and consolidates it with identity deception. Makes attempted murder a predicate offense for the use of a firearm sentence enhancement. Makes certain changes to the definition of "substantially similar" for purposes of the controlled substance law. Adds controlled substance analogs to certain statutes prohibiting controlled substances in penal facilities. Replaces references to delta-9 THC with THC. Repeals and consolidates various fraud and deception offenses. Defines "financial institution" for purposes of crimes involving financial institutions. Defines "pecuniary loss" for purposes of fraud in connection with insurance. Repeals or decriminalizes certain infrequently charged misdemeanors. Makes fraud a Level 4 felony if the amount involved is at least $100,000. Defines attempted murder as a "serious violent felony". Amends the definition of "emergency medical services provider" for the offense of battery to include a staff member in the emergency department of a hospital. Provides a procedure for a law enforcement officer to request a blood sample if the law enforcement officer has probable cause to believe that a person has committed the offense of operating a vehicle or motorboat while intoxicated causing: (1) serious bodily injury; or (2) death or catastrophic injury. Provides that the law enforcement training board may establish certain standards for training programs. Resolves technical conflicts with SEA 81, HEA 1006, and HEA 1564. Makes technical corrections. Makes conforming amendments.

*Current Status:* 4/13/2021 - DEAD BILL; Fails to advance by House 3rd reading deadline for Senate bills (Rule 148.1)

**SB198** **RIOTING** (YOUNG M) Grants, until January 1, 2025, the attorney general concurrent jurisdiction with the prosecuting attorney to prosecute an action in which a person is accused of committing a criminal offense while a member of an unlawful assembly. Permits the chief executive officer of a political subdivision to establish a curfew under certain circumstances. Makes refusing to leave a location in violation of a curfew, after having been informed of the curfew and ordered to leave by a law enforcement officer, a Class B misdemeanor. Allows for the civil forfeiture of property that is used by a person to finance a crime committed by a person who is a member of an unlawful assembly. Prohibits a person from being released on bail without a hearing in open court, establishes a rebuttable presumption that money bail shall be required, and requires a court to consider

whether bail conditions more stringent than the local guidelines should be imposed. Adds enhanced penalties to the crimes of: (1) rioting; and (2) obstruction of traffic. Allows a conspiracy charge for a misdemeanor committed while a member of an unlawful assembly. Provides that a person may recover actual damages in a civil action against a county, city, or town (unit) for loss of property proximately caused by an unlawful assembly, if the unit recklessly fails to exercise reasonable diligence to prevent or suppress the unlawful assembly.

*Current Status:* 4/13/2021 - DEAD BILL; Fails to advance by House 3rd reading deadline for Senate bills (Rule 148.1)

**SB199** **SELF-DEFENSE** (YOUNG M) Specifies that "reasonable force" includes the pointing of a loaded or unloaded firearm for purposes of arrest or to prevent an escape, or for self-defense when used to
prevent or terminate an unlawful entry of or attack on a dwelling, curtilage, fixed place of business, motor vehicle, or aircraft in flight.

*Current Status:* 4/13/2021 - DEAD BILL; Fails to advance by House 3rd reading deadline for Senate bills (Rule 148.1)

**SB200** **NONCOMPLIANT PROSECUTING ATTORNEY** (YOUNG M) Permits the attorney general to request the appointment of a special prosecuting attorney if a prosecuting attorney is categorically refusing to prosecute certain crimes and establishes a procedure for the appointment of a person to serve as a special prosecuting attorney to prosecute cases that the county prosecuting attorney is refusing to prosecute.

*Current Status:* 4/13/2021 - DEAD BILL; Fails to advance by House 3rd reading deadline for Senate bills (Rule 148.1)

**SB201** **OPERATING WHILE INTOXICATED** (YOUNG M) Provides a defense to prosecution for a person who operates a vehicle with marijuana or its metabolite in the person's blood under certain conditions.

*Current Status:* 4/15/2021 - Public Law 49

**SB218** **TOWNSHIP HOMELESS ASSISTANCE** (SANDLIN J) Establishes the low barrier homeless shelter task force. Beginning July 1, 2022: (1) allows a township trustee to place a homeless individual temporarily in a county home or provide temporary township assistance; and (2) requires the township trustees within a county to collaborate and prepare a list of public and private resources available to the homeless population that is distributed and published on the county's Internet web site, if the county has a web site, not later than March 1 of each year. Provides that a person commits the offense of criminal trespass if: (1) the person, who does not have a contractual interest in the property, knowingly or intentionally enters or refuses to leave the property of another

person after having been prohibited from entering or asked to leave the property by a law enforcement officer when the property is designated by a municipality or county enforcement authority to be an unsafe building or premises; or (2) the person knowingly or intentionally enters the property of another person after being denied entry by a court order that has been issued to the person or issued to the general public by conspicuous posting on or around the premises in areas where a person can observe the order when the property has been designated by a municipality or county enforcement authority to be an unsafe building or premises; unless the person has the written permission of the owner, the owner's agent, an enforcement authority, or a court to come onto the property for purposes of performing maintenance, repair, or demolition. Provides that an individual who harasses another person with the intent to obtain property from the other person commits aggressive harassment, a Class C misdemeanor. Defines "harasses". Repeals the chapter concerning panhandling.

*Current Status:* 4/19/2021 - Public Law 75

**SB238** **DESIGNATED OUTDOOR REFRESHMENT AREAS** (BROWN L) Modifies the term "entertainment complex." Allows a county or municipality to designate an area of the county or municipality as an outdoor refreshment area (refreshment area) with the approval of the alcohol and tobacco commission (commission). Provides that if a refreshment area is approved, the commission designates retailer permittees (designated permittees) located within the refreshment area. Allows a consumer to exit a designated permittee's premises with one open container of an alcoholic beverage at a time to consume within the refreshment area. Limits the volume of an open container (based upon the type of alcoholic beverage) that a designated permittee may sell or furnish to a consumer for a refreshment area. Requires a consumer to wear a wristband in order to exit a licensed premises into a refreshment area with an open container. Allows a minor to be present in a refreshment area. Allows a county or municipality to adopt an ordinance at any time to dissolve a refreshment area. Makes the following acts a Class C infraction: (1) A person who exits a designated permittee's premises with an open container of an alcoholic beverage without wearing a wristband identification. (2) A designated permittee who allows a person with an open container of an alcoholic beverage to exit the premises without wearing a wristband identification. (3) A designated permittee who sells or furnishes a person with: (A) an open container of an alcoholic beverage that exceeds the container volume limitations; or (B) two or more open containers of alcoholic beverages at a time. (4) A person who consumes an open container of an alcoholic beverage purchased from a designated permittee outside the refreshment area. (5) A person who brings an alcoholic beverage into a refreshment area that was not purchased from a designated permittee.

*Current Status:* 4/13/2021 - DEAD BILL; Fails to advance by House 3rd reading deadline for Senate bills (Rule 148.1)

**SB239** **REMOTE PROVISION OF CHILD AND FAMILY SERVICES** (BROWN L) Requires the department of child services (department) to establish before October 1, 2021, policies and procedures to allow for child and family services to be provided remotely. Specifies factors

that a child and family services provider and the department may consider in deciding as to whether remote provision of services is appropriate for a child. Provides that a child and family services provider's first meeting with a family, or with a child who lives with the child's family, must be conducted in person unless a declared health emergency makes an in person meeting unsafe. Provides that after a child and family services provider's first meeting with a family or with a child who lives with the child's family, or for purposes of providing services to a child who does not live with the child's family, the provider has the discretion to provide services to the family or child remotely for up to 14 days after the initial request for consultation if providing services remotely is in the best interest of the child and family, unless: (1) a decision is reached on the use of remote services at a child and family team meeting less than 14 days after the request for consultation; or (2) the department communicates to the provider a preliminary determination as to the role of remote services pending the child and family team meeting.

*Current Status:* 4/29/2021 - Public Law 144

**SB240** **FEMALE GENITAL MUTILATION** (BROWN L) Requires the office of women's health to perform certain actions relating to female genital mutilation. Provides that a child is a child in need of services if before the child becomes 18 years of age the child is a victim of female genital mutilation. Provides that a person who: (1) knowingly or intentionally performs the act of female genital mutilation on a child who is less than 18 years of age; (2) is a parent, guardian, or custodian of a child and consents to, permits, or facilitates the act of female genital mutilation to be performed on the child; or (3) knowingly transports or facilitates the transportation of a child for the purpose of having the act of female genital mutilation performed on the child; commits the offense of female genital mutilation, a Level 3 felony. Provides a defense to prosecution of female genital mutilation. Provides certain circumstances where a defense to prosecution of female genital mutilation does not apply. Defines "female genital mutilation". Provides that the license of a physician or a licensed health care professional shall be permanently revoked if the physician or licensed health care professional commits the offense of female genital mutilation. Provides that a person who has reason to believe that a child may be a victim of female genital mutilation has a duty to report the child abuse or neglect. Provides that an action for civil female genital mutilation must be commenced not later than 10 years after the eighteenth birthday of the child. Provides that a victim may seek certain remedies in an action against the defendant for civil female genital mutilation.

*Current Status:* 4/16/2021 - Public Law 51

**SB252** **DEATH PENALTY** (BOOTS P) Urges the legislative council to assign to the appropriate interim study committee the topics of: (1) death sentences; (2) life imprisonment without the possibility of parole; and (3) circumstances justifying the imposition of: (A) a death sentence; or (B) life imprisonment without the possibility of parole.

*Current Status:* 4/13/2021 - DEAD BILL; Fails to advance by House 3rd reading deadline for Senate bills (Rule 148.1)

**SB255** **EXPUNGEMENT** (FREEMAN A) Specifies that a "criminal history provider" includes certain persons who regularly publish criminal history information on the Internet, for purposes of the law requiring criminal history providers to periodically review their criminal history records for expunged convictions.

*Current Status:* 4/15/2021 - Public Law 52

**SB301** **CHILD SERVICES OVERSIGHT** (HOUCHIN E) Establishes the interim study committee on child services (committee). Provides that the committee: (1) shall review the annual reports submitted by local child fatality review teams and by the statewide child fatality review committee and shall report to the legislative council regarding the committee's review of the reports; and (2) may make recommendations regarding changes in policy or statutes to improve child safety; in addition to reporting to the legislative council regarding any other issue assigned to the committee by the legislative council. Provides that a local child fatality committee may meet at the call of members of the local child fatality committee other than the county prosecutor for purposes of the first meeting of the local child fatality committee. Requires the summary information included in the department's annual report regarding child fatalities to indicate, with regard to a child fatality that was the result of abuse or neglect, whether the child was a ward of the department at the time of the event that led to the child's death. Requires the department to provide the annual report to the committee. Urges the legislative council to assign the following topics to the committee, or to another appropriate study committee, for study during the 2021 legislative interim: (1) Amending the Indiana Code to provide for a structured, limited, confidential process by which members of the general assembly may, in the regular course of legislative duties, individually request and view reports and other materials regarding cases of child abuse or neglect and child fatalities resulting from abuse or neglect, while protecting personally identifying information and confidentiality. (2) The child fatality review process, including recommendations from the department and the state department of health with regard to improving reporting and data collection. Requires a local child fatality review committee that has not held its first meeting as of the effective date of the bill to hold its first meeting not later than December 31, 2021.

*Current Status:* 4/29/2021 - Public Law 148

**SB311** **USE OF FORCE AND SELF DEFENSE** (BALDWIN S) Prohibits a state or local law enforcement officer (officer) from firing warning shots. Allows a guard, official, or officer in a state or local penal facility to fire warning shots to prevent the escape of a person. Prohibits a law enforcement agency or merit board from taking an adverse employment action against a law enforcement officer who lawfully exercises the officer's right of self-defense and requires a law enforcement agency to indemnify a law enforcement officer for reasonable expenses incurred by the officer in successfully contesting an adverse employment action.

*Current Status:* 4/13/2021 - DEAD BILL; Fails to advance by House 3rd reading deadline for Senate bills (Rule 148.1)

**SB368** **JUVENILE JUSTICE** (TALLIAN K) Provides for the automatic expungement of certain juvenile offenses. Prohibits a juvenile arrestee who meets certain requirements from being housed with adult inmates prior to trial, with certain exceptions. Establishes a procedure for determining juvenile competency. Provides that after a juvenile court has determined that a child is a dual status child, the juvenile court may refer the child to be assessed by a dual status assessment team under certain circumstances.

*Current Status:* 4/29/2021 - Public Law 157

**SB380** **COURT MATTERS** (KOCH E) Adds a superior court in Hamilton County. Allows the judges of the Decatur circuit and superior courts to jointly appoint a magistrate to serve the Decatur County courts. Allows the judges of the Hancock circuit and superior courts to jointly appoint a magistrate to serve the Hancock County courts. Allows the judges of the Huntington circuit and superior courts to jointly appoint a magistrate to serve the Huntington County courts. Allows the judges of the Knox circuit and superior courts to jointly appoint a magistrate to serve the Knox County courts. Allows the judge of the Lake Superior Court Division No. 4 to appoint a magistrate to serve the Lake Superior Court Division No. 4. Makes clarifying changes to the powers and duties of the Marion superior court executive committee. Provides that an appointed judicial officer shall be vested by the judges of the family division of the Marion superior court with suitable powers for the handling of all probate matters of the court. Removes or reallocates the powers and duties of a probate hearing judge, probate commissioner, juvenile referee, bail commissioner, and master commissioner from the Marion superior court. Provides that the Marion County judicial selection committee nomination procedure shall be followed when filling a vacancy that occurs in a court. Provides that the: (1) clerk of a circuit court; (2) clerk of a city or town court; or (3) judge of a city or town court that does not have a clerk; may retain as an administrative fee an amount of up to $3 from the excess amount collected by the clerk for general court costs. Makes conforming changes.

*Current Status:* 4/13/2021 - DEAD BILL; Fails to advance by House 3rd reading deadline for Senate bills (Rule 148.1)

**Additional Resources:**

Indiana General Assembly (general legislative information, and links to pages on bills, legislators, and other relevant information): http://iga.in.gov.

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# Criminal Law Update 2021

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IGNORANCE IS NO EXCUSE !
BUT I DIDN'T KNOW THAT.
IT CERTAINLY WORKS IN POLITICS.


INDIANA PUBLIC DEFENDER COUNCIL
BILL of RIGHTS

# Updated IPDC Publications

- Motions (5/21)
- Pretrial Manual (2/26/21)
- Evidence Manual (8/20)
- Search & Seizure (8/20)
- Confessions (11/20)
- Expungement (11/20)
- Performance Guidelines (8/20)
- Defending a Capital Case (2/21)
- Alibi Defense Guide (2/21)
- CHINS/TPR (uploaded 1/21)
- Self-defense guide (1/21)
- Defending child molest & other sex offenses (1/21)
- Mental Health Manual (Indiana Law Section, ch. 6) (1/21)

# IPDC
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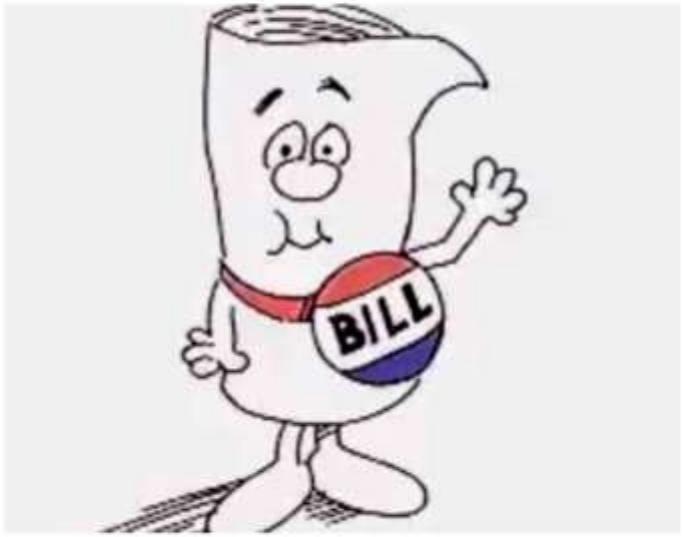
News +++ Information +++ News +++ Information +++ News +++ Information +++ News
Changes in legislation

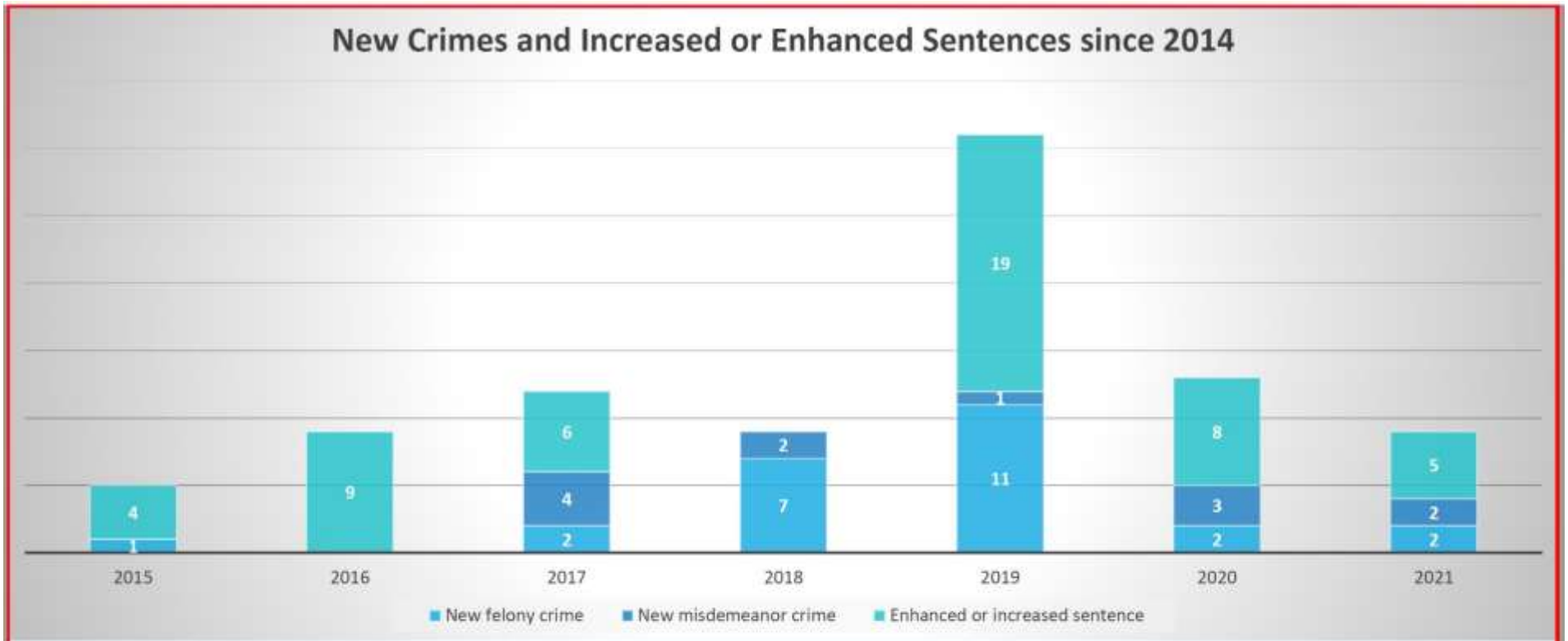
# Bills and Resolutions

- Legislation filed:
  - House: 580
  - Senate: 421

- Legislation passed:
  - House: 120
  - Senate: 102




- Passage Rates:
  - House: 20.7%
  - Senate: 24.2%
  - Overall: 22.2%




| | New felony crime | New misdemeanor crime | Enhanced or increased sentence |
|---|---|---|---|
| 2015 | 1 | | 4 |
| 2016 | | | 9 |
| 2017 | 2 | 4 | 6 |
| 2018 | 7 | 2 | |
| 2019 | 11 | 1 | 19 |
| 2020 | 2 | 3 | 8 |
| 2021 | 2 | 2 | 5 |

# NOTABLE LEGISLATIVE TRENDS

- Response to civil unrest
- Expansion of “crime fighting infrastructure”
- Marijuana legalization and defenses
- Centralizing Government Power
- Mental Health

# Response to Civil Unrest

- SB 34: Unlawful Assembly
- SB 96: Rioting
- SB 102: Historical Property Criminal Mischief
- SEA 187: Protection of Monuments, Memorials, and Statutes
- SB: 194 Obstruction of Traffic
- SB: 198 Rioting
- SB 199: Self-Defense
- SB 391: Prohibited Crowd Control Practices
- HEA 1006: Law Enforcement Officers
- HB 1205: Rioting

# Expansion of "Crime Fighting Infrastructure"

- SB 168: IMPD Study Committee
- SB 192: Law Enforcement Training
- HEA 1006: Law Enforcement Officers
- HEA 1068: Local or Regional Justice Reinvestment Advisory Councils
- HEA 1082: High Tech Crimes Unit Program
- HEA 1558: Indiana Crime Guns Task Force

# Marijuana Legalization and Defenses

- SB 87: Cannabis Regulation
- SB 104: Possession of Medical Marijuana or Paraphernalia
- SEA 201: Operating while Intoxicated
- SB 223 Marijuana Legalization
- SB 273: Craft Hemp Flower and Hemp Production
- SB 321: Marijuana and Medical Cannabis Matters
- HB 1026: Medical Marijuana
- HB 1028: Operating while Intoxicated
- HB 1117: Decriminalization of Marijuana
- HB 1154: Cannabis Legalization

# Mental Health

- SEA 63: Mental health Treatment for Inmates
- SEA 82: Mental health Diagnosis
- SB 217: Determination of Competency to Stand Trial
- HEA 1118: Mobile Integrated Healthcare Programs and Safety Plans
- HEA 1127: Mental Health and Addiction Forensic Treatments
- HB 1128: Mental Health Assessments of Law Enforcement Officers


# Civil Unrest

# HEA 1006: Law Enforcement (This Act is declared an Emergency)

citations affected: 5-2-1-2; 5-2-19; 5-2-1-12.5; 5-14-3-2.2; 34-30-2-10.5; 35-41-3-3; 35-44.1-2-2.5; 36-8-2-2

- Requires min standards for de-escalation training as part of existing use of force training. De-escalation must be included during Inservice training;
- Expands the authority of law enforcement training board to disciple an officer to include: suspension, modification, or restrict certification (previous law only permits revocation of certification) for:
- Conviction of a single misdemeanor (previous law permitted 2 or more misdemeanor convictions before discipl :) which would lead a reasonable person to believe dangerous/violent or propensity to violate the law;
- The name of decertified officers will be listed on the Indiana Law Enforcement Academy and will be listed on the Inter'l Assoc of Directors of Law Enforcement Standards and Training;
- Adds a new crime, and officer who disables body or vehicle cams to conceal the commission of a crime faces a Class A misdemeanor;
- Choke hold is defined and designated as "deadly force"

# SEA 187: Protection of monuments, memorials, and statues

citations affected: 10-10.7 (new); 35-31.5-2-341; 35-45-1-2;

- Directs ISP to prioritize the investigation and prosecution of any person who destroys, damages, etc. a private or government memorial, statute, or other commemorative property; and anyone who participates in inciting violence, rioting, or other illegal activity in connection with public/private monuments
- Any political subdivisions face loss of "discretionary funds" for failure to investigate and prosecute those responsible for crimes against monuments, statutes, or other commemorative property

# SEA 187: Protection of monuments, memorials, and statues

citations affected: 10-10.7 (new); 35-31.5-2-341; 35-45-1-2;



- Amends the Rioting statute as follows:

SECTION 3. IC 35-45-1-2, AS AMENDED BY P.L.158-2013, SECTION 521, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 2. A person who, being a member of an unlawful assembly, recklessly, knowingly, or intentionally engages in tumultuous conduct commits rioting, a Class A misdemeanor. However, the offense is:

**(1)** a Level 6 felony if it:

**(A)** is committed while armed with a deadly weapon;

**(B) results in serious bodily injury; or**

**(C) causes property damage of at least seven hundred fifty dollars ($750) and less than fifty thousand dollars ($50,000); and**

**(2) a Level 5 felony if it:**

**(A) results in catastrophic injury or death; or**

**(B) causes property damage of at least fifty thousand dollars ($50,000).**


# Crime Fighting Infrastructure – Local Structure

# HEA 1068 Local or regional justice reinvestment advisory councils (This Act is declared an Emergency)

citations affected: 33-38-9.5-1; 33-38-9.5-3; 33-38-9.5-4; 33-38-9.5-5; 33-38-9.5-6;

- Creates local advisory councils to review policies, promote state and local collaboration, and provide assistance for use of evidence based practices and best practices in community based alternatives and recidivism reduction programs;
- The composition of the local/regional advisory councils must include the chief public defender (designee), a defender who practices in that county;
- The work of each local/regional advisory council will result in an annual report to the State advisory council;
- JRAC will study community corrections code provisions and make recommendations to improve operations with evidence based practices. JRAC shall submit the final report to DOC by 12/1/2021. This charge expires Jan. 1, 2022.

# HEA 1082 High Tech Crimes Unit Program:

Adds: I.C. 33-39-8-7

Effective 7/1/2021: Establishes the High Tech Crimes Unit Program to assist prosecuting attorneys with the prosecution of high tech crimes.


- Defines "high tech crime" as a criminal act that is either: committed with or assisted by digital evidence, network or communications technology.
- Up to 10 counties can be selected to represent the North, South, East, West, and Central geographic areas of the state to receive funding from the High Tech Crimes Unit Fund for:

1. Provide for personnel costs, training, technical assistance, and technical support to establish the units; and

2. Enhance the ability of prosecuting attorneys to investigate, collect evidence and prosecute high tech crimes.

# HEA 1558 Indiana Crime Guns Task Force:

Amends: I.C. 5-2-6-3; Adds: I.C. 36-8-25.5-8

Effective 7/1/2021: Establishes the Indiana Crime Guns Task Force to address violent crimes in Boone, Hamilton, Hancock, Hendricks, Marion, Morgan, Johnson, and Shelby counties and to develop strategies to trace firearms used to commit crimes.

The task force's purpose is to reduce violent crime and bring violent criminals to justice by delivering, in cooperation with state and federal officials, a uniform strategy to trace firearms used to commit crimes.

# Mental Health – Addiction - Reentry

# HEA 1127 Mental health and Addiction Forensic Treatments

(citations affected:12-15-1-20.4; 12-23-19-2; 12-23-19-4; 12-23-19-7)

- Current law provides that any juvenile/adult who will be in confinement and is on Medicaid, participation in Medicaid is to be suspended for up to 2 years before terminating the person. This language has been amended to remove the 2 year language. Seems to permit suspension indefinitely.
- "Mental Health and Addiction Forensic Treatment Services Grants" – aka "Recovery Works" has been amended to permit the providing of competency restoration services. Conforming changes have been made to provide a person is eligible if they are in need to competency restoration.
- Expands the use of Recovery Works Funds for "Recovery community organizations" and "Recovery residences certified by DMHA;

## SEA 63: IDOC 14-day extension of commitment in certain circumstances.

citations affected: 11-10-12-5.7; Effective July 1, 2021


Allows IDOC to hold a person for an additional 14 days past release date when:

- The person has a serious physical or mental disorder/disability;
- The person is being held in an IDOC operated treatment facility;
- IDOC makes a good faith effort to timely place the person in a treatment setting on or before release date; AND
- The person:
  - Consents; or,
  - Is the subject to  a court-ordered commitment to a treatment setting outside IDOC.


That's an old photo

# Driving while suspended--some Staggering Statistics

Approx:

- 440,000 individuals are currently suspended
- 1.15 million active suspensions are currently suspended
- 830,000 people or 83% of the suspensions were for:
  - Failure to appear—330,000 or 35%;
  - Failure to pay tickets and fines—270,000 or 28%
  - No insurance/failure to maintain financial responsibility—200,000 or 21%
  - Delinquent child support—30,000 or 3%
- All others: criminal, admin and civil penalties

# 1.15 million active suspensions impacting 440,000 individuals

## HEA 1199: Suspended Driver's Licenses.

citations affected 9-25-4-3, 9-25-5-1, 9-25-6-3, 9-30-16-4.5; 9-33-4-6; 9-25-6-15.5 (NEW), 9-30-3-8.5 (NEW), 27-7-5.1-4 (NEW), 31-25-4-33.5, NEW CHAPTER 9-33-5 ; **Effective January 1, 2022**


### Highlights

- Extends the Traffic Amnesty Program until July 1, 2022
- Reduces Failure to Pay suspensions
- Only applies to pointable offenses
- Terminates after 3 years
- Reinstatement program for to convicted person obtain driving privileges
- Eliminates most no-insurance progressive penalties for prior violations
- Allows a stay of administrative suspensions if the driver shows proof of future financial responsibility (SR 22 insurance)
- Allows for automatic reinstatement of license suspended for child support reasons upon a payment of two months support

# Noteworthy Miscellaneous Legislation

# SEA 240 Female Genital Mutilation

(citations affected: 16-19-13-3; 16-19-13-8; 31-34-1-2; 34-11-2-16; 34-24-3-5; 35-31.5-2-130.4; 35-42-2-10)

- Office of Women's Health will serve as a clearinghouse on data, services, etc. on female genital mutilation and provide information to educators and law enforcement on recognizing signs of victims and the criminal penalties;
- Creates a civil action for female genital mutilation for actual, compensatory, punitive, and treble damages. Attorney's fees are also recoverable;
- Creates a Level 3 felony for the knowing/intentional act of female genital mutilation on a person less than 18 years of age. The person performing the act, the parents permitting the act, and a person who provides transportation to facilitate the act are all able to be charged with the offense.
- It is a defense if the person performing the act is a medical professional and the act was done for medical purposes.
- It is not a defense that: parents consented; it is a custom/stand practice of a particular group; or that it is performed in connection with a religious ritual;
- A person who has reason to believe that a child may be a victim of female genital mutilation shall make a report required under Child Abuse or Neglect statute;

# SEA 167: Theft and sale of Catalytic Converters & valuable metals

cites affected: 9-13-2-34; 25-37.5-1-7; 35-43-4-2;35-52-25-61.5

- Amends the definition of "component part" to include catalytic converter. Impact of this change is the theft of a catalytic converter is a Level 6, rather than an A misdemeanor;
- Amends the Theft statute providing an enhancement from an A misdemeanor to a Level 6, if the Def has a prior unrelated conviction for robbery or theft;
- Adds a Level 6 felony for a valuable metal dealer who knowingly, intentionally fail to comply with Regulation of Valuable Metal statues and purchases stolen valuable metal.

# SEA 201: New Defense—OVWI with Marijuana (THC) in blood or body

Citations Affected: IC 9-30-5-1 (Effective 7/1/2021)

Provides a defense to the charge of operating a vehicle with a controlled substance when all below apply:

- The controlled substance is THC (or its metabolite);
- The person is not intoxicated;
- The person did not cause a traffic accident; and,
- Marijuana was identified by a chemical test under I.C. 9-30-7


# Anticipatory Legislation for Future Sessions

- Noncompliant Prosecutors
  - Granting the Attorney General local prosecutory power
- Constitutional Carry
- Crippling Charitable Bail Organizations
- Centralizing Governmental Powers
- Limiting Defense Access to Witnesses
- Expanding Policing Powers during Protests

# For More Information

Indiana General Assembly website:

www.iga.in.gov

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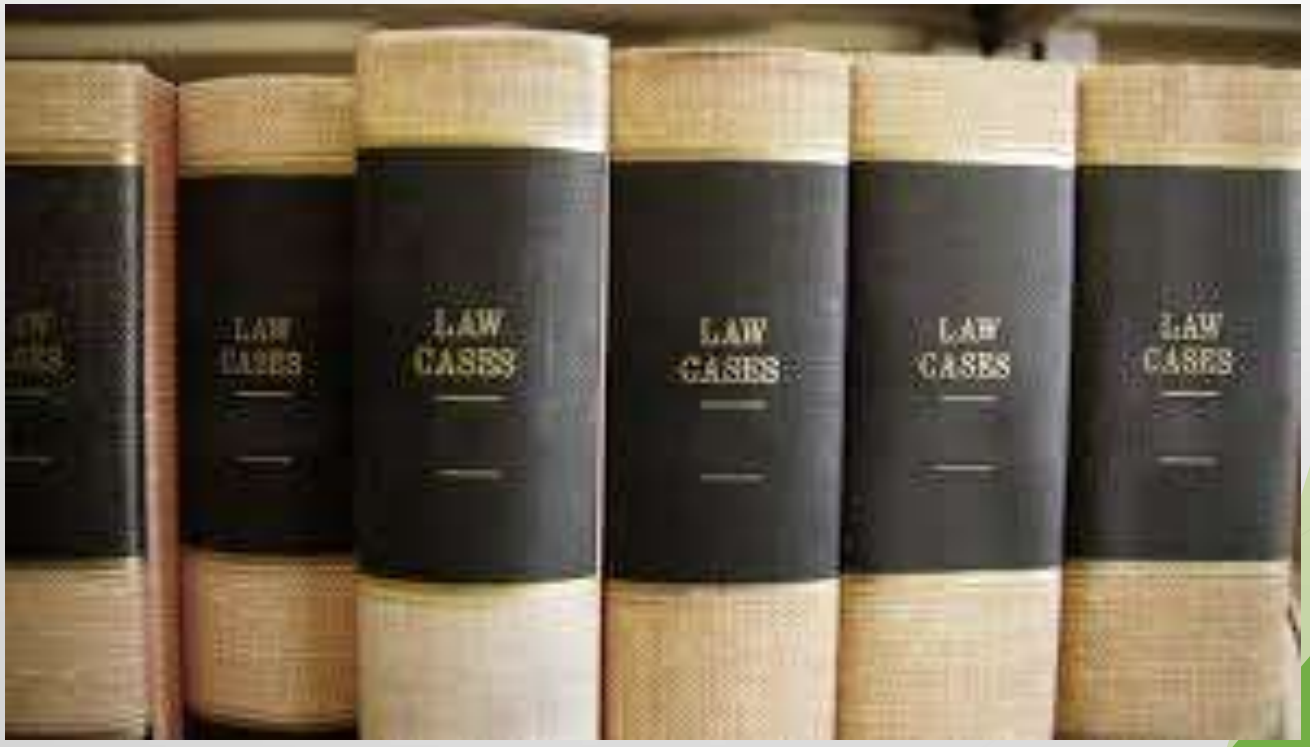
# Case Law

## (or is it caselaw . . . ?)



# CONFESSIONS

# *Crabtree v. State*, (09/02/2020) 152 N.E.3d 687 (Ind. Ct. App.)

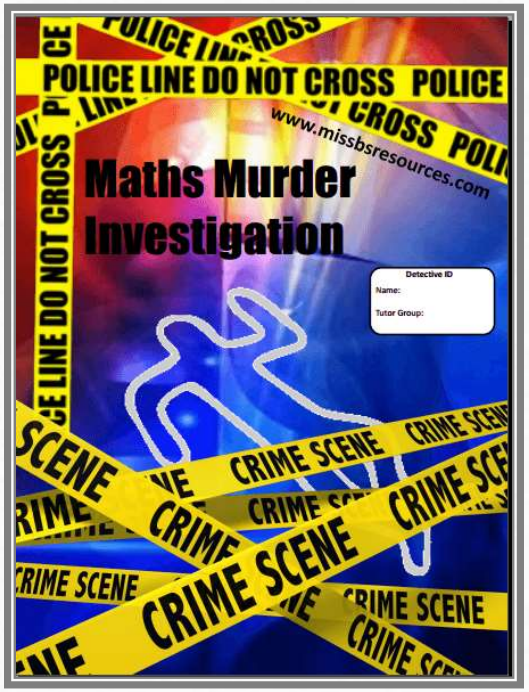
Defendant who voluntarily went to police station, took polygraph examination and spoke to police officers was not in custody for *Miranda* purposes.

# *Ross v. State*, (09/02/2020) 151 N.E.3d 1287 (Ind. Ct. App.)

- Custodial statements given to police were voluntary and Ch. did not violate *Miranda*
- J. Mathias found police conduct of showing the container content to D was reasonably likely to elicit an incriminating response from him. However, because response was merely cumulative of his previous volunteered statement, any error in admission was harmless.

# *Johnson v. State*, (06/24/2020) 150 N.E.3d 647 (Ind. Ct. App.)

Insufficient evidence of corpus delicti to support admission of confession



# BAIL

Criminal Rule 26

John Yeager,
Appellant,

v.

State of Indiana,
Appellee.

Supreme Court Case No.
21S-CR-265

Court of Appeals Case No.
20A-CR-121

Trial Court Case No.
39C01-1911-F3-1322


# Published Order

After the trial court denied the appellant's motion to reduce the amount of his pretrial bail, the Court of Appeals reversed in *John Yeager v. State*, 148 N.E.3d 1025 (Ind. Ct. App. 2020). The appellee sought transfer, and this Court held oral argument on the appellee's transfer petition. The Court is now informed that the trial court recently entered a judgment of conviction and sentencing, disposing of the underlying case. Thus, the question of the appellant's pre-trial bail is moot. *See Hill v. State*, 592 N.E.2d 1229, 1230 (Ind. 1992); *Partlow v. State*, 453 N.E.2d 259, 274 (Ind. 1983).

Being duly advised, the Court GRANTS transfer, thus vacating the Court of Appeals' opinion. *See* Ind. Appellate Rule 58(A). The Court DISMISSES this appeal as moot.

Done at Indianapolis, Indiana, on 5/26/2021.

# CJ Rush dissented in part:

- Would have preferred to deny transfer in order to **"leave valuable Court of Appeals precedent intact."**

# *DeWeese v. State*, (02/15/2021)

~~163 N.E.3d 357 (Ind. Ct. App.)~~

**TRANSFER GRANTED (Oral argument 10/21/21)**

- Defendant who was not a flight risk entitled to pre-trial release regardless of alleged victim's testimony of that he feared defendant's release
- Indiana Code section 35-33-8-4(b)
- Facts relevant to risk of nonappearance

# Sentence Modifications

*State v. Stafford*, 128 N.E.3d 1291 (Ind. 2019)

*Rodriguez v. State*, 129 N.E.3d 789 (Ind. 2019)

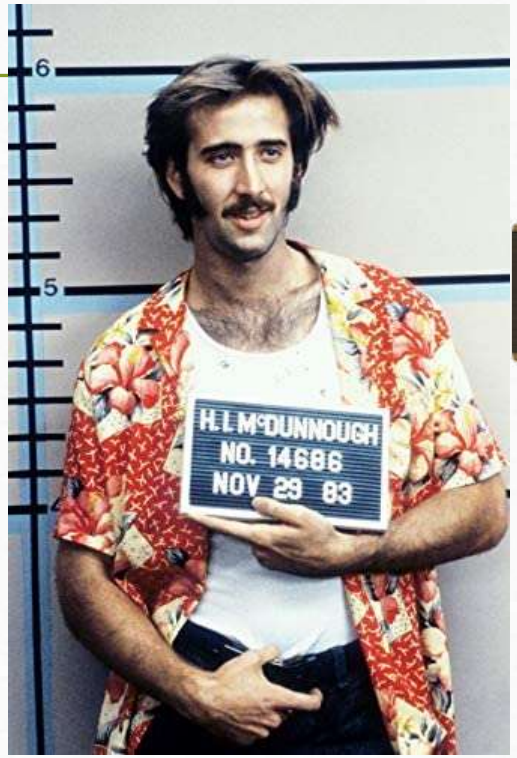
Trial courts may not modify sentences Entered under a fixed-term plea agreement.

# Criminal Procedure

# IMPROPER AMENDMENT – Habitual Offender charge

***Campbell,* 161 N.E.3d 371 (App. 2020)**

- Belated habitual offender charge requires State to affirmatively demonstrate good cause.
- Tr.Ct. allowed H.O. enhancement filed 1 business day before trial. Nine months before, State filed Notice of Intent to File H.O. Enhancement if good faith plea negotiations were unsuccessful.
- State argued the belated filing was due to ongoing plea negotiations & that it waited until last minute to file H.O. Enhancement to give D opportunity to accept a plea offer.
- In finding abuse of discretion in allowing the late filing, Ct. App. (2-1) found the State's tendering of the same plea offer several times and then asking D if he wanted to make a counteroffer is not a bona fide ongoing plea negotiation.



# SPEEDY TRIAL – Constitutional Violations

***Watson*, 155 N.E.3d 609 (Ind. 2020)**

- CR 4(C) inapplicable to retrial of habitual offender determinations, but constitutional speedy trial violation found from 6.5-year delay in retrying D following reversal of his 30-yr habitual offender enhancement (*Barker v. Wingo* factors weighed in favor of D)
- **FN:** Article 1, Section 12 is different/ more protective than 6th Amend. test., because it is a "directive" rather than a "right." "Thus, D need not assert his right to a speedy trial in making a claim under the Ind. Constitution because "the speedy trial demand is effectively made for him."

# SPEEDY TRIAL – D speaks to court through counsel (after appointment)

***Anderson*, 160 N.E.3d 1102 (Ind. 2021)**

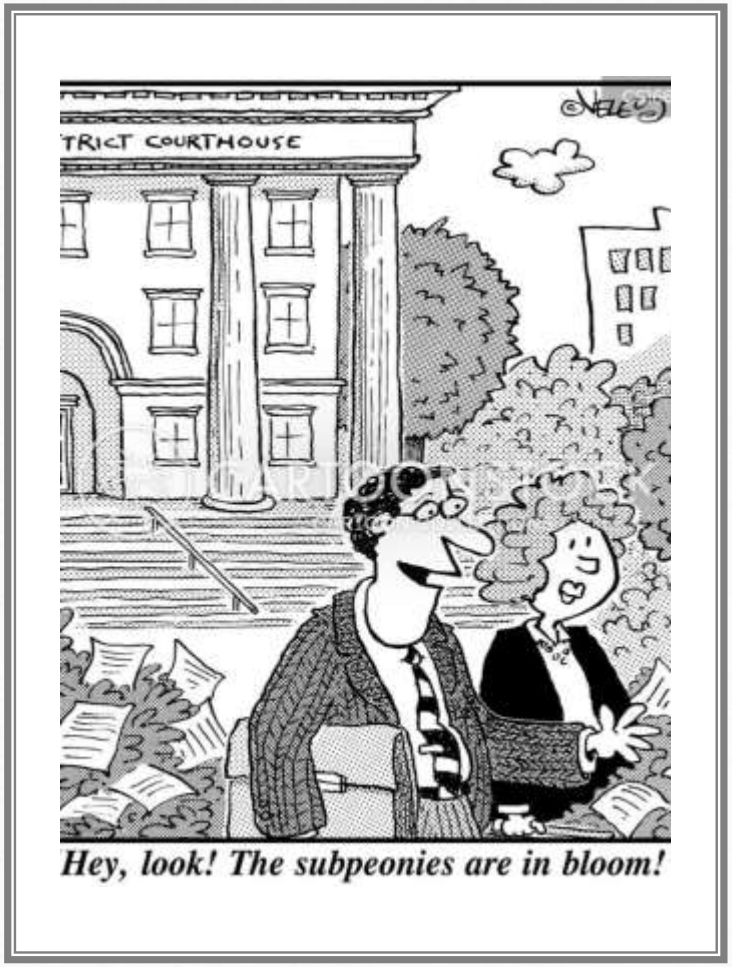
- Clarified view that once counsel has been appointed, even if appearance not yet entered, a defendant speaks to the court through counsel.

- When Def. files a *pro se* motion for early trial after counsel has been appointed, judge is not required to consider that request. Before counsel's appointment, Tr. Ct. must consider *pro se* motions, but after counsel's appointment, this consideration is left to judge's discretion.

# Right to self-representation

***Wright*, Ind. (5/4/21)**

- Affirmed denial of D's equivocal request for self-representation.
- Judges should focus on State's interest in heightened reliability/fairness of capital/LWOP cases b/c of serious consequences for criminal defendants (presumption against waiver)
- DISSENT: Majority's decision contradicts *Faretta v. California* & D here clearly, unequivocally invoked his right.




# Right to Depose Witnesses

- ***Sawyer v. State*, Ind. Ct. App. 5/19/21**
- ***Church v. State*, Ind. Ct. App. 6/28/21**
- ***State v. Riggs*, Ind. Ct. App. 7/29/21**
- ***Pate v. State*, Ind. Ct. App. 8/9/21**
- Ind Code § 35-40-5-11.5 (eff. 3/18/20) restricts D's ability to take depositions of alleged child victims of sex offenses by requiring prosecutor consent or showing "extraordinary circumstances"
- Because statute is procedural in nature and conflicts w/ Ind. TRs 26 & 30, the Trial Rules govern & statutory provisions in conflict are a nullity.

# Right to Depose Witnesses

Four unanimous published opinions striking down this statute is a defense friendly check on legislative intrusion into deposition procedures spelled out in our Trial Rules.

PREDICTION: these holdings will survive but SCOIN will likely grant transfer since this is a significant issue of first impression.

If transfer granted, pursue the fight; the arguments are still valid for those pursuing depositions in pending cases.

# Sufficiency Winners


*"There was 'reasonable doubt,' Ma'am, so we're hanging a few lawyers."*

# DRUG CASES – MAINTAINING COMMON NUISANCE

***Dowell*, 155 N.E.3d 1284 (App. 2020)**

- Single instance of drug dealing/possession insufficient to support conviction
- "one or more times" language in statute repealed in 2016 – now, the State has to prove D used house/car to deal drugs more than one time
- Text messages suggested multiple drug transactions, but not clear from those messages what vehicle, if any, Def. was driving to complete those transactions.

# Carrying Handgun w/o License

***B.R. v. State*, 162 N.E.3d 1173 (App. 2021)**

- D seated close to hidden compartment behind dashboard by steering wheel had capability to maintain dominion & control over handgun found therein
- But State failed to provide any "additional circumstances" to show BRD that juvenile **knew** of concealed handgun
- delinquency adjudication reversed as State failed to prove constructive possession
- *See* IPDC "Guide to Constructive Possession" (2020)

# THEFT
# Lost/Mislaid Property

***Williams*, 158 N.E.3d 817 (Ind. Ct. App. 2020)**

- D took change a previous unidentified customer accidentally left behind in grocery-store self-checkout station
- Ct. App. found that it could reverse D's theft conviction solely on basis of State's failure to prove ID of customer
- But more fundamental problem w/conviction is that Indiana's theft statute no longer criminalizes the taking of lost or mislaid property. Statute criminalizing failure to take reasonable measures to restore mislaid property to its owner was repealed over 40 years ago

# CASINO EXCEPTION?

- **I.C. 4-33-10-2 (10)**: A person who knowingly or intentionally does any of the following commits a Level 6 felony:
- (10) Claims, collects, or takes an amount of money or thing of value of greater value than the amount won in a gambling game.
- Rule of Lenity? Ambiguity in liability/punishment
- Proportionality? Identical conduct of "theft" only class A misdemeanor if value is under $700

# Domestic Battery Enhancement

***Gibbs*, 157 N.E.3d 562 (Ind. Ct. App. 2020)**

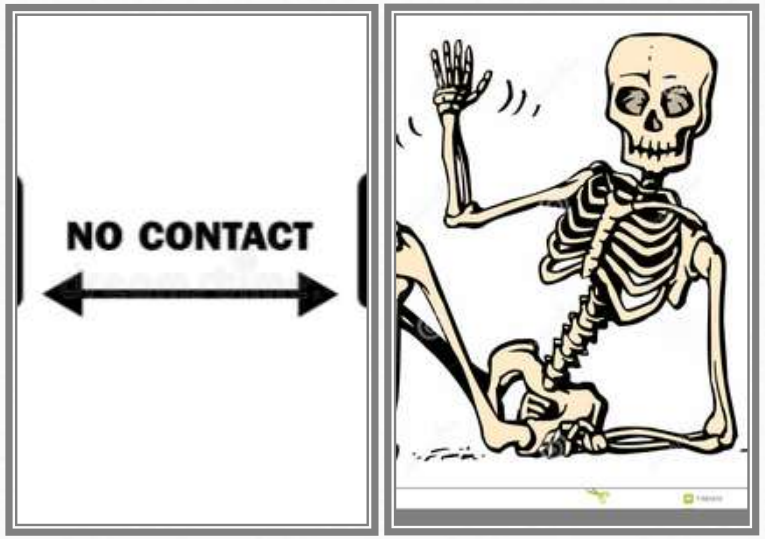
- C.W. was obese, had bad knees, struggled to stand, & used an electric scooter; but no evidence she was in anyone's care or that she needed or wanted care
- Even if C.W. did need some level of care because of her disability, the fact Def. entered a romantic relationship with her does not mean that he necessarily/voluntarily assumed care over her (no authority to support such proposition)
- Remanded to vacate F5 bodily injury to family member & enter conviction as Class A misd. battery

# DISORDERLY CONDUCT

***McCoy*, 157 N.E.3d 28 (Ind. Ct. App. 2020)**

- Neighbor briefly yelling at police as they intervened in a domestic disturbance constituted political speech protected by art. 1 sec. 9 of Ind. Const.
- No evidence that yelling rose to level of unreasonable noise or infringed upon peace/tranquility of neighbors; loud criticism of government action does not constitute D.C.
- evidence insufficient to support disorderly conduct conviction

# Attempted Invasion of Privacy/Probation Revocation




***Mosley,* (Ind. Ct. App. 5/21/21)**

- No-contact order cannot be issued to protect a dead person & probation cannot be revoked based on violation of that void order.
- Victim died 2 years before D's sentencing, when judge entered the no-contact order. VoP - 3 yrs. imprisonment based on apology letter to V/disdain for court
- Regardless of State's attempt to argue "impossibility is not a defense," probation revocation cannot be based on violating a void condition of probation; no authority to seek or issue a void no-contact order from the outset

# Sufficiency Loser

# Domestic battery – "dated or has dated"

***Jackson*, 165 N.E.3d 641 (Ind. Ct. App. 2021)**

- "**Dated or has dated**" language in statutory definition of "family or household member" for purposes of Indiana's domestic battery statute is not unconstitutionally vague, though it "encompasses the mundane to the intimate."
- **"Dating"** is within range of activities included in the statute, which as applied to the totality of facts & circumstances of this case is sufficiently clear to have informed D of prohibited conduct.

# SEARCH & SEIZURE

# Protective Patdown Search for Weapons

***Johnson* , 157 N.E.3d 1199 (Ind. 2020) (4-1)**

- Verified report/video of drug activity inside casino early in a.m. + Gaming Enforcement Agent was about to interview D alone in small room was reasonable basis standing alone to believe D was armed & dangerous
- During patdown, agent felt & removed a "giant ball" in D's pocket which he immediately believed was drugs. "Plain feel"doctrine applied, L5 dealing in a look-a-like substance affirmed
- Justice Slaughter dissent: suspected drug activity + time/location of encounter + being alone in a room with D not enough to suggest D armed & dangerous.

# Protective Patdown Search for Weapons


***Triblet v. State*, App, 5/25/21**

- Officer can rely on D's criminal history to determine if he is armed and dangerous
- Here, officer knew D's status as a SVF preluded him from legally possessing a firearm & size/shape of bulge in D's pocket as well as his attempts to conceal the firearm all support the officer's reasonable belief he was armed and dangerous

# Scope of search pursuant to search warrant

***Hardin*, 148 N.E.3d 932 (Ind. 2020)**

- 4th Am. allowed police to search D's vehicle which he drove up & parked on his driveway while they were executing a search warrant, which permitted police to search areas of D's yard, curtilage, & interior of his home.
- Balancing *Litchfield* factors, a 3-2 majority found no violation of Ind. Const. Art. 1, Section 11 because the high degree of law-enforcement concern & moderate L.E. need outweighed the moderate intrusion caused by the reasonable search.
- J. David/C.J. Rush, dissenting, would suppress evidence from D's vehicle under Art 1, Sec 11 b/c search was "highly intrusive" & law enforcement needs were "extremely low." Because police could have & should have obtained a warrant to search D's vehicle, the search was unreasonable under Ind. Constitution
- J. Slaughter, concurring, urges Court to reconsider *Litchfield* given the "widely varying conclusions" and "ongoing uncertainty among litigants and lower courts" in applying its three factors.

# … Another Warrantless Vehicle Search in Driveway Upheld


***Combs*, Ind., 6/3/21**: Van was instrumentality of D's class-B misdemeanor leaving the scene of an accident.

- Inventory search at scene pursuant to police department written policy.
- Goff, J., dissenting because State failed to show that officers needed the van itself to solve the OWI or leaving accident scene investigation & evidence obtained during the inventory search should have been excluded as fruit of the poisonous tree.
- Court's decision "will unnecessarily extend the government's reach into our private lives."

# Traffic Stops for Failure to Signal


***State v. Torres*, 159 N.E.3d 1018 (Ind. Ct. App. 2020)**

D properly stopped for not signaling until they reached stop sign-- failed to signal a turn at least 200 feet in advance as required by IC 9-21-8-25

Trial judge found compliance with statute is impossible "within a normal city block."

# Traffic Stops for Failure to Signal

- Judge Mathias, concurring, requests legislative review of this statute:
- "[a]ll Hoosiers will appreciate and benefit from a traffic code that reduces the opportunity for arbitrary enforcement. . . . this precise statute appears to be employed often to make arbitrary traffic stops."

# Evidentiary Issues

# Foundation for Social Media Evidence

***Parker v. State*, 151 N.E.3d 1269 (App. 2020)**

- Facebook messages properly authenticated & admitted as being authored by D
- Admissibility does not require "Indisputable proof" D wrote messages
- Under I.R.E. 901, authentication can be established by either direct or circumstantial evidence that the item is what it is claimed to be by a witness with knowledge, which was sufficient here

# Foundation for Social Media Evidence

***Wisdom v. State*, 162 N.E.3d 489 (App. 2020)**

- Instagram & Facebook posts showing photos/videos of D admissible--
- Detective testified she recognized D in photos & believed other individuals in the photos were gang members who had been convicted of gang-related activities, one of the accounts was registered in D's name, had a gang-related nickname as a username, & photos/videos referred to gang activity.

# Surveillance Videos – Silent Witness

***Flowers*, 154 N.E.3d 854 (App. 2020)**

Officer's testimony about what he knew re: security cameras at apartment complex where he worked part-time security provided sufficient grounds to admit surveillance video as substantive evidence under silent witness theory.

When cross-examining officer, D opened door to his opinion testimony re: contents & ID of person in video

# Confrontation Clause

"Honestly Madam, do you expect this court to believe that *all* of your husbands mysteriously disappeared at this same time in November?"

# Admission of "Forensic Interviews"

- Error to admit both a child C.W.'s live testimony **&** consistent prior videotaped statements. ***Tyler***, 903 N.E.2d 463 (Ind. 2009) (cumulative, unfairly prejud.)
- But F.I. video may be admissible under "recorded recollection" hearsay except. if CW cannot remember what she said. ***Gorby***, 152 N.E.3d 649 (App. 2020)
- OR refuses to testify live re: facts underlying the charge b/c she had already told forensic interviewer & sexual assault nurse. ***Williams***, App., 3/12/21"
- Also, may be admissible as statement for purpose of medical diagnosis or treatment hearsay exception under IRE 803(4) even if CW testifies at trial. ***Velasquez***, 944 N.E.2d 34 (App. 2011)

# Erroneous admission of victim's hearsay statement in domestic violence case

***Hurt v. State*, 151 N.E.3d 1256 (App. 2020)**

Statements to police offered to prove truth of matter asserted, that D struck C.W. & caused her injuries

- **Not recorded recollection exception**: C.W. did not vouch for accuracy of her statement recorded on officer's body cam (was heavily intoxicated & could not recall)
- **Not excited utterance**: 15 minutes elapsed b/t 911 call & statements to police, C.W. made statement in response to officer's questioning & deliberated (albeit drunkenly) about her responses, thus, C.W. was no longer under stress from suffering startling or stressful event
- **Not present sense impression:** C.W. did not make her statements to police either during or immediately after she was injured & had time to deliberate before speaking to police (she had multiple explanations for how she suffered the injuries); ability to deliberate was hindered by her intoxicated state but she was still able to consider her responses to officer's questions

# Exclusion of Victim's Statements Offered by Defendant

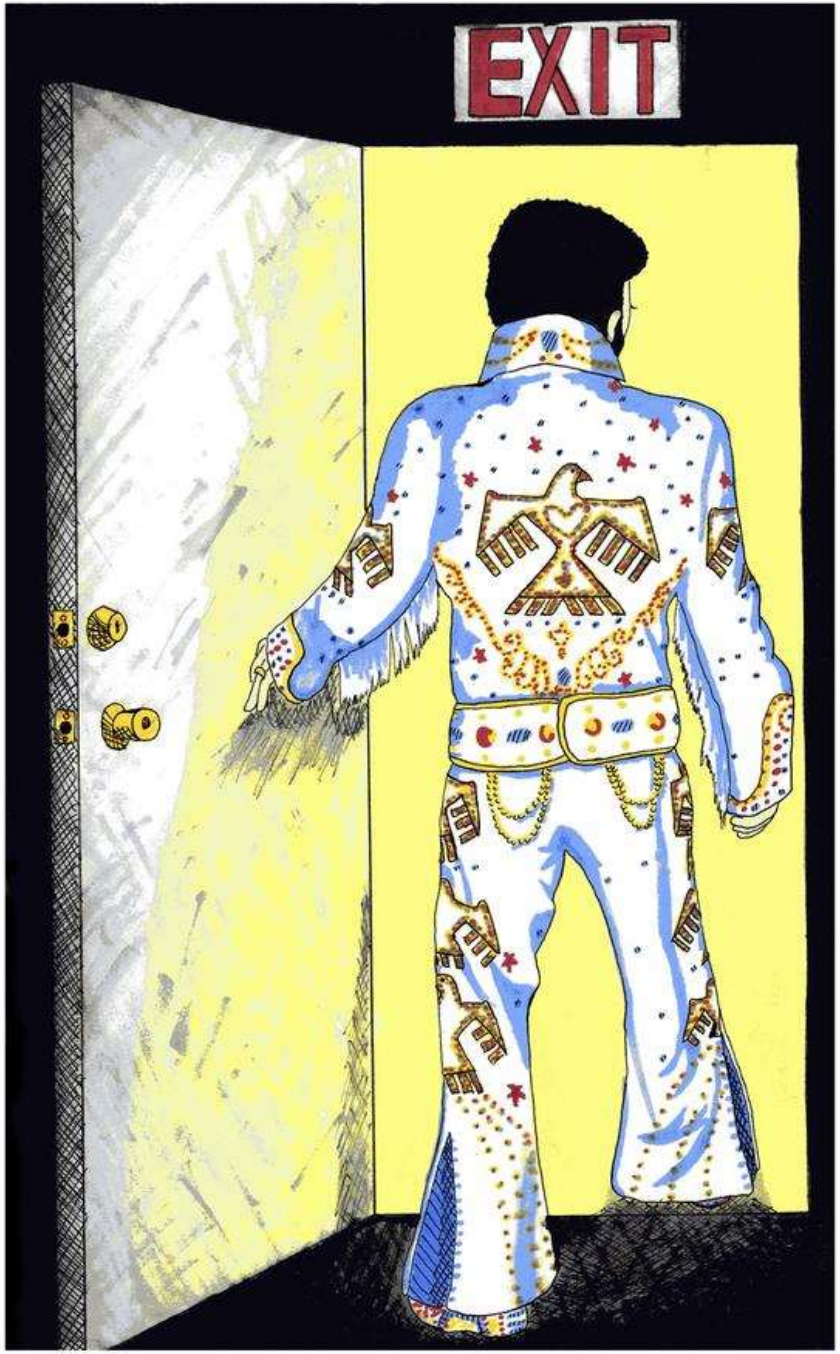
***Stewart*, App., 4/9/21**

Erroneous exclusion of murder D's testimony recounting "very aggressive" statements victim made to her before she shot him (harmless)

Statements made by a victim offered to show reasons why a person acted in the way he/she did are not hearsay

Even if truth of statement is at issue, may still be admissible under then existing mental, emotional or physical condition hearsay exception, Ind. R. Evid. 803(3), relevant to show D's fearful state of mind in self defense cases


*"Your Honor, we feel the trial failed to deliver on its pretrial publicity."*


EXIT

# Section Eight

# ICLEF INDIANA LAW UPDATE-2021

# TORTS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## Section Eight

**Torts……Sarah Graziano**
**Jennifer D. Warriner, Ph.D, J.D.**

**Cutchin v. Beard, ??? N.E.3d ????, 2021 WL 3204490 (Ind. 2021).**

Slaughter; Rush, Massa & Goff concur; David concurs in result with separate opinion.

**Issue:** Did plaintiff's claim that doctor's malpractice as to third party caused third party to kill his family fall under Indiana's Medical Malpractice Act ("MMA")?

**Holding:** MMA's definition of "patient" is sufficiently broad to encompass allegation that doctor's negligent treatment of third party resulted in injury to plaintiff.

**Facts & Procedural History:**

Seventy-two year old Sylvia Watson and her adult granddaughter picked up Watson's car from a repair shop. Granddaughter saw Watson swallow two pills from a prescription bottle. Then, as Watson was driving, she was unable to lift her foot from the accelerator for a stop light, and she said, "I can't stop." Watson ran the red light and crashed into another car. Watson died in the crash but her granddaughter lived. In the other car were Claudine and Adelaide Cutchin, who both died. Watson's body contained opiates, which had been prescribed by "Physician" who had treated Watson for many years.

Jeffrey Cutchin, who was husband of Claudine and father of Adelaide, filed a proposed complaint against Physician and Clinic with the Indiana Department of Insurance under Indiana's MMA. Cutchin also filed a civil action for medical malpractice in the Southern District of Indiana, claiming diversity jurisdiction. He alleged Physician breached the standard of care to Watson by failing to warn her of the dangers of driving on opiates, screen her for cognitive impairments from opiates, adjust her medications to address muscle control problems, or have her ability to drive tested. He also alleged Physician's negligence led to the death of his wife and daughter. Indiana's Insurance Commissioner intervened and asserted that the Fund had no responsibility to pay any excess damages because the claim was not covered by the MMA. Cutchin amended his complaint to seek a declaratory judgment that the Malpractice Act applied. The District Court entered judgment for the Fund. Cutchin appealed to 7th Circuit, which sent two certified questions to the Indiana Supreme Court.

The Supreme Court did not address the first certified question – whether the Fund's assertion was waived for being untimely. Instead the Court addressed only the second question – whether the MMA covers claims brought by a plaintiff against the doctor of a third party when doctor's alleged negligent treatment resulted in injury to plaintiff. The Court held the MMA does cover such actions because the MMA's definition of "patient" includes both a traditional patient and a third party with a claim against a healthcare provider for alleged malpractice. IC 34-18-2-22 states that patient includes "a person having a claim of any kind, whether derivative or otherwise, as a result of alleged malpractice on the part of a health care provider. Derivative claims include the claim of a parent or parents, guardian, trustee, child, relative, attorney, or any other representative of the patient . . . ."

Justice David concurs in result but believes the Court has read the definition of "patient" too broadly, when instead we should be interpreting the Act narrowly.

**<u>Rossner v. Take Care Health Systems, et al.</u>, --- N.E.3d ---, 2021 WL 2251627 (Ind. Ct. App. 2021)**.

Robb; Bailey & May.

**Issue**: Did the trial court err in granting summary judgment to Health Care Defendants on Rossner's complaint asserting ordinary negligence by Health Care Defendants?

**Holding**: Trial court did not err in granting summary judgment because Rossner's complaint, which asserted injury occurred because Health Care Defendants had a policy preventing *locum tenens* physicians from directly and independently accessing patients' electronic records, stated a claim that falls under the Medical Malpractice Act ("MMA"), and it had not been presented to a medical review panel.

**Facts & Procedural History**:

On March 3, 6, and 8, 2014, Shawn Rossner sought treatment at the Notre Dame Wellness Center. On the first two occasions, Shawn saw Dr. Ortega-Schmitt, and on the third he saw Dr. Millie. Dr. Millie was a *locum tenens* (temporary) physician, and Center rules required *locum tenens* physicians to access electronic record with the help of support staff, rather than directly. The nurse assisting Dr. Millie printed Shawn's medical records for Dr. Millie to review during Shawn's visit, and Dr. Millie discussed the records and notes from Dr. Ortega-Schmitt with the nurse and a medical assistant prior to seeing Shawn. Shawn indicated to Dr. Millie that he felt better and could return to work on Monday, but on Monday Shawn deteriorated, went to ER, and was diagnosed with bacterial endocarditis. He was placed in ICU and had a stroke that left him paralyzed and unable to speak. His wife was appointed his legal guardian.

Rossner filed a complaint alleging negligence based on the policy that *locum tenens* physicians could not directly access medical records. Rossner asserted the MMA did not apply. Health Care Defendants disagreed and moved for summary judgment. The trial court granted summary judgment to Health Care Defendants because Rossner failed to present the claim to a medical review panel as required by the MMA. Rossner appealed, and the Court of Appeals affirmed summary judgment for Defendants.

**Lake Imaging, LLC v. Franciscan Alliance, Inc., --- N.E.3d ---, 2021 WL 1747894 (Ind. Ct. App. 2021), *reh'g denied*.**

Vaidik; Brown & Pyle.

**Issue:** Did trial court err when it dismissed, for lack of subject matter jurisdiction under the Medical Malpractice Act ("MMA"), Franciscan's indemnification claim based on Lake Imaging's contract to reimburse Franciscan for damages caused by alleged medical negligence of Lake Imaging or its employed physicians?

**Holdings**:

1. Language of the MMA statutes "is broad enough to include an indemnification claim by one healthcare provider against another healthcare provider if the claim is based on the alleged medical negligence of the latter." Accordingly, the trial court properly dismissed for lack of jurisdiction when Lake Imaging's alleged malpractice had not been presented to a medical review panel.

2. While dismissal without prejudice based on MMA jurisdictional requirement of a medical review panel technically leaves Franciscan free to file a claim with the Indiana Department of Insurance, Franciscan obviously missed the statute of limitation for filing such a claim.

**Facts & Procedural History:**

In 2004 Lake Imaging and Franciscan contracted for Lake Imaging to provide radiology services at some Franciscan locations. The contract provided an indemnification clause requiring Lake Imaging to indemnify Franciscan for negligence by Lake Imaging in its radiology services. In April 2011, Joseph Shaughnessy was a patient at Franciscan and utilized radiology services from Lake Imaging, without Franciscan notifying Joseph that Lake Imaging was an independent contractor. Joseph died in April 2011.

Joseph's sons brought a proposed malpractice claim against Franciscan and named providers in April 2013. Lake Imaging was not named as a defendant by Shaughnessey or as a third-party defendant by Franciscan. In January 2014, Franciscan notified Lake Imaging that a named defendant had alleged Lake Imaging's radiologists failed to identify a subdural hematoma, which impacted Joseph's treatment. Franciscan informed Lake Imaging it intended to see indemnification under their contract based on Lake Imaging's negligence. The medical review panel found no negligence by Franciscan. In 2016, Franciscan settled the claim with Shaugnnessy for $187,0001 based on Franciscan's potential vicarious liability for the unnamed radiologist at Lake Imaging who misread Joseph's scan.

In May 2018, Franciscan sent a letter to Lake Imaging demanding indemnification for the settlement amount. Lake Imaging did not pay, so Franciscan sued. Lake Imaging moved for summary judgment because the complaint alleged medical malpractice and needed to be filed within two years of the date of the act or omission. The trial court agreed the claim was for medical malpractice, but rather than grant summary judgment on the statute of limitations, the trial court determined it did not have jurisdiction over Franciscan's claim because it was not presented to a medical review panel. The Court of Appeals affirmed the trial court's dismissal of Franciscan's claim against Lake Imaging.

**Scholl v. Majd, 162 N.E.3d 475 (Ind. Ct. App. 2020).**

May; Riley & Altice.

**Issue:** Did testimony by Scholl's neurosurgeon expert create a genuine issue of material fact about whether Dr. Majd violated the applicable standard of care?

**Holdings**: Expert's "imprecise" comments did not demonstrate a lack of familiarity with the applicable standard of care and, thus, contradicted the medical review panel's opinion sufficiently to create a genuine issue of material fact about malpractice.

**Facts & Procedural History:**

Dr. Majd performed lumbar fusion surgery and a subsequent revision surgery on Scholl. Scholl sued Majd for medical malpractice, and the medical review panel ruled in Majd's favor. At trial, after the parties testified, Scholl called Dr. Sexton as an expert witness. Sexton had performed over 12,000 spine surgeries, including 10,000 laminectomies and 150 fusions. Sexton testified: "I disagree with the review panel and their decision that Dr. Majd did not fall below the mythical standard of care of doing spine surgery." While Sexton testified to specific reasons – sparse workup, controversial nature of fusion surgery, and failure to conduct bone density test – as reasons why Majd's treatment was below the standard of care, he continued to assert there is no standard of care aside from what any individual doctor thinks. After Scholl's evidence, Majd moved for judgment on the evidence based on Sexton not demonstrating familiarity with the applicable standard of care. The trial court granted that motion, and Scholl appealed.

The Court of Appeals reversed and remanded because Sexton had demonstrated sufficient familiarity with the standard of care by saying it is "what a reasonably skilled doctor with reasonably skilled training would do in a given situation." Moreover, he had performed the same surgery and testified a prudent surgeon would have performed a bone density test first. While the standard of care is not "mythical"; it is not written any where and we do expect experts to have differing opinions. The trial court erred when it granted judgment to Majd.

**<u>Anonymous Hosp. v. Spencer</u>, 158 N.E.3d 380 (Ind. Ct. App. 2020), *trans. denied*.**

Crone; Robb & Brown.

**Issue:** Did the trial court abuse its discretion when it granted Spencer's motion to reconsider whether a vicarious liability theory of recovery against a hospital is preserved at the medical malpractice stage of proceedings regarding the conduct of physicians not named in the proposed malpractice complaint and for whom the statute of limitations precludes their addition as defendants?

**Holdings**: No abuse of discretion because plaintiff could present claim to medical review panel alleging vicarious liability of Hospital based on acts of treating doctors without naming the doctors individually as defendants and even if the statute of limitations prevented adding the doctors individually as defendants.

**Facts & Procedural History:**

Spencer was born with physical abnormalities that make breathing difficult. On May 21, 2016, Spencer was brought to Hospital's ER with nausea, vomiting, and diarrhea. Hospital treated him and sent him home. Two days later his family doctor sent him back to the ER, where he was diagnosed with pneumonia and low blood platelet count. He was admitted to Hospital for 25 days, during which he alleges he developed bed sores, skin deterioration, a dislocated jaw, and several other ailments.

Spencer filed a proposed complaint with the Indiana Department of Insurance on October 3, 2017, that alleged negligence on the part of the Hospital. A medical review panel was formed, and Spencer submitted his evidence to the panel on July 2, 2019. His submission included allegations that Hospital should be held vicariously liable for various physicians, as well as Hospital employees and agents.

The Hospital filed a motion for preliminary determination asking the trial court to strike Spencer's vicarious liability claims involving physician negligence, as the Hospital had no notice of such claims and as the unnamed physicians could not be added as defendants because the statute of limitations had expired. The trial court initially granted Hospital's motion, but then reversed its ruling in response to Spencer's motion to correct error. Hospital then brought this interlocutory appeal.

**Estate of King by Briggs v. Aperion Care, 155 N.E.3d 1193 (Ind. Ct. App. 2020), *reh'g denied*, *trans. denied*.**

Bradford; Najam & Mathias.

**Issue:** Did the trial court err by denying Estate's motion to compel arbitration of an alleged medical malpractice claim with a qualified healthcare provider when the claim had not yet been submitted to a medical review panel as required by the Medical Malpractice Act ("MMA")?

**Holding**: Trial court erred in denying motion to compel arbitration because agreement to arbitrate included all-encompassing language submitting "any legal claim" to arbitration "exclusively", such that qualified medical provider had "relinquished its right to avail itself of the Act", as permitted by IC § 34-18-8-5.

**Facts & Procedural History:**

For four months in 2015, Sandra King lived at Aperion, which is a skilled nursing facility and a qualified healthcare provider under the MMA. Before moving in at Aperion, King signed paperwork that included an Arbitration Agreement. King developed ailments while living at Aperion and died in November 2015.

In 2017, King's Estate filed a proposed complaint with the Indiana Department of Insurance alleging medical malpractice by nurses at Aperion. The parties proceeded through discovery, during which the Estate learned about the Arbitration Agreement. Prior to submitting its evidence to the medical review panel, the Estate moved for the court to compel arbitration. The court ultimately denied that motion after finding the case was "not yet ripe for arbitration" because the review panel had not made a determination.

**<u>Anonymous Physician 1 v. White</u>, 153 N.E.3d 272 (Ind. Ct. App. 2020).**

Pyle; May & Crone.

**Issue:** Did trial court err in denying Trial Rule 12(B)(6) motion to dismiss filed by Fertility Doctor and Fertility Clinic as to claims brought by child whose mother was artificially inseminated with sperm from Fertility Doctor, rather than from an unknown donor?

**Holdings**:

1. Child's complaint stated circumstances under which child was third-party beneficiary of the artificial insemination contract and thus could sue for breach of contract.

2. Taking the facts in the complaint as true, Matthew pleaded facts to demonstrate Fertility Doctor owed him a duty of care when inseminating Elizabeth, such that dismissal of his malpractice complaint would be improper.

**Facts & Procedural History:**

In 1981, Elizabeth White sought help from Appellants to become pregnant. Fertility Doctor indicated that he would inseminate Elizabeth with donor sperm from an anonymous medical school resident and that he would use the donor sperm in no more than three successful pregnancies in the geographic area. Elizabeth got pregnant and gave birth to Matthew in 1982. In September 2016, Elizabeth and Matthew learned that Fertility Doctor had used his own sperm. IN November 2016, Elizabeth and Matthew filed a proposed medical malpractice complaint with the IDOI.

In December 2016, Elizabeth and Matthew filed a complaint for damages that alleged breach of contract, medical malpractice, and negligent hiring and retention. As to medical malpractice, Matthew alleged Appellants breached their duty by deviating from the standard of care in fertility practices and that as a result he suffered substantial harm and incurred significant damages. Appellants filed a TR 12(B)(6) motion to dismiss because, as to med mal, Appellants owed him no duty of care and he failed to state a claim for compensable injuries. In response, Matthew reiterated that the donor was to have no more than three children in the area to reduce the risk of "accidental incest" between offspring who did not know they were related and that he had suffered substantial emotional and physical harm. Matthew added a count to his complaint that alleged gross negligence from Fertility Doctor's "series of conscious, voluntary acts or omissions in reckless disregard of the consequences to" Matthew. The trial court held a hearing and denied the Appellants' motion to dismiss. The Court of Appeals affirmed.

**Johnson v. City of Michigan City, --- N.E.3d --, 2021 WL 2350887 (Ind. Ct. App. 2021).**

Sharpnack; Najam concurs; Brown dissents with opinion.

**Issue:** Did trial court err in granting summary judgment to City under Indiana's Tort Claim Act ("ITCA") for injuries sustained by Johnson when her bicycle fell into a known pothole on a City street?

**Holding:** Pursuant to IC § 34-13-3-3(7), governmental entities have immunity for "planning activities" which are those act or omissions that involve formulation and making of policy decisions, and thus, when City was awaiting bid to repave the road on which Johnson crashed, City was engaged in planning and entitled to immunity under the ITCA.

**Facts & Procedural History:**

City is responsible for maintaining streets, but cannot perform all repairs at once because of financial constraints. Instead, City engineer analyzes streets using a common rating system approved by the Department of Transportation. The engineer combines street ratings, citizen complaints about streets, and his own inspection of the streets to prioritize which streets should be repaired each year. When that determination has been made, bids are taken to hire companies to make the repairs.

City also has a separate process for complaints about potholes. When Street Department receives a complaint, it sends a crew out to patch the pothole.

In April 2017, Dune Beach Drive ("the street") was on the list to be resurfaced. In May, a call for bids went out for the job, and bids were due by June 5, 2017. In April and May, the City received complaints about the street having severe pothole problem, causing cars to swerve dangerously. On June 18, 2017, at 6:30 pm, Johnson went for a bike ride. Around 7:30 pm, as she rode downhill on the street, her front tire fell into a pothole, which propelled her over the handlebars, seriously injuring her left arm and leg. Johnson had multiple surgeries on her leg and will need more in the coming years. The permanent injury kept her from joining the National Guard. A contractor was hired to fix the road on July 10, and the road repair was complete by October 2017.

Johnson sued the city for negligence. City filed a motion for summary judgment. The trial court found City was immune under the ITCA. Johnson appealed, and the Court of Appeals affirmed the trial court's summary judgment because City was immune for performance of a discretionary function when it was in the planning process to fix the road, "weighing alternatives and choosing public policy."

Judge Brown dissents, believing City's knowledge of the dangerous pothole and the evidence that City had a separate policy for addressing dangerous potholes should require City to demonstrate it consciously balanced immediate repair of the pothole against resurfacing of the entire road. "[T]he fact that the City made a decision to repave the entire Drive does not mean that filling identified, dangerous potholes of which the City had actual knowledge was not an operational function."

**Schon v. Frantz, 156 N.E.3d 692 (Ind. Ct. App. 2020).**

Crone; Robb & Brown.

**Issue:** Did trial court err in granting summary judgment to the Allen County War Memorial Coliseum pursuant to Indiana Tort Claims Act following complaint for injuries to Michaele Schon, wife of Journey founder Neal Schon?

**Holdings**:

1. Coliseum is a political subdivision of the county for purposes of the ITCA because Allen County runs the Coliseum through its Board of Commissioners and any judgment entered would be paid from County funds.

2. Coliseum was immune pursuant to ITCA for claims of vicarious liability for negligent hiring, supervision, and retention claims, because Ind. Code § 34-13-3-3(10) makes governmental entities immune for acts of those who are not the entity or an employee, independent contractor security guards are not "employees" pursuant to Ind. Code § 34-6-2-38(b)(1), and contract between Coliseum and ESG gave Coliseum no control over ESG employees.

**Facts & Procedural History:**

The Coliseum is a multipurpose arena in Allen County that hosts sporting events and concerts. It is owned by the Allen County Board of Commissioners and operated through the Allen County War Memorial Coliseum Board of Trustees. The Commissioners contracted with ESG Security to provide security services for events at the Coliseum. That contract gave the Commissioners no "right or responsibility to control ESG personnel's work activities, set or enforce their wages, hours and/or other conditions of employment or in any way treat and/or direct them as joint officers, supervisors and/or employees…." The contract also stated the Commissioners are "hereby expressly relieved and discharged from any and all liability for any loss, injury or damage to the person or property that may be sustained by reason of the services rendered or any part thereof under this contract."

Neal Schon is a founder of the rock band Journey. His wife, Michaele Schon, travels with the band to film concerts and greet fans. On March 31, 2017, Journey was performing at the Coliseum, and Michaele was moving back and forth from the front to the side of the stage to film the band. During "Don't Stop Believing" there was a confetti release, and Michaele moved to the front of the stage to film. As she was filming, an ESG security guard, Mike Frantz, put his hands on her and threw her into the "PA." She further alleged that two of Journey's personal security guards had to pull Frantz off of her. Frantz alleged he did not touch Michaele and she said she was with the band but did not display a lanyard or credentials.

The Schons sued Frantz, ESG, and the Coliseum for respondeat superior, intentional infliction of emotional distress, negligence, premises liability, negligent hiring, and negligent undertaking. The Schons later added Live Nation Worldwide at a defendant. Coliseum moved for summary judgment because it is a political subdivision that is immune from liability for the acts of others, because it is not liable for acts of independent contractors, and because it had no way to know Frantz & ESG would commit misconduct. Trial court granted summary judgment to Coliseum, and Court of Appeals affirmed.

**Murphy v. Indiana State Univ., 153 N.E.3d 311 (Ind. Ct. App. 2020).**

Tavitas; Riley & Mathias.

**Issue: Did trial court err when it granted summary judgment to ISU because Murphy failed to comply with the notice requirement of the Indiana Tort Claims Act?**

**Holdings**:

1. While notice of a claim against State or State agency is to be sent to the Attorney General, notice of claim against a political subdivision such as ISU must be sent to the governing body of that political subdivision. Compare IC § 34-13-3-6 with § 34-13-3-8. Therefore, Murphy failed to send proper notice under the Act when she sent her tort claim notice to the AG rather than to ISU.

2. Murphy's assertion that she substantially complied with the notice requirement of the Tort Claims Act also fails:

A. ISU's investigation of the underlying facts for criminal proceedings against Pledger was not the same investigation ISU would have needed to conduct as to Murphy's negligence claim.

B. Court could not infer notice to AG was sufficient notice to ISU because: (i.) There is no agency relationship between the AG and ISU that would allow us to infer notice to ISU from the notice sent to the AG.; and (ii.) Murphy did not fall into a "trap for the unwary" simply because (a.) the AG provided the tort claim form on the website, as it was required to do by statute; or (b.) the AG did not inform her that she sent the notice to the wrong party.

C. Notice provided to ISU by another member of the volleyball team about her individual tort claim against ISU did not put ISU on notice of claims by other team members.

D. Even taken together – other teammate's notice to ISU, Murphy's notice to the AG, and ISU's investigation for the criminal charges – were not sufficient to amount to substantial compliance that would satisfy the notice requirement of the Tort Claim Act.

**Facts & Procedural History:**

In 2016, ISU student Nick Pledger installed hidden cameras in the locker room used by the ISU women's volleyball team. Pledger recorded the women changing clothes and posted the videos on the internet. ISU received a tip and investigated. ISU notified the volleyball team members on May 4, 2016, and then Pledger was charged with 20 criminal counts. On July 11, 2016, another member of the volleyball team filed a notice of tort claim with ISU based on ISU's negligent management of the locker room. In September 2016, Murphy, who was on the team, filed a tort claim notice with the AG that indicated her claim was against ISU for negligent management of the locker room.

On December 1, 2017, Murphy filed a complaint in court against ISU and Pledger. In the complaint, Murphy indicated she had sent tort claim notice to the AG. One month later, ISU filed a motion to dismiss because Murphy had not given timely notice to ISU as required by the Tort Claim Act. Murphy filed a number of documents, converting ISU's motion to summary judgment. The trial court granted ISU's motion because Murphy failed to comply with notice requirements. Court of Appeals affirmed.

**Indiana University v. Thomas, 167 N.E.3d 724 (Ind. Ct. App. 2021).**

Crone; Kirsch & Mathias.

**Issues:** Did the trial court err in certifying classes for class action suits against the University and in denying the University's motion for partial summary judgment as to students' tort claims?

**Holdings**:

1. Trial court abused its discretion when it certified a Moldy Dorms Class and a Noise Polluted Dorms Class, as those classes were based on claims not pled in Plaintiffs' amended complaint.

2. Trial court erred when it denied University's motion for partial summary judgment as to tort claims because the University had already paid $7,374,000 to 2458 residents of Foster and McNutt dorms, which exceeded the $5,000,000 liability cap for a single tort occurrence.

3. Students' final two claims – for money had and received and for unjust enrichment – were expressly pled in the alternative to their contractual claims and arise from the University's alleged tortious conduct, such that they are also tort claims for which the University cannot be liable based on the liability cap for tort claims. Thus, the University is entitled to summary judgment as to those claims.

**Facts & Procedural History:**

Residential dormitories at IU Bloomington allegedly were "infested" with mold. The University undertook remediation efforts and moved some students to lounges in other dormitories. IN October 2018, attorneys representing several named plaintiffs, including Jaden Thomas, filed a notice of tort claim on behalf of all students who received injuries for exposure to mold. The plaintiffs then filed a class action complaint for breach of contract, breach of implied warranty of habitability, and declaratory judgment. They requested damages, equitable and injunctive relief. The plaintiffs requested remediation, but it was already underway, and students in Foster, McNutt, and Teter dorms were relocated. The University also placed high efficiency HEPA filters in other dorms, which led to noise complaints from students. The University also gave a $3000 credit to 2458 residents of Foster and McNutt, for a total of $7,374,000, and paid $237,629 in ongoing claims to students. In January 2019, the University declined to pay pursuant to the tort claim notice because it had already expended 1.5X its possible liability for torts ($5,000,000 per occurrence).

The Plaintiffs then filed an amended complaint for breach of contract, breach of implied warranty of habitability, negligence, negligent failure to war, constructive fraud, negligent infliction of emotional distress, money had and received, and unjust enrichment. The University moved to dismiss, which the trial court denied. The Plaintiffs moved to certify four classes of students – a Moldy Dorms Class, a Noise Polluted Dorms Class, a Overcrowded Dorms Class, and a Tort Issues Class. The trial court certified all but the Overcrowded Dorms Class. The University moved for partial summary judgment on all tort claims, which was 6 of the 8 claims. The trial court denied the University's motion. The Court of Appeals reversed the Class certification as to two of three classes and reversed the denial of summary judgment to the University on the 6 tort claims, such that Plaintiffs' remaining claims were for breach of contract and breach of implied warranty of habitability.

**City of Marion v. London Witte, et al., 169 N.E.3d 382 (Ind. 2021).**

Massa; Rush, David, Slaughter & Goff.

**Issue**: Did trial court err in granting summary judgment to London Witte on the City's claims of negligence and breach of fiduciary duty based on the application of the two-year statute of limitations?

**Holdings**:

1. Supreme Court adopted "the equitable tolling doctrine of adverse domination as a logical corollary of Indiana's discovery rule." The doctrine of adverse domination extends the discovery rule to situations in which a corporation is prevented from discovering a cause of action because there is no one who has the knowledge, ability, and motivation to act for the corporation. If officers or directors are acting against the interests of the corporation, the corporate plaintiff cannot be expected to act to remedy the injury during the time is it controlled by the alleged wrongdoers. Accordingly, the statute of limitations is tolled during the time the alleged wrongdoers are in control.

a. The doctrine will apply only to intentional wrongdoing, not negligent acts.

b. The doctrine will apply to both private and municipal corporations.

c. The doctrine will apply to co-conspirators of the controlling wrongdoers.

2. Because London Witte's evidence did not affirmatively negate the City's claims of adverse domination, summary judgment to London Witte was inappropriate. Genuine issues of material fact exist about whether Mayor Seybold adversely dominated the City and whether London Witte helped him. At trial, for the City's action to continue against London Witte, the City will have to prove adverse domination by Mayor Seybold and complicit behavior by London Witte.

**Facts & Procedural History**:

Wayne Seybold was Mayor of the City of Marion from 2004-2015. During that time, corruption is alleged to have occurred involving redevelopment contracts, funding for the redevelopment, payments to Seybold's family, etc. On January 1, 2016, a new Mayor took office and investigations began.

In September 2017, the City filed suit against London Witte for negligence, breach of fiduciary duty, and constructive fraud/unjust enrichment. London Witte moved for summary judgment on the basis that the City's claims were barred by the statute of limitations -- London Witte asserted the statute of limitations was two years and City's claims arose in 2014. The City argued the statute of limitations did not begin to run until December 2015 because the doctrine of adverse domination tolled the statute of limitations until Mayor Seybold left office.

The trial court refused to adopt the doctrine of adverse domination for extending the two-year statute of limitations found in IC 34-11-2-4(a) and granted summary judgment to London Witte on the City's negligence and breach of fiduciary duty claims. The court denied summary judgment on the constructive fraud/unjust enrichment claim after finding it was governed by a six-year statute of limitations under IC 34-11-2-7(4). The Court of Appeals affirmed summary judgment to London Witte on the first to counts and reversed the denial of summary judgment as to the third after concluding a two-year statute of limitations controlled all three counts.

**Miller v. Patel, 160 N.E.3d 1111 (Ind. Ct. App. 2020).**

Kirsch; Plye concurs; Tavitas dissents with opinion.

**Issue:** Did the trial court err when denying Miller's motion to amend her complaint to add a claim against Health Care Network under the federal Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. § 1395dd?

**Holding**: Because *Williams v. Inglis*, 142 N.E.3d 467 (Ind. Ct. App. 2020), which held two-year statute of limitation under EMTALA cannot be extended by Trial Rule 15's relation back provision, was properly decided, the trial court properly relied on it when denying Miller's motion to amend her complaint. EMTALA claim had to be filed within two years of underlying occurrence.

**Facts & Procedural History:**

Betty Miller's grandson, Zachary, killed her husband, John. On December 18, 2018, Betty filed a complaint individually and on behalf of John's Estate against numerous healthcare providers including Community Howard, alleging providers negligently treated Zachary's mental illness between December 9, 2016, and January 8, 2017. Allegedly Zachary had seen medical personnel on at least five occasions during that month, and on January 8, 2017, he asked to be admitted for "mental illness and dangerous propensities." After he was treated and released, Zachary went home and killed his grandfather because voices told him to do so.

Community Howard filed an answer in February 2019, and in January 2020, Community Howard filed a motion for summary judgment contending Miller lacked standing to assert a negligence claim and that Community Howard was immune from civil liability. Two weeks later, Miller filed a motion to amend her complain to add a claim against Community Howard under EMTALA. Community Howard objected because the two-year statute of limitations for EMTALA had already passed. Miller replied to argue her motion was not prohibited by the statute of limitations because it "related back" to her original complaint pursuant to Trial Rule 15(C). The trial court denied Miller's motion to amend pursuant to *Williams v. Inglis*, 142 N.E.3d 467 (Ind. Ct. App. 2020), and certified its decision for interlocutory appeal. We accepted jurisdiction.

Judge Tavitas dissented, believing the relation back provision of TR 15(C) was not preempted by the EMTALA's two year statute of limitations, and she, therefore, would hold *Williams* was wrongly decided in light of federal authority and 42 U.S.C. § 1395dd(f), which states: "The provisions of [EMTALA] do not preempt any State or local law requirements, except to the extent that the requirement directly conflicts with a requirement of this section."

**Branscomb v. Wal-Mart & Clark, 165 N.E.3d 982 (Ind. 2021).**

David; Rush, Massa, Slaughter, & Goff.

**Issue:** Can a store manager be held liable for negligence when he is not directly involved in the accident at issue?

**Holdings:**

(1) Manager cannot be liable under the tort of negligent hiring, training, and supervision because that claim can be brought against the employer, but not against a manager, who is just another employee.

(2) Manager cannot be held liable based on failure to have and/or implement proper safety policies and procedures when Manager's affidavit indicates Manager does not have discretion to set safety policies or procedures.

(3) Manager cannot be held liable for failure to inspect and maintain property when that duty to inspect and maintain rests solely on Wal-Mart, who possessed the land/store. If Manager had a duty, it was to Wal-Mart as Wal-Mart's employee, not to store patrons.

**Facts & Procedural History:**

David Branscomb tripped over a wooden pallet in a Wal-Mart garden department and sustained injuries. Branscomb and his wife sued Wal-Mart and the store manager. As to the store manager, Branscomb alleged the manager failed to properly hire, train or supervise employees; failed to have or implement safety policies and procedures; and failed to properly inspect and maintain the property. Manager filed an affidavit indicating manager was not at the store on the day of the accident and manager does not have the discretion to set safety policies or procedures.

Branscombs brought their claim in state court, because Branscombs and Manager were Indiana residents. Wal-Mart wished to move the case to federal court and, in support thereof, asserted Manager was improperly added as a defendant because he could not be liable under the theories alleged by the Branscombs. The US District Court sent the certified question to the Indiana Supreme Court for resolution. Indiana Supreme Court held Manager could not be liable under any of the three theories alleged by the plaintiffs.

**Hogan v. Magnolia Health Systems 41, LLC, 161 N.E.3d 365 (Ind. Ct. App. 2020), *trans. denied*.**

Robb; Crone & Brown.

**Issue:** Did the trial court err in granting summary judgment for Health System in plaintiff's action to recover for injuries caused to resident of assisted living facility when employee dropped a buffet table onto resident's walker, which caused resident to fall?

**Holdings**:

1. Dismissal of alleged negligent employee from lawsuit (because she was named outside the statute of limitations) did not foreclose plaintiff's action against employer, under respondeat superior theory, for alleged negligent act of employee. Employer could still be liable for negligent act of employee if act was performed in the scope of employee's employment.

2. Genuine issue of material fact existed about whether employee was negligent, and therefore trial court erred in granting summary judgment.

**Facts & Procedural History:**

Mary Hogan lived at Crowne Point of Carmel, an assisted living facility, and she used a walker to walk. Magnolia owns Crowne Point. On August 10, 2016, Hogan filed a complaint that alleged that on April 7, 2016, when she was in the dining hall near the buffet table, when a negligent employee "John Doe" caused the buffet table to fall onto her walker, which caused her to fall and suffer serious injury. Hogan alleged she incurred special expenses and permanent injuries because of Magnolia's negligence. During discovery, a incident report from Magnolia's files indicated that the table fell because the Dietary Manager, Jackie Woods, placed charts on a cabinet, the cabinet broke and tipped, which caused the cabinet to hit the table that hit Hogan's walker.

Hogan died in 2017, and her estate replaced her as plaintiff. Then in 2019, the court ordered plaintiff to name "John Doe." Plaintiff named Jackie Young. Magnolia admitted Young was acting within the scope of her employment but denied she was negligent. Young moved to be dismissed based on the two year statute of limitations, and the court granted Young's motion. Magnolia then moved for summary judgment, asserting a company could not be liable under a theory of respondeat superior unless the alleged negligent employee was also part of the suit. Plaintiff disagree with Magnolia's legal assertion, a hearing was held, and the trial court granted summary judgment to Magnolia. Plaintiff appealed. The Court of Appeals reversed the trial court's grant of summary judgment to Magnolia.

**Matter of C.G., 157 N.E.3d 543 (Ind. Ct. App. 2020).**

Tavitas; Kirsch & Pyle.

**Issue:** Did trial court properly grant summary judgment to School Corporation on C.G.'s claim that School Corporation was liable, under theory of respondeat superior, for alleged negligence of basketball coach that resulted in injury to C.G. during basketball practice?

**Holdings**:

1. Although C.G. waived the issue by failing to raise it at trial court, coach is a "sports participant" covered by the rule applied to players.

2. Because a sports participant breaches no duty as a matter of law by engaging in conduct ordinary to the sport and C.G. concedes blocking a basketball during a layup is ordinary conduct in basketball, liability could attach only if Coach Amor injured C.G. intentionally or recklessly.

3. C.G. did not believe Coach Amor hurt her intentionally, and C.G. failed to argue on appeal that Coach Amor struck her recklessly. Thus, C.G. failed to create a genuine issue of material fact to prevent summary judgment.

**Facts & Procedural History:**

C.G. was a high school freshman at basketball practice in her school's gym. As the team was practicing layups, Coach Amor was defending the basket to swat away the shots. When C.G. was at the side of the court to retrieve a basketball, Coach Amor aggressively blocked a shot, which caused the ball to hit an unaware C.G. in the temple, causing C.G. to have a concussion. C.G. did not believe Coach Amor hit her intentionally, and in a deposition C.G. admitted getting hit on the head with a basketball is "a possible outcome of playing."

C.G. filed a complaint against the school that alleged the school was liable by the theory of respondeat superior for Coach Armor's negligent injuring of C.G. The school filed a motion for summary judgment based on Indiana's limited rule of liability for sports injury cases. C.G. responded that liability could exist because a jury could find Coach Amor acted recklessly. The trial court granted summary judgment for the school. The Court of Appeals affirmed.

**Glover v. Allstate Prop. & Cas. Ins. Co., 153 N.E.3d 1114 (Ind. 2020).**

Slaughter; Rush, David, Massa & Goff.

**Issue:** Did the trial court err when it entered summary judgment for Allstate?

**Holdings**:

1. Glover was a "resident relative" who, pursuant to policy language, was eligible to receive UIM coverage without Allstate being notified that she had moved into her parents' home.

2. The Allstate policy has an anti-stacking clause, but it prevents aggregation of UIM policy limits, not collection of more than one UIM recovery.

3. The Allstate policy's offset provision sets off against the UIM policy limit all payments from those "legally responsible for the bodily injury" which in this case is the two drivers at fault, whose insurers paid a combined $75,000, leaving the Estate with the possibility of collecting an additional $25,000.

**Facts & Procedural History:**

Shelina Glover died in a car crash for which she had no fault. Her Estate settled with the two drivers at fault, and their insurance companies paid their policy limits, which totaled $75,000. Shelina's own auto policy paid her Estate $25,000 in Underinsured Motorist coverage (UIM). The insurance carrier for her estranged husband, Steven Glover, who was driving the car in which Shelina died, also paid $25,000 in UIM coverage to her Estate.

Shelina's Estate then requested $25,000 in UIM coverage from the Allstate auto policy of Shelina's parents. Allstate opposed the Estate's claim on two grounds – (1) Shelina was not an insured under the policy because her parents had not notified Allstate that Shelina was living with them; and (2) the offset and anti-stacking provisions in the parents' policy bars recovery because the Estate had already collected $125,000 from other insurers, which exceeds the $100,000 policy limit for bodily injury. The trial court granted summary judgment to Allstate based on the policy's offset provision. The Court of Appeals affirmed. The Supreme Court reversed.

Under the Allstate policy, an insured includes "any resident relative." Everyone agreed Shelina was a "relative" of parents. Because she had moved herself, her children, and all their belongings into her parents' home and she had changed her address with the post office, she was a "resident" of the home. As for the notice provision, the policy placed a notice requirement on "operator[s,]" which were people who would be operating a car covered under the policy. As Shelina was not operating her parents' car, no notice requirement existed for coverage.

The Allstate policy's anti-stacking language prohibits the Estate from receiving more than $100,000 in UIM, but the total UIM received before the request to Allstate was only $50,000, such that the anti-stacking provision does not prevent the Estate from recovering up to $50,000 more in UIM funds.

The Allstate policy's offset provision states the UIM coverage limit "shall be reduced by all amounts paid or payable by or on behalf of any person or organization that may be legally responsible for the bodily injury for which the payment is made." Those "legally responsible" is those who caused the injury, which in this case is the two men responsible, who paid $75,000. This leaves $25,000 under the cap for the Estate to collect under the Allstate policy.

**<u>Humphrey v. Tuck & US Xpress</u>, 151 N.E.3d 1203 (Ind. 2020).**

Slaughter; Rush, David, Massa, & Goff.

**Issue**: How much evidence is necessary for a court to instruct a jury on mitigation-of-damages defense?

**Holding:** Defendants needed to point to only a scintilla of evidence in support of a plaintiff's failure to mitigate in order to be entitled to a jury instruction on that defense.

**Facts & Procedural History:**

Humphrey was traveling from Georgia to Iowa when his car was struck by a tractor-trailer in Indiana. Humphrey hit his head against his car's window. The tractor-trailer was driven by Tuck, who drove for US Xpress. Humphrey declined medical assistance and continued his trip to Iowa. As he drove, Humphrey felt something in his left eye but thought it was dust. Later that day, Humphrey pulled a sliver of glass out of his eye. His vision changed the next day, so he went to the hospital, which referred him to an ophthalmologist. The ophthalmologist recommended an MRI, which revealed a tumor on Humphrey's pituitary gland. The ophthalmologist told Humphrey he would go blind if the tumor was not taken care of. Humphrey saw a neurosurgeon who diagnosed Humphrey's tumor as a pituitary apoplexy, which is the rapid increase of an already existing tumor due to a sudden event, and recommended surgery. The neurosurgeon removed the tumor.

Four months later, Humphrey was experiencing hormone imbalances – specifically low testosterone and high prolactin – which were causing weight gain, lethargy & low sex drive, and he met with an endocrinologist. The endocrinologist proscribed bromocriptine to lower Humphrey's prolactin level. Initially Humphrey could not afford the drug. When he acquired it, it lowered his prolactin level, but it also caused significant nausea. The endocrinologist advised Humphrey to stop taking the medicine and make an appointment for them to find an alternative. Humphrey did not make that appointment. Instead, a full year later, Humphrey began testosterone injections, which improved his symptoms greatly.

Humphrey sued Tuck & US Xpress, who admitted liability but alleged that Humphrey failed to mitigate his damages. In support they noted Humphrey's inconsistent use of medication, his failure to follow up with the endocrinologist, and his failure to fill a glasses prescription while complaining of vision problems. Tuck & US Xpress asked for an instruction on failure to mitigate damages, and Humphrey objected that the evidence did not support such an instruction. The trial court gave the jury instruction. A jury awarded Humphrey $40,000. He filed a motion to correct error, which the trial court denied.

Humphrey appealed the giving of the instruction. The Indiana Supreme Court held the trial court had properly instructed the jury on failure to mitigate damages, as there was at least a scintilla of evidence supporting the proposed instruction. Failure to mitigate has two elements: (1) plaintiff did not exercise reasonable care to mitigate injuries; and (2) failure to exercise reasonable care caused plaintiff to experience injuries beyond those caused by defendant. The first element was met by Humphrey's failure to get glasses and to promptly and consistently take medication to deal with hormone imbalances. The second element was met by evidence of Humphrey's continuing symptoms when he failed to follow doctor's orders. Trial court affirmed.

**<u>Brandell v. Secura Insurance</u>, --- N.E.3d ---, 2021 WL 2407884 (Ind. Ct. App. 2021).**

Robb; Bailey & May.

**Issue:** Did the trial court err in granting summary judgment to Secura as to Brandell's bad faith claim?

**Holding:** The trial court did not err in granting summary judgment to Secura as to Brandell's bad faith claim because there were no genuine issues of material fact:

a. Contrary to Brandell's allegation that Secura failed to disclose an available underinsured motorist coverage, there is no evidence in the record to suggest Secura would have known prior to Brandell's letter of November 7, 2017, that Brandell had an active relationship with a stake bed truck, such that auto insurance policy coverage would be relevant.

b. Secura's denial of Brandell's request for coverage cannot demonstrate bad faith where "at the time of Secura's initial UIM claim denials all evidence indicated that Brandell was not occupying a … vehicle" such that UIM coverage would apply.

c. Secura can't be said to have mishandled Brandell's claim or unreasonably denied it when the evidence indicated Brandell was not occupying a vehicle at the time of the accident such that the UIM coverage would be relevant.

**Facts & Procedural History:**

On May 2, 2016, Brandell was working in a construction zone on I-469 as an employee of Three Rivers Barricade & Equipment Company. Three Rivers was in charge of traffic maintenance and construction zone signage. That day, as Brandell was adjusting traffic barrels when he was struck by a truck driven by Roger Caley and sustained extensive injuries. The police crash report indicated Brandell was a pedestrian. At the time of the accident, Three Rivers had three insurance policies with Secura Insurance – worker's comp, commercial general liability, and commercial auto. The auto policy included underinsured motorist (UIM) benefits. On May 3, Brandell made a worker's comp claim under the Three Rivers policy with Secura. The injury report therefore indicated Brandell was adjusting traffic control devices inside a work zone when he was hit by a vehicle, which caused multiple injuries. Brandell filed a tort claim notice with INDOT, and the relevant contracts caused Three Rivers to become responsible for indemnification. Secura, believing Brandell was not making a UIM claim on his own auto policy, denied the request that it defend and indemnify Three Rivers. On September 15, 2017, Brandell's counsel contacted Three Rivers to see if it had UIM coverage because Brandell intended to make such a claim. Secura opened a UIM claim file and assigned an adjuster, who determined Brandell had to be "occupying a covered auto" for Three River's UIM coverage from Secura to apply, and "Occupying means in, upon, getting in, on, our or off…" according to the insurance contract. On Sept. 25, 2017, Secura sent Brandell a letter indicating he did not fit the definition of "insured" for UIM coverage, but to please send them information that would change their analysis. Brandell objected to Secura's determination. On October 13, 2017, Secura sent a letter saying its information indicated he "was not using the vehicle at the time and would not be considered an insured under the policy," but he should forward any information that would change that analysis. On Nov 7, 2017, Brandell sent a letter indicating he had an active relationship with the Three Rivers' stake bed truck, as he as getting in and out of it to move barrels. Secura settled Brandell's claim after a deposition, and Brandell sued for bad faith. Trial court granted summary judgment to Secura, and Court of Appeals affirmed.

**CW Farms, LLC v. Egg Innovations, LLC, 169 N.E.3d 874 (Ind. Ct. App. 2021), *reh'g denied*.**

Najam; Pyle & Tavitas.

**Issue:** Did trial court err when it granted Company's TR 12(B)(6) motion to dismiss Farmer's claim that Company acted negligently when it provided insufficient amounts of poor-quality food and necessary supplies for Farmer to achieve optimal egg production?

**Holding**: When parties have a contractual relationship, the economic loss rule "reflects that the resolution of liability for purely economic loss caused by negligence is more appropriately determined by commercial rather than tort law." Here, where Farmer alleged Company performed negligently under the contract, Farmer's recovery must occur pursuant to contract law and, thus, its negligence claim was properly dismissed.

**Facts & Procedural History:**

Company (EI) hired Farmer (CW) to raise chickens for egg productions. Farmer was to provide facilities, care for the chickens, and oversee egg production. Company was to provide the chickens and the feed. The agreement was to last "8 flocks." After a few flocks, disagreements arose, so they agreed to amendments to the contracts. Final flocks were brought to Farmer, but 48 weeks later the flocks were suddenly removed by company without explanation.

Farmer sued Company for breach of contract, promissory estopel, breach of good faith and fair dealing, and negligence. Farmer claimed Company was negligent when it "provided poor quality and/or insufficient feed for the flock[s] and failed to provide necessary supplies. Company moved to dismiss, and trial court granted its motion, dismissing all of Farmer's claims. Farmer appealed and, as to the negligence claim, the Court of Appeals affirmed the trial court's dismissal because the Economic Loss Rule prohibits a party from alleging a claim in tort when the basis of the claim is economic loss under a contract.

**<u>Shiel Sexton v. Towe</u>, 154 N.E.3d 827 (Ind. Ct. App. 2020).**

May; Mathias & Brown.

**Issue:** Did relevant contracts create, for general contractor or subcontractor, a non-delegable duty to protect a temporary employee of third-party supplier who was injured while delivering supplies to construction site?

**Holdings**:

1. Specific contracts did not contain clear language whereby general contractor assumed a non-delegable duty to protect temporary employee of third-party supplier.

2. Subcontractor did assume a non-delegable duty to protect the temporary employee of its supplier of materials because contract required it to: (1) take precautions for safety of employees; (2) comply with applicable law and regulation; and (3) designate a person to prevent accidents.

**Facts & Procedural History:**

Hendricks Commercial Properties owned land at the corner of 86th and Keystone Avenue in Marion County. Hendricks hired Shiel Sexton as general contractor to construct the Ironworks on the property. Shiel Sexton subcontracted with Circle B for Circle B to build part of the Ironworks, and Circle B contracted with Rose & Walker Supply to deliver materials needed for Circle B to construct its portion. On October 16, 2013, Rose & Walker sent three workers –two permanent employees and temporary employee from Express Employment Professional– to deliver two truckloads of metal studs to Circle B at the Ironworks. Each bundle of studs weighed about 1,000 pounds, so Rose & Walker's employees brought a truck with a mounted boom crane. When Rose & Walker's employees arrived at the Ironworks, a Circle B employee told them where to unload the metal studs. A permanent employee of Rose & Walker (Criddle) was operating the boom to life loads up to the designated area. When it was time for break, Criddle left a load in the air and turned off the crane. The other two employees (McNeese & Towe) walked under the hoisted load to smoke a cigarette. Before Criddle could get down the ladder from the crane, the load tipped and dumped metal studs onto McNeese and Towe, injuring both. An investigation revealed a leak in a hydraulic line had allowed the boom to tip.

Towe sued Shiel Sexton, Circle B, Rose & Walker, and businesses that may have serviced the boom truck's hydraulic lines. Rose & Walker was dismissed because it was paying worker's compensation benefits to Towe. A number of the service companies were dismissed as not having worked on the hydraulics. Shiel Sexton and Circle B filed competing motions for summary judgment, each asserting they did not owe a duty of care to Towe under the contracts at issue. The trial court reviewed the contracts and found Shiel Sexton assumed a "non-delegable duty of safety to all persons working on the project . . . [but] that there are questions of material fact as to proximate cause of the injury . . . ." The trial court similarly determined Circle B assumed by contract a nondelegable duty of safety to all persons working under Circle B.

Court of Appeals determined Master Contract between Hendricks and Shiel Sexton did not create a non-delegable duty to protect employee of Rose & Walker, such that Shiel Sexton was entitled to summary judgment. Circle B, however, entered a contract that contained all three requirements for a contractor to be liable to others, such that trial court had properly granted partial summary judgment to Towe.

**Ohio Cas. Ins. Co. v. State, 167 N.E.3d 784 (Ind. Ct. App. 2021), *trans. denied*.**

May; Robb & Vaidik.

**Issue:** Did the trial court err in granting summary judgment to insurance company on State's claim to recover on crime insurance policies issued to the City of Lawrenceburg?

**Holding**: Trial court properly determined State's claim was untimely pursuant to the notice provisions in the insurance contracts, which required insurer be given proof of loss within 120 days and a complaint be filed within two years of discovery of loss, which had occurred in 2013.

**Facts & Procedural History:**

Theresa Bruening worked at the Clerk-Treasurer's office in Lawrenceburg, and on April 30, 2013, she was placed on administrative leave because of discrepancies in the payroll records. The State Board of Accounts (SBOA) and State Police began investigating. On June 14, 2013, Lawrenceburg's Mayor's Office, the Common Council, and the Clerk-Treasurer placed Bruening on unpaid administrative leave. On August 14, 2014, federal charges of wire fraud (for excess and duplicate payroll checks) were brought against Bruening, who was alleged to have stolen $40,500. Bruening pled guilty and was ordered to pay $40,500 in restitution.

On April 16, 2015, the SBOA finished a preliminary report and discussed it with Bruening. The SBOA also emailed with Lawrenceburg's insurance agent, who reminded the SBOA that notice of the loss needed to be give to the insurer. In August 2015, Ohio Casualty sent a letter to Lawrenceburg acknowledging the claim and providing the required Proof of Loss form. The SBOA gave Lawrenceburg the preliminary report on November 18, 2015. On December 3, 2015, Ohio Casualty closed the claim file because she had not received a Proof of Loss. The SBOA filed its final report on December 29, 2016, finding damages attributable to Bruening were $274,782.60.

On March 3, 2017, the State and Lawrenceburg submitted proof of loss to Ohio Casualty. On July 15, 2017, the State filed a complaint against Bruening and Ohio Casualty. The State asserted Bruening was liable for the full $274,782.60, while Ohio Casualty was jointly & severally liable for $252,131.35. Ohio Casualty moved to dismiss because the State's action was untimely, and the trial court denied that motion based on issues of fact about when loss occurred. The State and Ohio Casualty both moved for summary judgment, which the trial court granted to the State based on *Robertson v. State*, 121 N.E.3d 558 (Ind. Ct. App. 2019), *trans. granted*.

In *Robertson*, 141 N.E.3d 1224 (Ind. 2020), our Supreme Court held the State's claim against a former employee for misappropriation of public funds did not accrue until the Office of the Attorney General received the final verified report from SBOA. Court of Appeals noted that, while State's claim against Bruening was timely, Ohio Casualty was not the tortfeasor and its ability to be held liable was determined by policy language. Lawrenceburg knew loss had occurred by 2013, such that notice to Ohio Casualty in 2017 was too late pursuant to the policy of insurance. Court of Appeals reversed and remanded for entry of summary judgment for Ohio Casualty.

**Doe v. Carmel Operator, LLC, et al., 160 N.E.3d 518 (Ind. 2021).**

Rush; David, Massa, Slaughter, & Goff.

**Issue:** When contract of residency contained arbitration agreement, could the company that performed background checks on senior living facility's employees enforce the arbitration agreement in suit by the guardian of a resident?

**Holding:** Company that performed background checks for senior living facility could not enforce arbitration agreement between facility and resident because:

(1) background check company was an independent contractor, not an agent of the facility, and thus not a third-party beneficiary listed in the arbitration agreement; and

(2) unlike federal law, Indiana law prohibits application of equitable estoppel without proof of detrimental reliance (explicitly overruling *German Am. Fin. Advisors & Trust Co. v. Reed*, 969 N.E.2d 621 (Ind. Ct. App. 2012)); party claiming estoppel must prove: (1) lack of knowledge; (2) reliance; and (3) prejudicial effect.

**Facts & Procedural History:**

Guardian moved her 77-year-old ward into Carmel Senior Living (the facility). As part of the residency contract, Guardian signed an arbitration agreement. A few months later, Guardian filed suit against the facility alleging an employee of the facility had sexually abused the ward. Soon thereafter, Guardian amended the complaint to add as a defendant Certiphi Screening, which the facility hired to run background checks on new employees. Neither the facility nor Certiphi had discovered the employee's criminal history of a felony sex crime and murder.

The facility argued Guardian had to arbitrate the claims against the facility, based on the arbitration agreement. Certiphi also demanded arbitration under the agreement based on Certiphi being an agent of the facility and based on the theory of equitable estoppel. The trial court agreed with Certiphi on both grounds. Guardian appealed, and the Court of Appeals affirmed. The Indiana Supreme Court reversed the trial court's order that Certiphi could compel arbitration

**<u>Poppe v. Angell Enterprises, Inc.</u>, 169 N.E.3d 408 (Ind. Ct. App. 2021), *reh'g denied*, *trans. denied*.**

Najam; Pyle & Tavitas.

**Issue:** Did trial court err when it granted summary judgment to grocery store's landlord, which was responsible for maintaining the parking lot, in Poppes' lawsuit for injuries caused by a drunk driver who hit the Poppes in the grocery parking lot?

**Holdings**:

1. Poppes' assertion of that the appropriate negligence analysis to apply is that for premises liability based on a condition of the land, *see Burrell v. Meads*, 569 N.E.2d 637 (Ind. 1991) (adopting Section 343 of the Second Restatement of Torts), is incorrect as the Poppes were injured not by a condition of the land but by the criminal conduct of a drunk driver.

2. Based on the *Goodwin* analysis, *Goodwin v. Yeakle's Sports Bar*, 62 N.E.3d 384 (Ind. 2016), the foreseeability component of duty turns on the broad type of plaintiff being a grocery store patron using a crosswalk and the broad type of harm being that grocery store patron being struck by a drunk driver… and Angell could not reasonably foresee that such an accident would occur. Angell had no duty to protect Poppes from a drunk driver.

**Facts & Procedural History:**

Poppes went grocery shopping at Baesler's Market in Sullivan. Baesler's rents space from Angell, which is responsible for maintaining the parking lot. When Poppes exited the store, they walked through a crosswalk to their van, which was in a nearby handicapped spot. Poppes saw a truck coming toward them, and they tried to get out of the way, but the truck pinned them against their van, causing injuries to both of them. The driver of the truck was Hughes, who claimed he lost control of the truck, but he was under the influence of cocaine and alcohol.

Poppes sued Hughes, Baesler's, Angell, and USAA. USAA is Poppes underinsured motorist carrier. For reasons not disclosed in the record, Hughes and USAA were dismissed as parties, and Baesler's was granted summary judgment. Angell also moved for summary judgment, which the trial court granted. The Court of Appeals affirmed.

**<u>Albanese Confectionary Group, Inc. v. Cwik</u>, 165 N.E.3d 139 (Ind. Ct. App. 2021), *trans. denied*.**

Tavitas; Bailey & Robb.

**Issue:** Did the trial court err when it denied summary judgment to Albanese on Cwik's claims of negligence, criminal mischief, trespass, theft, breach of bailment, and invasion of privacy following Albanese's factory reset of Cwik's phone when Cwik was terminated from employment?

**Holdings**:

1. The Agreement permitting Albanese to erase Cwik's phone was not part of the employment agreement and thus did not become inoperative when Cwik's employment terminated.

2. Albanese was not negligent when it deleted the phone data because "There can be no duty, however, to refrain from doing what one has expressly been authorized to do."

3. Cwik's tort-analogue criminal claims (trespass, criminal mischief & theft) fail because Cwik authorized and consented to factory reset in the Agreement.

4. Cwik's bailment claim fails because Albanese never had "exclusive possession" of Cwik's phone.

5. Albanese did not commit invasion of privacy by intrusion when it reset Cwik's phone because the record contains no evidence of physical intrusion.

6. Albanese was not entitled to summary judgment as to attorney fees because evidence did not demonstrate as a matter of law that Cwik's claims were groundless.

**Facts & Procedural History:**

Cwik began working for Albanese in 2013. In 2017, Cwik voluntarily connected her smartphone to the email server at Albanese. In order to make that connection, Cwik had to accept an Agreement that gave Albanese control of some security features on her phone, including the ability to "Erase phone's data without warning, by performing factory data reset." Then, on March 13, 2017, Albanese management lost confidence in Cwik and terminated her employment. An Albanese employee escorted Cwik to her desk to retrieve personal items and walked her out of the building. When Cwik got to her car, she noticed that her phone was rebooting. She went to a cell phone store and learned that her phone had been reset to the factory settings, which had deleted all data from her phone. Cwik requested Albanese return her data and was told she could find it in a cloud backup. After technical difficulties not relevant here, Cwik was able to restore all data except her photos and videos from December 2016 to March 13, 2017.

In May 2017, Cwik filed a complaint against Albanese for negligence, criminal mischief, trespass, theft, breach of bailment, and invasion of privacy. Albanese counterclaimed for attorney fees because Cwik's claims were groundless. Albanese moved for summary judgment as to Cwik's claims and its claim for attorney fees. The trial court denied the motion for summary judgment after determining the Agreement was unenforceable after Cwik's employment was terminated. Court of Appeals reversed denial of summary judgment as to Cwik's claims, but affirmed denial of summary judgment as to attorney fees.

**<u>Brown v. Southside Animal Shelter, Inc.</u>, 158 N.E.3d 401 (Ind. Ct. App. 2020), *on reh'g* 162 N.E.3d 1121 (Ind. Ct. App. 2021), *trans. denied*.**

May; Riley & Altice.

**Issue:** Did trial court err in granting Animal Shelter's motion for summary judgment as to child's claim for injuries sustained when child was bitten by a dog adopted from Animal Shelter?

**Holdings**:

1. Animal Shelter had a duty to inform adopting family of dog's vicious characteristics if Animal Shelter knew or could have known by exercise of reasonable care.

2. Genuine issues of material fact about what Animal Shelter knew or could have ascertained by exercise of reasonable care prohibited trial court's grant of summary judgment to Animal Shelter.

**Facts & Procedural History:**

In December 2014, the Clinton County Humane Society (CCHS) received a Gordon Setter dog named Grieg, who was surrendered by his owner because Grief did not get along with the owner's other dog. In January 2015, CCHS adopted Grief out to Amy Dirks, who lived in Indianapolis. About a month later, Dirks surrendered Grieg to Marion County Animal Control (MCAC) because Grieg nipped at her toddler son in the morning and then lunged at the toddler and bit him later in the day. MCAC placed Grieg on a ten-day quarantine. During the quarantine, CCHS informed MCAC that CCHS wanted Grieg back, even though Grieg had bitten a child, so MCAC returned Grieg to CCHS. Between March and December 2015, CCHS adopted Grieg out to an owner who returned Grieg to CCHS after Grieg lunged at him. In December 2015, Darcie Kurtz, who transported dogs for the Low Cost Spay and Neuter Clinic in Brownsburg, visited CCHS and saw Grieg. Kurtz contacted the founder of Southside about Grieg, indicated Grieg was a "nice boy," and then delivered Grieg to Southside. A deposed employee of Southside admitted being told Grieg had been brought back for lunging at a person, but had not bit, and the general consensus was that it was a miscommunication between owner and dog. Southside watched Grieg for eight days, during which he showed no signs of aggression.

On December 29, 2015, the Browns came to the shelter to adopt a dog. No one told the Browns about the lunging incident. On December 31, 2015, the Browns signed a waiver releasing Southside from any future damages and adopted the Grieg. At 1:00 am on January 1, 2016, Grieg attacked 6 year old Brooke Brown and injured her face. MCAC retrieved the dog and placed him on bite quarantine. MCAC contacted Southside, who did not want the dog back. Southside refunded Brown's adoption money. MCAC euthanized Grieg.

Browns sued Southside for negligence. Southside filed an answer and named CCHS, MCAC, and Indianapolis Animal Control (IAC) as nonparties who proximately caused Brooke's injuries. Browns filed amended complaints adding those parties as defendants and adding claims against Southside for fraud and constructive fraud based on Southside representing that Grieg's history was unknown. Southside moved for summary judgment because it was not Grieg's owner at the time of the accident, because Brown signed the release, and because Southside did not commit fraud. CCHS, MCAC, and IAC also moved for summary judgment. The trial court granted summary judgment to all four defendants. Brown appealed only as to Southside. Court of Appeals reversed and remanded.

**Singh v. Singh, 155 N.E.3d 1197 (Ind. Ct. App. 2020).**

Brown; Robb & Crone.

**Issue:** Did the trial court err when it granted summary judgment to Gurdwara Hargobind ("Gurdwara") on a worshiper's claim for personal injuries from a physical altercation that occurred following worship services, based on the Gurdwara having no duty to protect worshiper because a physical altercation between Gurdwara members was unforeseeable?

**Holding**: Trial court erred when it found Gurdwara did not have a duty to worshiper on the day he was stabbed because Gurdwara knew tensions were high due to the disturbance around the selection of new board members, due to the termination of some memberships that day, and due to the fact that, unlike *Cavanaugh's*, which involved 3rd parties fighting, the president of the Gurdwara's Board appears to have shoved another member, which began the fracas.

**Facts & Procedural History:**

On April 15, 2018, Harjinder Singh was at Gurdwara to worship when another group that wanted control of the Gurdwara came in and a physical fight ensured. During the fight, Harjinder was stabbed by Amardeep Singh and "assaulted in other areas of his person."

Harjinder filed suit against Amardeep, who was a member of the Gurdwara board. He then amended his complaint to add the Gurdwara as a defendant because it "owed business invitees a duty to maintain its premises in a reasonably safe condition [and] it breached by 'failing to reasonably control its congregation and failing to provide proper security.'" Gurdwara moved for summary judgment and asserted it had no duty to protect Harjinder from the unforeseeable criminal acts of third parties. Both sides designated copious amounts of evidence. The trial court granted the Gurdwara's motion for summary judgment based on the foreseeability element of the duty analysis as stated in *Goodwin v. Yeakle's Sports Bar*, 62 N.E.3d 384 (Ind. 2016). Trial court disagreed that hiring of security guards was an acknowledgment of possible violence between worshipers, believing instead guards were hired to protect worshipers from external threats. Court of Appeals reversed and remanded after comparing the facts to those in *Cavanaugh's Sports Bar & Eatery v. Porterfield*, 140 N.E.3d 837 (Ind. 2020), which had modified *Yeakle's* analysis by considering the particular facts of the case surrounding the plaintiff's injury, in addition to *Yeakle's* two factors: (1) broad type of plaintiff and (2) broad type of harm.

**Winters v Pike, --- N.E.3d --, 2021 WL 2325302 (Ind. Ct. App.2021).**

Crone; Riley & Mathias

**Issue**: Was judgment by trial court, which required Winters to return property to Pike and pay damages for unaccounted-for property, clearly erroneous?

**Holdings**:

1. Trial court did not violate Winters' due process rights when it applied bailment principles within the framework of statutory replevin action, as our courts have done for some 200 years.

2. Parties had a "mutual benefit bailment," as they agreed Pike could use the shop for $400 per month and lawn mowing services, such that Winters had a duty to explain the loss of Pike's property.

3. Trial court's calculation of damages was within the range of the evidence.

**Facts & Procedural History**:

For several years, Kyle Pike ran a mechanic shop out of a small garage on rural property in Hendricks County. Over the years he collected equipment worth over $100,000. There was a residence on the same property, Kyle lived there with his wife and her parents. In 2017, Kyle and his wife moved out, but her parents continued to live there (until 2019) and Kyle continued to use the garage as his shop. In 2019, Blake Winters and his wife rented the property with the residence and the garage that was Kyle's Shop. Because Blake and Kyle were friends, they agreed Kyle could continue using the garage as his shop for $400 per month and lawn mowing services. In 2020, Blake and Kyle had a fight about a motorcycle, Blake threatened to kill Kyle if he came on the property and to sell all of Kyle's equipment in the shop. Blake refused Kyle access to the shop to get his equipment and offered to let Kyle get his equipment if Kyle first paid $5000.

The Pikes filed a replevin action to stop Winters from selling their property, get their property, inspect the shop, and be paid damages for any missing items. The trial court ordered an inspection and Pike listed sixty-seven items that were missing. Blake denied taking or selling the missing items. The trial court entered findings and conclusions requiring Winters to allow Pike to collect his property and to pay Pike $26,600 for missing items. Winters filed a motion to correct error, which the trial court denied. The Court of Appeals affirmed the judgment as supported by evidence.

**Holland v. Trustees of Indiana University, ---N.E.3d --- 2021 WL 2280757 (Ind. Ct. App. 2021), *reh'g denied*.**

Weissmann; Kirsch & Altice.

**Issue**: Did trial court err by denying Holland's Trial Rule 60(B) motions for relief from judgment without holding a hearing?

**Holdings**:

1. Trial Rule 60(B) relief from judgment is not authorized when the reasons for movant's motion are identical to arguments that already resulted in judgment being entered against the movant. Because res judicata barred Holland's arguments, the trial court therefore did not err when it denied Holland's motions without a hearing.

2. Because of Holland's repeated frivolous filings, Court of Appeals remanded to the trial court for consideration of Holland's history of abuse of the court system and restrictions on his ability to file documents pursuant to *Zavodnik v. Harper*, 17 N.E.3d 259 (Ind. 2014).

**Facts & Procedural History**:

In 2016, Holland filed a complaint against IU for injuries incurred during a fall outside the Library at IU Northwest. In 2018, Holland filed an affidavit alleging IU can't claim sovereign immunity and he cited irrelevant caselaw. The trial court struck the affidavit, imposed an order for attorney fees to IU, and warned Holland his case would be dismissed if he continued to file frivolous motions. Holland asked the trial court to certify 24 of its orders for interlocutory appeal, which the trial court refused to do, but Holland proceeded to file the appeal anyway. Holland failed to file a transcript, prompting the Court of Appeals to dismiss his appeal, and Holland then filed for transfer, which the Indiana Supreme Court denied.

In 2019, in the trial court, IU filed for dismissal and additional sanctions based on Holland's continued frivolous filings (and failure to pay the first sanction order). Because of Holland's frivolous appeal, the trial court dismissed Holland's lawsuit. Holland filed a motion to correct error alleging he could not pay the fine due to indigency and he is not subject to Indiana law because he is an "indigenous aboriginal autochthonous Moorish American National." The trial court denied the motion to correct error. Holland sought transfer to the Indiana Supreme Court under TR 56 because the trial court ignored his rights as a "Moorish American." The Supreme Court denied his petition and the Court of Appeals dismissed his appeal because his brief was untimely.

After more appellate filings, Holland returned to the trial court, where he filed a TR 60(B) motion for relief alleging the trial court was required to acknowledge his Moorish American National birthrights, privileges, and protections under the 1787 Moroccan Treaty of Peace and Friendship and that, pursuant thereto, IU was estopped from asserting the Tort Claims Act. The trial court rejected the TR 60(B) motions because Holland's lawsuit was dismissed with prejudice, he had exhausted the appeals, and no lawsuit remained pending before the trial court. Holland then initiated an appeal from the rejected TR 60(B) motions. The Court of Appeals affirmed the trial court's rejection of those motions because they were barred by res judicata.

**HERCO, LLC v. Auto-Owners Ins. Co., 167 N.E.3d 770 (Ind. Ct. App. 2021).**

May; Kirsch & Bradford.

**Issue:** Did trial court err when it ruled HERCO's complaint against Auto-Owners was barred by res judicata?

**Holding**: Trial court properly granted summary judgment on second suit where suits involved same parties; the first suit was in a court of competent jurisdiction; settlement of the first suit was a judgment on the merits; resolution of the first suit impacted HERCO's ability to recover in the second suit; and HERCO could easily have raised the breach of contract and bad faith claims in the first suit but simply chose not to do so.

**Facts & Procedural History:**

HERCO owned an apartment building in Gary. On April 27, 2012, an unknown person threw a Molotov cocktail into the building, which caused fire damage. HERCO reported the loss to Auto-Owners and boarded up the building. Soon thereafter, unknown persons stole and vandalized the building, which was reported to Auto-Owners July 10, 2012. The parties disagreed about the compensation due to HERCO, so HERCO filed a petition to appoint an umpire on February 21, 2013. The umpire determined the fire damage to the building was $435,000; the business interruption from the fire was $36,000; the vandalism damage to the building was $109,739; and the business interruption from the vandalism was $10,000. Auto-owners paid the policy limit for the fire damage, but contested coverage for the theft and vandalism, so a bench trial was set. On September 4, 2015, Auto-owners filed a notice indicating it would pay the $119,739 rather than go to trial. The bench trial scheduled for October 21, 2015, was cancelled.

On October 8, 2015, HERCO filed a second suit against Auto-Owners in which it alleged Auto-Owners breached the contract by not paying within 30 days of the appraisal and delayed payment in bad faith. HERCO served Auto-Owners at the wrong address and therefore did not effectuate service of the second suit.

On December 23, 2015, the parties filed a release and satisfaction in the first lawsuit that indicated Auto-Owners had paid and HERCO received payment in full of the disputed amount such that the matter was resolved. The court approved the release and entered the order on January 1, 2016. No mention of the second lawsuit was made during the release and satisfaction proceedings.

Auto-Owners was not effectively served on the second lawsuit until February 25, 2016. On November 1, 2019, Auto-Owners moved for summary judgment. At the hearing, Auto-Owners asserted the second suit was barred by res judicata. The trial court granted summary judgment for Auto-Owners after finding the parties were the same, the issue of Auto-Owners' delay of payment could have been litigated in the first suit, and the issue could easily have been raised in the first suit. The

**<u>Progressive Southeastern v. B&T Bulk</u>, --- N.E.3d ---, 2021 WL 1747897 (Ind. Ct. App. 2021), *reh'g denied*.**

Vaidik; Brown & Pyle.

**Issue:** When truck was not listed on trucking company's insurance policy, but policy contained an MCS-90 endorsement, was insurance company liable for accident if truck was on intrastate-not interstate-trip and if truck was on the way to pick up a load?

**Holdings**:

(1) Although a majority of courts have held the MCS-90 endorsement applies only to interstate transportation, IC § 8-2.1-24-18(a) makes the requirement applicable to intrastate transportation, and all law in effect at the time an agreement is made "impliedly forms a part of the agreement."

(2) The MCS-90 endorsement applies when a truck is driving to get the load it is to haul because that is "service related to" the transportation of property, not a "personal mission."

**Facts & Procedural History:**

B&T Bulk is based in Mishawaka, hauls bulk cement in Indiana and Michigan, and is registered as an interstate motor carrier. B&T had a commercial auto policy with Progressive Southeastern Insurance Company that covered specifically listed motor vehicles in B&T's fleet. That policy included an MCS-90 endorsement, which is required by the federal Motor Carrier Act of 1980 to ensure that motor carriers have sufficient responsibility for operation on public highways. The MCS-90 endorsement is effective even if a specific vehicle is not listed for coverage in a particular policy.

On December 4, 2017, B&T sent employee Bruce Brown to pick up a load of cement at Lehigh Cement in Logansport and deliver it to Southbend. Brown drove a truck and trailer owned by B&T but not listed on the Progressive Policy. Before arriving at Lehigh, Brown crossed a median and struck an oncoming car, which killed the car's driver, Johnson. Johnson's husband filed a claim against B&T and Brown, and B&T asked Progressive to defend and indemnify it. After investigating, Progressive filed a declaratory judgment action asking the trial court to determine whether Progressive had a duty to defend B&T. The trial court determined Progressive had no duty to defend or indemnify B&T, but the MCS-90 endorsement applied.

Progressive appealed the trial court's determination that the MCS-90 applied. No one appealed that Progressive had no duty to defend or indemnify. COA affirmed that MCS-90 applied.

**K.G. by Next Friend Ruch v. Smith, 164 N.E.3d 829 (Ind. Ct. App. 2021).**

May; Kirsch & Bradford.

**Issue:** Did the trial court err in granting summary to School Defendants for claims brought by Ruch in her individual capacity as mother of K.G., a child with physical disabilities who was sexually abused by a teaching assistant at School?

**Holdings**:

1. Appellate Court would not expand modified impact rule or bystander rule to provide recovery for a parent's emotional distress in circumstances, such as sexual abuse, that usually happen only when no witness is present.

2. Indiana Constitution's requirement that every person have a remedy at law for injury (Art. 1, § 12) does not require creation of cause of action allowing Ruch to recover damages for her emotional distress.

3. Trial court erred in granting summary judgment to School Defendant as to Ruch's claim for expenses she incurred by placing K.G. in a care facility. School Defendants moved for summary judgment as to her emotional distress claim, but they did not move for summary judgment as to her economic damages.

**Facts & Procedural History:**

K.G. was born in 2004 with numerous physical conditions that result in her having limited movement, vision, communication, and comprehension. She communicates only nonverbally. In 2015 & 2016, KG attended a school in Pike Township, where staff had to assist K.G. with numerous tasks, including diaper changes. An instructional assistant, Morgan Smith, sexually molested K.G. while changing her diaper. Ruch learned of the abuse in 2018.

In 2019, Ruch, individually and on behalf of K.G., filed a claim against Smith and School Defendants. As part of the claims, Ruch alleged she "suffered emotional distress . . . and lost the ability to care for her daughter in her home. She has incurred expenses for the placement of K.G. in a chronic care facility." School Defendants took Ruch's deposition, during which Ruch testified she was not present during the sexual abuse. Based thereon, School Defendants filed for summary judgment and argued Ruch individually could not recover for emotional trauma. The trial court granted summary judgment to School Defendants on all claims Ruch brought individually. Court of Appeals affirmed in part, reversed in part, and remanded.

**Lowrey v. SCI Funeral Services, Inc., 163 N.E.3d 857 (Ind. Ct. App. 2021), *trans. denied*.**

Crone; Najam & Riley.

**Issue:** Did trial court err in granting summary judgment to cemetery in plaintiffs action for injuries incurred when plaintiffs fell after one of them stepped off the sidewalk to take a shortcut to the car?

**Holding**: Because plaintiffs each stated they had seen the two-inch differential between the sidewalk and the grass next to the sidewalk before one of the plaintiffs chose to step off the sidewalk to take a shortcut, the cemetery could not be liable for plaintiff's fall that was caused by a "known and obvious" condition.

**Facts & Procedural History:**

Donald and Barbara Lowrey went to the local cemetery to see their daughter's internment site. They had been numerous times before without incident. On this particular visit, the weather was cold and windy, so the Lowreys decided to go back to their car while waiting for relatives to arrive. At an intersecting corner of two sidewalks, Donald stepped off the sidewalk and onto the grass to take a shortcut, and when he attempted to return to the sidewalk, he tripped and fell. At the place he fell, there was a two inch difference between the level of the sidewalk and the level of the ground. Both Donald and Barbara admitted they had noticed the area where this erosion had occurred.

The Lowreys sued the cemetery for negligence, and the cemetery moved for summary judgment based on the Section 343A of the Restatement, which indicates a possessor of land cannot be liable to invitees for harm caused by a known and obvious dangerous condition unless the possessor should anticipate the harm despite the invitee's knowledge or the condition's obviousness. Court granted summary judgment to cemetery. Lowreys appealed, and Court of appeals affirmed summary judgment to cemetery based on known and obvious condition of the ground next to the sidewalk.

**Henderson v. New Wineskin Ministries Corp., 160 N.E.3d 582 (Ind. Ct. App. 2020).**

Vaidik; Brown & Pyle.

**Issue:** Did trial court err in granting summary judgment to church in congregant's action for injuries incurred when congregant fell in snow and ice in parking lot after arriving for worship?

**Holdings**:

1. "Premises" for purposes of IC § 34-31-7-2 was not defined by the statute and therefore has the ordinary dictionary meaning "house or building, along with its grounds," and includes the parking lot, such that Henderson's ability to recover is controlled by that statute and not general premises liability law.

2. Pursuant to the statute, New Wineskin could not be liable to Henderson when the undisputed evidence demonstrates the snow and ice were not a hidden danger.

**Facts & Procedural History:**

On January 29, 2017, Paula Henderson and her son drove to New Wineskin to attend a morning service. It was snowing, and Henderson noted the roads had about two inches of snow. When they arrived at the church, the parking lot was covered in snow and ice, and it had not been cleared or treated. They parked in a spot near the door, and her son warned her the lot was slick. Henderson took two steps toward the front of her car, fell, and injured her shoulder, back, and neck.

In January 2018, Henderson filed a complaint against New Wineskin. New Wineskin moved for summary judgment because there was no genuine issue of material fact that New Wineskin had not breached its duty, as defined in IC § 34-31-7-2. That statute provides, in pertinent part:

> Except as provided in section 3 of this chapter, a nonprofit religious organization has only the following duties concerning persons who enter premises owned, operated, or controlled by the nonprofit religious organization and used primarily for worship services:
>
> (1) If a person enters the premises with the actual or implied permission of the nonprofit religious organization, the nonprofit religious organization has a duty to:
>
> > (A) warn the person of a hidden danger on the premises if a representative of the nonprofit religious organization has actual knowledge of the hidden danger; and
> >
> > (B) refrain from intentionally harming the person.

The trial court granted summary judgment to New Wineskin because Henderson was aware of the snow and ice in the parking lot. Court of Appeals affirmed.

**Perkins v. Fillio, 155 N.E.3d 626 (Ind. Ct. App. 2020), *trans. denied*.**

May; Robb & Vaidik.

**Issue:** Did jury instructions or testimony violating a motion in limine require reversal of trial court's entry of judgment on jury's verdict for defendant in plaintiff's action for injuries resulting from plaintiff being headbutted by defendant's ram on plaintiff's buttocks?

**Holdings**:

1. Trial court did not err by refusing instruction that presumed Perkins was an invitee on the property, as Perkins' status was a question of fact for the jury to determine.

2. Trial court did not err by instructing jury that invitee had to prove landowner knew that ram was dangerous or that invitee would not recognize the danger.

3. Trial court did not err by instruction jury that invitee had a duty to maintain a lookout.

4. Perkins waived any error in Fillio's question to Dennis regarding Perkins' disability, as Perkins failed to request a mistrial or indicate court's admonishment of the jury was insufficient.

**Facts & Procedural History:**

Fillio owns a farm in Salem, Indiana, where she keeps livestock including sheep and goats. Her brother Dennis watches over the animals when Fillio spends time at her Florida property. In 2016, Fillio left for six weeks in Florida and asked Denis to keep care for her property and animals while she was away. Dennis noticed a goat lying down at the edge of the pen and the goat did not respond when Dennis nudged it. Dennis called Fillio, and she told him to leave the goat alone. A few days later, Dennis tried to call Fillio about the goat, but she did not answer. Dennis went to the home of his ex-wife, Perkins, and told her about the goat. Perkins agreed to help with the goat, and they went to get antibiotics and electrolyte fluid for the goat. Dennis and Perkins entered the goat pen, loaded the sick goat on a wagon, and rolled it out of the pen for care. As they were exiting the pen, the hornless white-haired ram that lived in the pen headbutted Perkins' buttocks, causing her to fall and injure her right arm and wrist. Perkins needed two surgeries and physical therapy.

Perkins filed suit against Fillio for negligent maintenance of her premises, which created an unreasonably dangerous environment for Perkins. Fillio moved for summary judgment, which the court granted after finding Fillio had no way to know Perkins would be there or that the ram was dangerous. Perkins appealed, and the Court of Appeals reversed for genuine issues of material fact about the dangerousness of a ram and Fillio's precautions.

On remand, the trial court granted a motion in limine to exclude reference to medical or social security disability and disability fraud. However, on cross examine of Dennis, defense counsel asked Dennis a question about Perkins being on disability. After a hearing, the court instructed the jury to disregard the statement about disability. Court declined two instruction changes requested by Perkins. Jury returned a verdict for Fillio. Perkins appealed and Court of Appeals affirmed.

**<u>Whetstine v. Menard, Inc.</u>, 161 N.E.3d 1274 (Ind. Ct. App. 2020), *trans. denied*.**

May; Riley & Altice.

**Issue:** Did trial court commit errors that invalidated jury's verdict in favor of Mendard?

**Holdings**:

1. Where Menard was not added as a defendant until 2 years after accident and 18 months after Whetstine filed complaint, Menard could not have known it needed to save surveillance tape from the day of the accident and, thus, it had not committed spoliation of evidence.

2. Trial court did not abuse its discretion in denying admission of photo of a Menard truck carrying wooden pallets on an open trailer. Whetstine had not laid proper foundation when Menard employee testified that system was used at least 15 years prior, but not currently, and when Whetstine had obtained the photograph from a google search and had no further information regarding its origin.

3. Trial court did not err in denying use of Whetstine's res ipsa loquitur instruction because there was no evidence in the record to demonstrate Menard had control over the pallet prior to it being on the highway.

**Facts & Procedural History:**

On May 26, 2012, Jessica Whetstine was riding on the back of the motorcycle driven by Tyler Norrenbrock. Norrenbrock was unable to avoid a wooden pallet in the middle of the road, and the impact threw Whetstine from the motorcycle, rendering her unconscious and causing her substantial injuries. Norrenbrock told the responding officer that he saw a large object sail out of a truck and could not react fast enough to avoid it. Police located a wooden pallet at the side of the road, which accident witnesses had moved out of the road after the accident. Police also located shipping label in the vicinity. After news coverage of the accident, Menards employees called police to report the shipping label was one used by Menard, and an eyewitness called to say he had seen a maroon pick-up backing up to pick up the pallet. Further investigation revealed the packing label was for polystyrene that travelled two weeks earlier from Ohio to a Mendards store in Kentucky The local Menards also reviewed its surveillance footage for a pickup truck that could have been involved and provided a still image, which police were able to exclude as the vehicle that dropped the pallet.

On October 1, 2012, Whetstine filed a complaint against "John Doe" alleging Norrenbrock struck a wooden pallet negligently left there by an unknown party. On May 23, 2014, Whetstine amended her complaint to add Norrenbrock and Menard as defendants, alleging the accident was a result of the negligence of Norrenbrock and Menard. After years of pretrial motions and decisions, a jury trial was held in 2019, and the jury found in favor of Menard and Norrenbrock. Whetstine appealed.

**Reece v. Tyson Fresh Meats, Inc., 153 N.E.3d 1193 (Ind. Ct. App. 2020).**

Bailey; Vaidik; Baker dissents with opinion.

**Issues:** Did the trial court abuse its discretion in excluding certain evidence from the summary judgment record or err when it granted summary judgment to Tyson on Reece's claim that Tyson's negligent maintenance of grass growth on its property caused the vehicle accident injuring Reece.

**Holdings**:

1. Reece could not demonstrate an abuse of discretion when excluded evidence from Moistner, who could not be deposed because he did not remember the accident, was cumulative of police officer's report of grass growth along road.

2. Trial court did not abuse discretion by excluding accident reconstruction expert's opinion about Tyson's sign being in the line of vision, when only eyewitness testified driver was past the sign at issue such that it could not have been in the line of sight.

3. Trail court did not err in granting summary judgment to Tyson when the alleged dangerous condition – high grass growth—was confined to the Tyson property and was not spilling out into the roadway.

4. Nor could Reece avoid summary judgment based on an assumption-of-duty theory, based on a Tyson employee having mowed the ditch in prior years, as Reece did not demonstrate that an assumed duty cannot be abandoned.

**Facts & Procedural History:**

Tyson owns property on the northwest corner of Hunnicut Road and Boyd Road. At approximately 7:30 pm on August 10, 2014, 92-year-old Harold Moistner approached the intersection traveling east on Hun, hesitated, and pulled out in front of a motorcycle approaching from the north on Boyd Road. The motorcycle was driven by Walter Reece, who sustained catastrophic brain injuries. Moistner left the scene but was located by police, and he claimed the motorcycle pulled out in front of him. The police report indicated the grass on the northwest corner of the intersection "would have limited or prohibited" Moistner's view of Reece approaching.

Reece's wife, on behalf of herself and Reece, filed a complaint against numerous parties, including Tyson and alleged Tyson was liable for negligently letting the grass grow so high that it blocked the roadway. Tyson moved to strike an interrogatory from Moistner, who no longer remembered the accident, and a statement from Reece's accident reconstruction expert about Tyson's sign obstructing the view. Tyson also moved for summary judgment based on a landowner having no duty to a member of the travelling public. The trial court excluded the evidence and granted summary judgment to Tyson. The Court of Appeals affirmed.

Judge Baker concurred as to the evidentiary issues but would have denied summary judgment because the record containing questions of fact about whether Tyson exercised reasonable care in maintaining the vegetation in light of the population density of the area, which is the test to be applied under the Restatement (Second) of Torts § 363, as adopted by the Indiana Supreme Court in 1991.

**Vigus v. Dinner Theater, 153 N.E.3d 1150 (Ind. Ct. App. 2020), *trans. denied*.**

Najam; Kirsch & Brown.

**Issues:** Did errors occur that would require reversal of judgment for Dinner Theater?

**Holdings**:

(1) Trial court did not err in revoking pretrial order because statements by Theater's counsel, as a whole, were neither clear nor equivocal in admitting a building code violation.

(2) Trial court cannot be said to have erred in failing to instruct the jury as to the judicial admission when Vigus waived the issue by failing to tender a proposed instruction.

(3) Trial court did not abuse its discretion by excluding evidence of statements Theater owners made following Vigus's fall because the court did not err as a matter of law when it found the statements would confuse the issues at trial by pointing the jury to owners' knowledge of the circumstances after Vigus's fall, rather than owners' knowledge when the fall occurred.

**Facts & Procedural History:**

On August 20, 2012, Ruth and Eugene Vigus went to the Derby Dinner Playhouse in Clarksville for a buffet dinner and a live show. The Playhouse is owned by Dinner Theater of Indiana, LP. The Viguses were seated at a table on a riser that had a height of approximately 10 inches. Ruth successfully navigated the riser multiple times that evening, but after the show Ruth fell off the riser and broke her hip. The Viguses sued. During a pretrial hearing, counsel for Theater made contradictory statements about whether Theater admitted the 10-inch riser/step was a building code violation. The trial court ruled before trial that the Theater had made the admission. Then, after Theater presented contrary evidence without objection from Viguses, the court ruled after trial that no judicial admission had occurred. The jury ruled in favor of Theater and the trial court entered judgment on that verdict. The appellate court affirmed.

**<u>Miami County v. US Specialty Ins. Co.</u>, 158 N.E.3d 415 (Ind. Ct. App. 2020), *trans. denied*.**

Weissman; Bailey & Vaidik.

**Issue:** Did trial court err in entering judgment for City, and against County, when County workers dropped an 800+ pound homemade device for removing logjams onto a water pipe buried under the river?

**Holdings**:

(1) Indiana Damage to Underground Facilities Act ("DUFA") abrogated common law negligence claims only for those situations that fall under DUFA's purview, which specifically includes damages to underground facilities stemming from excavation of real property or demolition of a structure that is served by an underground facility.

(2) Because removing a logjam around a bridge pier in a river was neither excavation nor demolition of a structure served by underground facilities, DUFA did not prohibit the City's common-law negligence action against the County.

(3) trial court's judgment for City was supported under common law negligence

a. County owed a duty to the City to act with reasonable care in removing logjam.

b. Evidence supported finding of breach, as County knew of water lines and set down 800-pound device on riverbed without locating pipes.

c. There is no dispute that City incurred $104,370.94 in damages from broken water pipe.

**Facts & Procedural History:**

In 2014, County wanted to remove a logjam from a bridge pier in the river using a backhoe in the river. At that time, City employees informed County employees of water lines on the east side of the bridge under the river. City employees showed County employee Randy Heilman a map of the water lines and explained the backhoe ran the risk of hitting the water lines, so the county stopped its work.

On January 26, 2016, County intended to remove the logjam with an excavator parked on the bridge. As County was preparing to work, City employees learned of the plan and went to the bridge to explain to County employees, including Heilman, that there were two water lines near the bridge – the first was above ground in the water 36 feet from the bridge, while the second was underground between the first pipe and the bridge. County did not ask for a map or for the water lines to be marked.

On January 28, 2016, County used an excavator on the bridge to lower an 800-1000 pound homemade logjam-removing device with spinning metal "fingers" to hook and release the logs. County removed a dozen logs and then, to take a break, set the device on the river bed. Water immediately began bubbling up from the river, which indicated a water line had been broken. County did not inform City, but City noted the drop in water pressure. By the time City determined the problem and shut down the broken line, City had it institute a citywide boil order. City's insurer, US Specialty, paid $103, 370.94 for repairs, and City paid a $1,000 deductible.

**Franciscan ACO v. Estate of Newman, 154 N.E.3d 841 (Ind. Ct. App. 2020), *trans. denied*.**

Robb; May & Vaidik.

**Issues:** Did the trial court err when it denied Franciscan's motion for summary judgment as to the Survivorship Claim, IC § 34-9-3-4, and the claim under the General Wrongful Death Statute, IC § 34-23-1-1?

**Holdings**:

1. Although mother paid son income during those months when he took medical leave from work to care for her and although mother had purchased son's last two cars for him, son had full time job, could pay his share of household expenses, and filed his own tax return, such that he was ineligible to be a "dependent" who could recover under the General Wrongful Death Statute.

2. Because mother's death was caused by Franciscan's negligence, Plaintiff has no clause of action under the Survival Act.

**Facts & Procedural History:**

Virginia Newman participated in a Franciscan program for seniors. A Franciscan employee failed to secure Virginia's wheelchair in the Franciscan van, and when the van turned a corner, Virginia and her wheelchair tipped over, causing injuries that resulted in Virginia's death two weeks later. Virginia's Estate bought action for negligence, for wrongful death, and (in the alternative) pursuant to Indiana's Survival Act.

General Wrongful Death Statute provides greater recovery than Adult Wrongful Death Statute, which applies to unmarried adults without dependents. "Dependency" has been defined as having two elements: (1) "a need or necessity for support on the part of the person alleged to be a dependent" and (2) "contribution to such support by the deceased". Franciscan filed a motion for summary judgment that alleged adult son could not be a dependent. Trial court held genuine issue of fact precluded summary judgment. Court of Appeals held the designated evidence created no genuine issue of fact as to either prong of test.

Survivorship claims are available when a person is injured by the wrongful act or omission of another, but then dies from other causes. *See* IC 34-9-3-4(a). Such an action allows for recovery of damages the injured person could have recovered if she hadn't died. Indiana law prohibits collecting on both Wrongful Death and a Survivorship claim. Court of Appeals held that because Virginia died from the injuries caused by Franciscan's negligence, the Estate has no cause of action under survival statute. Trial court erred by denying Franciscan's partial summary judgment as to this claim.

**McGowan v. Montes, 152 N.E.3d 654 (Ind. Ct. App. 2020), *trans. denied*.**

Friedlander; May & Tavitas.

**Issue:** Is a driver who stopped his truck to offer assistance at a vehicle accident site immune from liability to a driver who rear-ended his stopped truck, pursuant to Indiana's Good Samaritan Law ("GSL"), IC 34-30-12-1?

**Holdings**:

1. "Emergency care" in the GSL is not defined as only medical treatment or first aid, and McGowan was rendering "emergency care" when he stopped to ask if a person in an accident needed help.

2. The accident scene McGowan encountered – with a truck in the ditch and a driver wandering around as if drunk or injured – is a sudden event that qualifies as an emergency.

3. Stopping for 15 to 30 seconds, without putting the vehicle in park, to ask if someone at an accident site needs help, is not "the reckless disregard for others" that characterizes gross negligence required to prohibit reliance on the GSL.

4. Nor did McGowen's decision to stop briefly out of concern for possibly injured driver constitute willful or wonton misconduct that prohibits reliance on the GSL.

**Facts & Procedural History:**

On before sunrise on November 4, 2016, there was heavy fog in rural Tippecanoe County as McGowen drove his employer's semi-tractor (without a trailer) on a two-lane county road. The speed limit was 50 mph and traffic was light, but McGowen drove at 35-40 mph because of limited visibility in fog. As McGowen drove east, he saw a truck sitting upright facing west, headlights on, in the ditch at the side of the road. The roof, windshield, and hood of the truck were heavily damaged, and second vehicle drove away as McGowan approached, which caused McGowan to speculate one driver was leaving the scene of a two-vehicle accident. McGowan then saw a man, Patton, wandering around the truck as if he were drunk or injured, so McGowan slowed his semi to a stop in the road. He kept his foot on the brake, which lit his brake lights, and he checked his side mirrors to ensure no cars were approaching from behind. McGowen rolled down his window to ask if Patton was okay and if he needed McGowen to call 911. Patton asked McGowan to call 911. Within 15 to 30 seconds of being stopped, McGowen's truck was rear-ended by a car driven by Montes, who failed to slow down for warnings provided by another driver who had stopped to provide assistance.

McGowen sued Montes for negligence, and Montes countersued McGowen and his employer who owned the truck. McGowen and employer moved for summary judgment based on the GSL, and Montes responded to assert the GSL did not apply to McGowen's conduct. The trial court determined there was no dispute of material fact that McGowen was rendering "emergency care" under the GSL, but there was a dispute of fact about whether McGowan stopping in the road was "gross negligence" or "willful or wanton misconduct" under the GSL. The trial court certified its decision for interlocutory appeal, and we accepted jurisdiction. The Court of Appeals affirmed in part and reversed in part, remanding for entry of summary judgment for McGowan & employer, as McGowan was entitled to rely on the GSL.

# Section Nine

# Evidence Update
# 2021

**Hon. Robert R. Altice, Jr.**
Indiana Court of Appeals
Indianapolis, Indiana

## Section Nine

## Evidence Update 2021…….. Hon. Robert R. Altice, Jr.

PowerPoint Presentation

# EVIDENCE UPDATE 2021

Hon. Robert R. Altice, Jr.

Court of Appeals of Indiana

# INCONCLUSIVE DNA RESULTS

***Rodriguez v. State***, 158 N.E.3d 802 (Ind. Ct. App. 2020)

**Rules 401 and 403**

# RULES 401 & 403

## MEDICAL BILLS AS RELATED TO PAIN & SUFFERING

***Gladstone v. W. Bend Mut.***, 166 N.E.3d 362 (Ind. Ct. App. 2021)

# SPOLIATION

# FOUNDATION

# RELEVANCE

***Whetstine v. Menard, Inc.***, 161 N.E.3d 1274 (Ind. Ct. App. 2020)

# Rule 404(a) Character Evidence

# &

# Rule 702 Expert Testimony

***Tate v. State***, 161 N.E.3d 1225 (Ind. 2021)

# Rule 404(b) Prior Bad Acts

Defendant charged with child molesting accessed adult pornography earlier in evening

***Cutshall v. State***, 166 N.E.3d 373 (Ind. Ct. App. 2021)

# Rule 404(b)

***Vanryn v. State***, 155 N.E.3d 1254 (Ind. Ct. App. 2020)

-Timeliness of other act evidence only one factor in determining relevance.

# Rule 404(b)

Intent Exception Defendant must put intent at issue first.

***Schnitzmeyer v. State***, 168 N.E.3d 1041 (Ind. Ct. App. 2021)

# DOCUMENTS PREPARED FOR MEDIATION

## Rule 408

***Berg v. Berg***, 170 N.E.3d 224 (Ind. 2021)

# Rule 615

## Separation of Witnesses

Child in adult criminal court may use R.615(c) to establish that a parent is "essential" to the presentation of the defense and is, thus, excluded from a witness-separation order, but exception is not categorical.

***Harris v. State***, 165 N.E.3d 91 (Ind. 2021)

# **Rule 801(d)(1)**

## Declarant-Witness's Prior Statement

- Not considered hearsay under certain circumstances.
- Rule does not alter other law regarding hearsay & exceptions

# **Rule 704(b)** Vouching Testimony

***Garber v. State***, 152 N.E.3d 642 (Ind. Ct. App. 2020)

# Rule 801(d)(2)(B)

- Adoptive Admission – not hearsay – is a statement offered against an opposing party that "the party manifested that it adopted or believed to be true."

***Lancaster v. State***, 153 N.E.3d 1144 (Ind. Ct. App. 2020)

# RULE 803(2) EXCITED UTTERANCE

"A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused."

***Jones v. State***, 159 N.E.3d 55 (Ind. Ct. App. 2020)

- Continuing Trauma

# Rule 803(5)

# Recorded Recollection

(A) is on a matter witness once knew about but now can't recall well enough to testify fully & accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

***Gorby v. State***, 152 N.E.3d 649 (Ind. Ct. App. 2020)

## Police Body Cam Video of Victim

- Could not come in as recorded recollection b/c victim was unable to vouch for accuracy of her prior statement.
- But came in as excited utterance.

## Rule 803(8) Public Records Exception

- Does not apply to probable cause affidavits or officer's investigation report.

***McMillen v. State***, 169 N.E.3d 437 (Ind. Ct. App. 2021)

# Rule 803(6)
# Business Records

- Records may be self-authenticated under **Rule 902(11)** unless the source of info or the circumstances of preparation indicate a lack of trustworthiness.

***McGill v. State***, 160 N.E.3d 239 (Ind. Ct. App. 2020)

# Various Hearsay Exceptions Found Not to Apply – Reversed

- Recorded Recollection (Rule 803(5))
- Excited Utterance (Rule 803(2))
- Present Sense Impression (Rule 803(1))

***Hurt v. State***, 151 N.E.3d 809 (Ind. Ct. App. 2020)

# Rule 804(b)(2)

# Dying Declaration

## A Nod of the Head

***Hackner v. State***, 161 N.E.3d 1287 (Ind. Ct. App. 2021)

# Rule 804(b)(3)

## Co-Conspirator's Statement Against Interest

- Not admissible in criminal case where unavailable declarant implicates both declarant and accused

***Hendricks v. State***, 162 N.E.3d 1123 (Ind. Ct. App. 2021)

# FORFEITURE BY WRONGDOING DOCTRINE

***Smoots v. State***, ___ N.E.3d ___ (Ind. Ct. App. 2021)

*** An exception to the 6th Am. right to confront witnesses**

# Rule 901(a) Authentication

## Facebook Messages

***Parker v. State***, 151 N.E.3d 1269 (Ind. Ct. App. 2020)

# Rule 901(a) Authentication

## Social Media Posts of Photos/Videos

***Wisdom v. State***, 162 N.E.3d 489 (Ind. Ct. App. 2020)

# USE IMMUNITY

- State may not use power to interfere with defense's presentation of its case.
- Prosecutorial misconduct will be found when State acts with a deliberate intention of distorting fact-finding process.

***Hughes v. State***, 153 N.E.3d 354 (Ind. Ct. App. 2020)

# RIGHT TO PRESENT DEFENSE

## LIMITS ON EXPERT TESTIMONY RE: FALSE CONFESSIONS

***Kincaid v. State***, ___ N.E.3d ___ (Ind. Ct. App. 2021), *trans. pending*

# Foundation for Blood Draw Evidence

- Ind. Code § 9-30-6-6(a) requires collection by certain individuals

***Martin v. State***, 154 N.E.3d 850 (Ind. Ct. App. 2020)

# Silent Witness Theory

- Surveillance Footage
- Requires strong showing of authenticity/competency

***Flowers v. State***, 154 N.E.3d 854 (Ind. Ct. App. 2020)

# ***Experiment by the Jury***

* Jurors were permitted to pull the trigger of gun in evidence during deliberations.

***Brown v. State***, 160 N.E.3d 205 (Ind. Ct. App. 2020)

# **Informer's Privilege** (Discovery)

*As a matter of law, the Court held that an informer's identity is inherently revealed through their physical appearance at a face-to-face interview.*

***State v. Jones***, 169 N.E.3d 397 (Ind. 2021)

# CHILD DEPOSITION STATUTE § 35-40-5-11.5 IS PROCEDURAL AND IMPERMISSIBLY CONFLICTS WITH TRIAL RULES 26 & 30

***Sawyer v. State***, Cause No. 20A-CR-1446 (May 19, 2021), *trans. pending*

**Church v. State**, Cause No. 21A-CR-68 (June 28, 2021), *trans. pending*

**State v. Riggs**, Cause No. 20A-CR-2144 (July 29, 2021)

**Pate v. State**, Cause No. 21A-CR-287 (August 9, 2021)

## Evid. Rules 401 and 403 (Admission of Inconclusive Scientific Tests)

***Ausencio Rodriguez v. State*, 158 N.E.3d 802 (Ind. Ct. App. 2020)**

**Facts:** Rodriguez molested girlfriend's 10-year-old daughter. Child testified that while playing, Rodriguez joined her on the floor where he pulled down her pants and licked her vagina. Soon after, Child went to a friend's house and called her mother.

Child was examined by a forensic nurse who collected internal and external vaginal swabs for testing. One test assessed the amount of the enzyme amylase, which is expected to be at elevated levels in saliva. The test can produce three possible results: (1) no indication of saliva; (2) inconclusive for saliva; or (3) indicative of saliva. *The test here was inconclusive, which means the samples contained amylase, but not at a high enough level to be indicative.* DNA tests showed male DNA on both sets of vaginal swabs, but only the external sample was sufficient to create a comparable profile. TC admitted the inconclusive tests into evidence over objection.

**Issues:** Whether TC committed reversible error by admitting the inconclusive test results.

**Holding:** Affirmed.

**Evidence is relevant if it has any tendency to alter the probability of a material fact. R. 401**.

This standard is a "low bar," and trial courts enjoy broad discretion in deciding whether that bar is cleared.

Bar was cleared here, as the inconclusive test results could assist the jury in determining guilt or innocence. The presence of male DNA and amylase made it more probable that Child was molested in the manner she described.

**Yet, even relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury . . . ." R. 403**.

Rodriguez neither explained how the evidence could have confused or misled the jury nor identified what improper assumptions or conclusions the jury may have drawn.

Extensive testimony from forensic scientists explained how the testing worked and what each result might indicate. The jury was fully informed on the particulars of each test. Thus, there was ample evidence to support TC's conclusion that the probative value of the evidence was not substantially outweighed by a danger of confusing the issues or misleading the jury.

Further, any error was **harmless**.

Child's unequivocal testimony was corroborated by several witnesses and there was uncontested DNA evidence.

## Evid. Rules 401 and 403 (Medical Bills as Related to Pain and Suffering)

### *Gladstone v. W. Bend Mut. Ins. Co.*, 166 N.E.3d 362 (Ind. Ct. App. 2021), *trans. denied*

> **Facts:** Gladstone was injured in auto accident. After settling with tortfeasor, he continued suit against his insurer for underinsured-motorist coverage. He eventually dropped his claim for medical expenses, electing to seek damages for pain and suffering only. At trial and over Gladstone's objection, insurer was permitted to present evidence of his medical bills. Jury awarded $0 to Gladstone.

**Issue:** Did the trial court abuse its discretion by admitting evidence of Gladstone's medical bills?

**Holding:** Affirmed.

> **Evid. R. 401** - Evidence is relevant where it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action.
>
> **Evid. R. 403**, however, allows exclusion of relevant evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence."

**The question of whether evidence of medical bills is admissible in a proceeding in which recovery of them is not sought has not been specifically addressed in Indiana.**

> -Gladstone argued that such evidence is never relevant to the question of pain & suffering. Alternatively, he argued that the bills' probative value, if any, is substantially outweighed by a danger of unfair prejudice or misleading the jury.

**COA declined to adopt a bright-line rule and concluded that "evidence of medical bills will generally have some relevance to the amount of pain and suffering experienced by the patient."**

> > "Common sense and experience dictate that a more serious injury generally brings with it greater medical expenses as well as greater pain and suffering."
> >
> > "Medical expenses are routinely considered by both attorneys and insurance companies in negotiating settlements and appellate courts routinely look at medical expenses as a factor in determining whether the non-economic portion of a damage award is appropriate."
>
> Here, West Bend "cleared the low bar for establishing relevance." If, in the estimation of one of the parties, the amount of the medical bills does not accurately reflect the amount of pain and suffering, that party is free to counter it with other evidence and argument, as Gladstone did in this case.
>
> Additionally, Gladstone failed to establish that the danger of unfair prejudice or confusion of the issues substantially outweighed the relevance of the bills.

COA found that Gladstone had failed to preserve two other evidentiary issues (admission of testimony regarding settlement negotiations in violation of R. 408(a) and alleged violation of the collateral source statute, IC 34-44-1-2, which excludes certain evidence of insurance payments).

## Spoliation, Foundation, and Relevance

***Whetstine v. Menard, Inc.***, **161 N.E.3d 1274 (Ind. Ct. App. 2020),** ***trans. denied*****.**

> **Facts:** Passenger injured when driver of motorcycle (her boyfriend) struck a wooden pallet in middle of the interstate. Boyfriend saw an object fly out of the back of a truck. The pallet had a Menards shipping label, later determined to have been part of a delivery from a distribution center completed two weeks prior. A tip also came in from a man who had observed a pallet on the road the night before with a pickup truck backing up as if to retrieve it.
>
> At a detective's request, a Menards security manager reviewed surveillance video from the day of the incident looking for a pickup truck. The manager obtained a still image of a pickup truck and sent it to the detective, who later eliminated the truck as the suspect vehicle.
>
> During jury trial, Plaintiff sought the admission of a photo from a Google search that she purported was a picture of a Menards enclosed trailer hauling an open flatbed trailer stacked with wooden pallets. TC did not admit the evidence, finding lack of a proper foundation and no relevance. The jury returned a verdict in favor of Menards.

**Issues:** (1) Whether the trial court abused its discretion when it denied Plaintiff's motion for default judgment based on alleged spoliation of evidence; (2) Whether the trial court abused its discretion when it denied her request to admit a photograph of an alleged Menard truck.

**Holding:** Affirmed.

**Spoliation elements**: (1) there was a duty to preserve the evidence, and (2) the alleged spoliator either negligently or intentionally destroyed, mutilated, altered, or concealed the evidence.

> Here, no duty b/c Menards had no reason to suspect (before the video was destroyed after 90 days pursuant to company policy) that it would be a party to the suit.

**Inadequate foundation for photo's authenticity (barely laid any competent foundation at all)**

Photographs tend to have great probative weight and should not be admitted unless TC is convinced of their competency and authenticity to a relative certainty. This requires witness testimony that the photo is a true and accurate representation of the things it is intended to depict.

> Plaintiff attempted to admit photo from the internet that was "found through a Google search of Menards trucks." Further, she did not establish a date or location for the picture, and the GM of the Evansville store testified that he thought it looked 15-20 years old.

**Additionally, the photo lacked relevance (R. 401):**

> Without info of when/where the picture was taken and whether the truck was one that had ever actually been used by Menards, we cannot say that the picture was relevant. Moreover, its introduction would run the risk of confusing or misleading the jury (**R. 403**) when there was no evidence to suggest any such truck was in the area in the days, weeks, or months prior to the accident.

## Evid. Rules 404(a) & 702

***Dylan Tate v. State*, 161 N.E.3d 1225 (Ind. 2021)**

> **Facts:** Jury found Tate guilty of molesting and murdering girlfriend's eighteen-month-old son. Tate (intentionally) crashed his car, pulled the child from his vehicle, and rushed him to the hospital. Hospital staff found myriad injuries including brain damage; tearing, bleeding, and bruising around the child's anus; scrapes around his genitals; a paper towel in his airway; and burn and bite marks on his body.
>
> During interrogation, Det. Cole told Tate "I don't think you're a monster, I don't think that you would do something like that." When asked about exchange at trial, Cole clarified that he did not believe this to be true & stated he was using a technique to establish a rapport with Tate.
>
> Dr. Short and Nurse Birge, testified that Tate "seemed like a threat" when he was banging on the hospital door and shouting. The two also testified that the child's bruises did not look as if they had been caused moments earlier in a car accident and that Tate slept on a cot in the hallway while the child was being treated.

**Issues:** Whether TC committed fundamental error (no objections below) during guilt phase by admitting certain testimony from Detective Cole and Child's medical providers.

**Holding:** Affirmed, finding no error, let alone fundamental error.

**Evid. R. 404(a)(1)** prohibits the admission of evidence of a person's character or character trait to prove that on a particular occasion the person acted in accordance with the character or trait.

> **"Critically, Rule 404(a)(1) does not prohibit all references to an accused's character; it prohibits only references used to show the accused acted according to his propensity for bad character on a specific occasion."**
>
> -The obvious purpose of testimony was to contextualize detective's statements.
>
> -Once put in context, the State immediately passed the witness without referencing "monster" in any follow-up questions to Detective Cole or any other witness.

Further, Tate's argument that the purpose of Nurse Birge's and Dr. Short's testimony regarding his behavior at the hospital was to show his propensity to be "a scary monster" is unsupported.

> **404(a)(1) does not prohibit eyewitnesses from describing their perceptions of a defendant's demeanor and behavior during events giving rise to the charged conduct.**

**Evid. R. 702 (a)** allows witnesses to testify to their opinions if they have specialized "knowledge, skill, experience, training, or education" that would be helpful to the trier of fact.

> Based on experience treating trauma victims, medical providers testified Child's bruises did not look as if they had been caused moments earlier in a car accident. This was helpful to jury in determining nature and extent of Child's injuries.

Further, w/o explanation from Tate, Sup Ct found no violation of **702(b)**, which requires that a court be "satisfied" that "scientific testimony . . . rests upon reliable scientific principles."

## Evid. Rule 404(b)

***Robert Cutshall v. State*, 166 N.E.3d 373 (Ind. Ct. App. 2021)**

> **Facts:** Defendant's 14-year-old daughter saw Defendant under the covers of his bed with his 3-year-old granddaughter. They were lying perpendicular with their crotch areas close together. The victim had her legs in the air and was crying while the Defendant was moving back and forth and telling the victim to be quiet. Defendant's daughter got the victim out of the bed. When the Defendant called the victim back to his bed, his penis was out and erect. Victim was too young to verbalize what occurred. A sexual assault examination revealed that victim had swelling of the outer part of her genitalia and abrasions to her inner genitalia. Defendant was charged with child molesting, among other offenses. At first trial, jury could not reach a decision as to the charge of child molesting, so the TC declared a mistrial.
>
> At the second jury trial, TC, over Defendant's objection, admitted evidence that Defendant had accessed a large amount of "adult pornographic material" earlier in the evening. The jury found Defendant guilty of child molesting.

**Issue:** Did TC abuse its discretion in admitting evidence about Defendant's viewing of "adult pornographic material"?

**Holding:** Affirmed – error but harmless.

**R. 404(b)(1)** – Evidence of other crimes, wrongs, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character" – i.e., the forbidden inference.

**R. 404(b)(2),** however, allows admission of such evidence to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."

> -Evid. of pornography in a defendant's internet search history has been admitted under the "plan" exception where the search was close in time and where acts in internet search history were "very similar" to acts committed.

COA determined that *pornography here did not have a "strong parallel" to the charged act*. While he had accessed "adult pornography," the evidence did not detail the type of pornography. COA held that the pornography admitted into evidence was not similar enough to Defendant's actions to be considered relevant. TC erred in admitting such evidence.

COA, however, determined that the error was **harmless** in light of the testimony from daughter as to what she observed and evidence of injuries to the victim's genitalia.

## Evid. R. 404(b) Crimes, Wrongs, or Other Acts

***Mitchell Vanryn v. State*, 155 N.E.3d 1254 (Ind. App. Ct. 2020)**

> **Facts:** Convicted of Level 1 felony aggravated battery and Level 2 felony domestic battery (acquitted of murder) following the death of his girlfriend's 2-yr-old son. Brutal facts of abuse of the child in Defendant's care while Mother was at work.
>
> The day after the child's death, Mother posted a video on Facebook of her and the child, which Mother indicated in the post as having been taken the night before death. On the video, the child could be heard telling Mother that Defendant had hit him in the head. One of Mother's friends was concerned about the video, told her father about it, and then sent it to her father's friend, who worked at the police department. The video was admitted into evidence over Defendant's objection.

**Holding**: Affirmed, as TC did not abuse its discretion by admitting the video.

Vanryn argued that the video failed to sufficiently establish the timeliness of the video,

> Specifically, he noted prior caselaw regarding the admissibility of 404(b) evidence that required "other evidence" to be "similar enough and close enough in time to be relevant to the matter at issue."

COA recognized that our Supreme Court has rejected the above requirement. *See Hicks v. State*, 690 N.E.2d 215 (Ind. 1997).

- Such a requirement unnecessarily restricts the discretion of TC to determine whether 404(b) evidence is relevant.
- Although some proffered evidence may be irrelevant because it is too remote, an event occurring in the past can be critical.

> **Thus, admissibility hinges on relevance, not a litmus test based on an isolated factor – remoteness, similarity, or anything else – that may bear on relevance.**

Further, COA noted that the State had established the timeliness of the video based on Mother's statement in the post and a scar on the child's lip due to a recent accident.

## Evid. R. 403 Balancing & Evid. R. 404(b) Intent Exception

***Jason Schnitzmeyer v. State*, 168 N.E.3d 1041 (Ind. Ct. App. 2021)**

> **Facts:** Dealing in meth. After responding to a shooting, an officer discovered an open van in front of Def's house. The van belonged to the deceased victim of the shooting, whom Def. knew. Def. cooperated and police collected his cell phone. Police searched Def's home and shed and recovered 1.88 grams of meth, along with electronics, firearms, and a meth pipe.
>
> A text string over the last month between Def. and victim suggested that victim occasionally sold tools and electronic gadgets to Def. in exchange for drugs (texts referenced common euphemisms for meth). Additionally, messages on the day of the shooting indicated an agreement between the men to make another exchange that day.

**Issue:** Did TC abuse its discretion when it admitted the text messages from before the day of the shooting into evidence under R. 403? Did admission of the text messages violate R. 404(b) and amount to fundamental error?

**Holding:** Affirmed.

**Evid. R. 403 -** The contested text messages were highly probative in establishing intent to deal drugs rather than retain for personal use, his unusual dealing relationship with victim, and his identity as the owner of the meth found in the shed, and any prejudice did not substantially outweigh the highly probative value of the text messages.

**Evid. R. 404(b)** – (Def. did not preserve below, so fundamental error standard)

The intent exception to 404(b) is narrow and is available when a defendant goes beyond merely denying the charged culpability and affirmatively presents a claim of particular contrary intent.

> *To prevail on the claim that evidence of prior acts is properly probative of intent, Defendant must have first put intent at issue*.
>
> Here, Defendant put his intent at issue during his opening statement, when cross-examining the officer, and during closing.
>
> > "The totality of Def's statements demonstrate that he not only denied dealing the methamphetamine, but he disputed the requisite intent to deal and presented a contrary explanation that he could have intended to personally use the drug."

Because the messages were not introduced for the impermissible purpose of demonstrating Def acted in accordance with his prior acts and because the risk of unfair prejudice did not outweigh this highly probative value, the messages were therefore both relevant and admissible.

## Evid. Rule 408 Confidential Settlement Negotiations/Documents

***Russell Berg v. Stacey Berg*, 170 N.E.3d 224 (Ind. 2021)**

**** spoke about COA case last year with split panel**

**Facts:** Parties entered into a mediated settlement agreement concerning the disposition of marital property. Wife later filed a T.R. 60(B) motion, alleging that a stock account was omitted from a balance sheet during mediation. She sought to avoid the agreement on basis of fraud (or mutual mistake) or, alternatively, enforce it by alleging Husband breached a warranty therein. TC granted relief to Wife.

**Issue**: Did the judgment rely on inadmissible evidence of what occurred at mediation?

**Holding:** **TC erroneously admitted into evidence marital balance sheet prepared for mediation, but SC affirmed on other grounds.**

Communications during settlement negotiations are confidential under Evid. R. 408(a), and this *includes documents produced in anticipation of mediation* (that is, information exchanged specifically to assist in mediation).

> Indiana judicial policy strongly urges the amicable resolution of disputes and, thus, we embrace a robust policy of confidentiality of conduct/statements made during negotiation and mediation.

**Evid. R. 408(b)** provides a limited exception allowing admission "for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."

Here, mediation evidence was essential to the judgment and not collateral.

- Wife sought to change the agreement itself
- Evidence in balance sheet was not discoverable outside of negotiations
- Contents of balance sheet were admissions of fact that certain assets/debts existed and their values.
- These facts established a starting point for negotiations. That the admissions occurred prior to the formal mediation proceeding does not remove them from the ambit of the mediation process.

## Evid. Rule 615 Separation of Witnesses

***Byron Harris v. State*, 165 N.E.3d 91 (Ind. 2021)**

**Facts**: 15-yr-old defendant waived into adult court and convicted of attempted murder. His mother, a witness, was not allowed to stay in the courtroom during trial. Harris – who had a history of learning disabilities and mental health problems – objected, indicating that *his mother wanted to be in trial as much as possible*. Harris did not mention any right to have a parent present and never said that he himself wanted her present.

On appeal, Harris argued 1) a parent always falls under the "essential" exception to the rule governing separation-of-witness orders and 2) he has a due process right to have his parent present for all stages of a criminal proceeding in which liberty interests are at stake.

COA (split) reversed, holding DP rights were violated, as mother was "essential" to defense.

**Issue**: Whether a juvenile waived into adult court has a categorical right to have a parent present during the criminal proceedings, even when the parent is a witness subject to a witness-separation order.

**Holding**: Affirmed the trial court (reversed COA).

**We hold that a child in adult criminal court may use Evidence Rule 615(c) to establish that a parent is "essential" to the presentation of the defense and is thus excluded from a witness-separation order. But Harris did not make the requisite showing under the rule, nor did he show he had a due process right.**

**R. 615(c) exception** for a witness "whose presence a party shows to be essential to presenting the party's claim or defense." **But exception is not categorical.**

-To invoke it, child must show (which Harris did not do) that they need parent to assist with defense. This can be done in a myriad of ways. For example:

> "Parents may possess 'intimate knowledge' of critical aspects of the child's case or may be the only ones able to help the defendant deal with any anxiety and fully participate in the trial. In those cases, the juvenile defendant could show a parent possesses the 'unique ability' to assist the defense—thus, rendering them 'essential' under Rule 615(c)."

-Once showing is made, TC must also consider State's interest and determine whether parent's presence will undermine truth-seeking function.

Due Process - Harris did not properly raise a DP argument, and thus Ct did not consider whether there is an absolute constitutional right to have a parent-witness present throughout criminal trial.

## Evid. Rule 801(d)(1) Declarant-Witness's Prior Statement & Rule 704(b) Vouching

***Terry Garber v. State*, 152 N.E.3d 642 (Ind. Ct. App. 2020)**

**Facts:** Garber forced his way into ex-girlfriend's apartment and sexually assaulted her. After victim ran to nearby apartment. When neighbor opened door, victim yelled "[h]e raped me." Inside, victim called her boyfriend and told him that Garber had tried to rape her. Officer responded within minutes and recorded his interview with victim with his body camera, during which victim identified Garber as her assailant. At the hospital, victim told the ER physician that Garber had digitally penetrated her anus and vagina.

At trial, Garber objected to introduction of police officer's body cam footage of victim's statement and testimony of victim's boyfriend as to what victim told him when she called. Garber did not object to testimony of neighbor or ER doctor as to what victim told them. In addition, ER doctor testified, without objection, that in her opinion, people are "very honest" when answering questions while seeking medical care.

**Issues: 1)** Did TC abuse its discretion in admitting testimony regarding the victim's out-of-court statements to her boyfriend, her neighbor, the police officer, and the ER doctor?

**2)** Did ER doctor's statement that she believed people were "honest" in answering questions while seeking medical treatment constitute improper vouching?

**Holding:** Affirmed.

**1) R. 801(d)(1)** provides that a **declarant-witness's prior statement is not hearsay** if declarant testifies and is subject to cross and statement is (A) inconsistent with declarant's testimony and was given under oath; (B) consistent and (i) offered to rebut an express or implied charge of fabrication or improper influence/motive or (ii) to rehabilitate declarant's credibility; or identifies a person as someone the declarant perceived earlier.

*** The rule does not alter other law regarding hearsay or its exceptions.

- While rule did not apply here, COA observed that the testimonies of the officer and boyfriend about what victim told them were actually admitted as excited utterances, which defendant does not challenge. Also, the evidence was merely cumulative of victim's own testimony, and thus, any error was harmless.

**2)** Regarding whether doctor's testimony constituted improper vouching, COA found that while it came "close to crossing the line," such did not rise to the level of impermissible vouching under **R. 704(b)**. ER doctor did not opine that the victim was telling the truth but offered only a general observation as to how emergency room patients behave based on her experience.

## Evid. Rule 801(d)(2)(B) Adoptive Admission

***Kenneth Lancaster v. State*, 153 N.E.3d 1144 (Ind. Ct. App. 2020), *trans. denied*.**

> **Facts:** Convicted of three counts of murder. Lancaster, a known heroin dealer, was angry at one of his regular buyers, Jessica, over money. Jessica lived with her boyfriend and his parents. On the morning of June 1, 2017, Lancaster and accomplices shot and killed Jessica, her boyfriend, and her boyfriend's father (the mother had left for work).
>
> Over defendant's objection, Tony Leonard was permitted to testify regarding a conversation he overheard between Lancaster and Lancaster's brother in May 2017. Leonard testified that the brother said, "we need to smoke Jessica" and Lancaster responded, "If we do her, we'll have to do them all."

**Issue**: Did the TC abuse its discretion by admitting Leonard's testimony regarding the conversation between Lancaster and his brother?

**Holding**: Affirmed.

> Statement made by brother that "we need to smoke Jessica" was admissible as an adoptive admission.
>
> > **An adoptive admission, which is not hearsay, is a statement offered against an opposing party that "the party manifested that it adopted or believed to be true."** Evid. R. 801(d)(2)(B).
>
> Indiana law on adoptive admissions is scarce, so COA looked to federal case law addressing identical federal rule for guidance.
>
> > The federal rule governing adoptive admissions does not require the party to specifically adopt another person's statements, but a manifestation of a party's intent to adopt another's statements, or evidence of the party's belief in the truth of the statements, is all that is required.
> >
> > > Here, after brother's statement, *Lancaster did not deny, disagree with, or refute the statement, and even went a step further*, saying that they would "have to do them all."

(Statement made by Lancaster admissible as a statement by a party opponent. R. 801(d)(2)(A))

## Evid. R. 803(2) Excited Utterance

***Quantavious Jones v. State*, 159 N.E.3d 55 (Ind. Ct. App. 2020), *trans. denied***

> **Facts:** After a UPS package went missing, Jones drove his girlfriend/victim to Madden's house and forced her into basement. Jones choked her and handcuffed her to a chair. As Jones questioned about the package, Madden threw scalding water on her and beat her. This continued after he made her strip naked. Madden inquired about killing her. Jones called victim's family demanding money for her release. They eventually released her in an unknown neighborhood.
>
> She was taken to local hospital and then transferred to Eskenazi Hospital and placed in a shock room, an area reserved for "life-threatening things." Forensic nurse examiner Janet Jackson treated abrasions and severe burns. Nurse interviewed victim several hours after the incident. Victim was shaking, shivering, scared and grimacing from pain.
>
> At trial, Nurse Jackson testified, over hearsay objection, about interview of victim, including information about the day before the attack leading up to hospitalization. Testimony included that missing package contained heroin.

**Issue:** Did TC abuse discretion by admitting nurse's testimony as an excited utterance?

**Holding:** Affirmed.

**Evid. R. 803(2)** excited utterance exception: "statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused."

- The passage of time reduces the likelihood that an utterance is spontaneous.
- However, continuing trauma can render the declarant more reliable because still incapable of thoughtful reflection and deliberation.

Defendant argued: Several hours passed between incident and victim's interview with Nurse Jackson, in which victim spoke with several people and had time to rehearse her story.

COA disagreed with defendant and noted substantial evidence of **continuing trauma**.

- Victim testified her pain was "worse than a ten"
- Woman who helped victim call for help testified victim was scared, crying and badly injured
- Police officer – "some of the worst injuries I've seen next to death"
- Nurse Jackson – victim was still shaking, shivering, grimacing from pain

## Evid. R. 803(5) Recorded Recollection

***Jared Gorby v. State*, 152 N.E.3d 649 (Ind. Ct. App. 2020)**

**Facts:** Molested his 5-yr-old niece. During a forensic interview that was video recorded, the child explained a "copy game" defendant had her play that involved watching a video of Anna and Elsa (from movie Frozen) and then reenacting scenes. This involved putting defendant's "peeing thing" in her mouth. She talked about "pee" that is "usually white" and indicated that the conduct hurt her "head and mouth and throat."

Child testified at trial that she did not like playing the "copycat game" with defendant. She explained that Anna and Elsa were doing something that was "not okay" but that she did not "remember" or "know" what it was. Child said she remembered being interviewed and that she told the truth to the interviewer. During a break, she was shown video of interview, but then she still testified that she did not remember what Anna and Elsa were doing or what she and defendant did, but she said—twice—that everything she told the interviewer was "the truth." Over defendant's objection, the State was permitted to play the video of the interview for the jury.

**Issue**: Did TC abuse its discretion by allowing the video of the forensic interview under the "recorded recollection" exception to the rule against hearsay?

**Holding**: Affirmed.

**Recorded Recollection Exception R. 803(5)** allows admission of a record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and
(C) accurately reflects the witness's knowledge.

Defendant challenged whether the first and third elements were satisfied.

Regarding 1st – Even if shaking head was Child's way of indicating she did not want to talk about game, that must be weighed against all the times she said she did not remember the details. Conflicting answers – up to TC to decide whether Child could not remember or simply did not want to talk about it.

Regarding 3rd – Again, Child made conflicting statements as to whether she could vouch for the accuracy of the recorded statement. TC's task to weigh the conflicting testimony and determine whether Child adequately vouched for accuracy of the statements.

## Evid. R. 803(2) Excited Utterance/R. 803(5) Recorded Recollection & R. 803(8) Public Records

***Michael McMillen v. State*, 169 N.E.3d 437 (Ind. Ct. App. 2021)**

**Facts:** Level 5 felony battery. Within minutes of attack and after McMillen fled, Mother saw a police officer and got his attention. She was crying and had significant visible injuries. Mother told the officer that she and her son "got into it" and that he "abused" her by hitting her with his fist and choking her. Officer recorded the conversation on his body camera.

Later that day, when officer returned, Mother changed her explanation and did not dispute McMillen's claim that he did not hit her but that she fell.

At trial, Mother denied that he hit her and testified she had trouble with her balance and ran into walls. She remembered speaking to the officer, but she had no independent recollection of the statement she gave to him. Body cam video was admitted over McMillen's hearsay objection.

In second phase of trial, State offered into evidence certified docs from county clerk (charging info, probable cause affidavit, investigative reports, plea agreement, and sentencing order).

**Issue:** Did TC abuse discretion by (1) admitting the body camera footage and (2) the exhibit used to prove McMillen's prior battery conviction?

**Holding:** Affirmed.

**Body Cam Video**

**R. 803(5) recorded recollection exception did not apply**

- Mother was unable to vouch for the accuracy of the prior statement as she indicated she had no independent recollection of the statement.

**R. 803(5) excited utterance exception, however, did apply**

- Statement was given w/in minutes of beating and victim was crying/bleeding

**Exhibits documenting prior conviction**

**Public Records Exception R. 803(8)**

-Applied here to the charging information, plea agreement & sentencing order, as each were records regularly maintained by the county clerk.

-BUT the exception did not apply to the probable cause affidavit or the officer's investigation report, as such records are expressly excluded in the rule.

-Any error harmless b/c defendant testified and admitted he had a 2018 conviction for battery against Mother.

## Evid. R. 803(6) Business Records

***Michael McGill v. State*, 160 N.E.3d 239 (Ind. Ct. App. 2020)**

**Facts**: Residential entry. Ivey and his wife left the back door to their home unlocked while running to Dollar General. While driving, they passed two individuals (McGill and a woman) walking along the road. In his rearview mirror, Ivey saw them turn down his driveway, so he turned his truck around. Ivey found his back door open and the individuals standing inside. Defendant looked scared, and the two left upon Ivey's request. They then walked down the road and into another house, which turned out to be the woman's house.

McGill asserted a mistake-of-fact defense. In support, he sought admission (as a business record) of an intelligence test, which was performed by Sheila Switzer & showed an IQ of 67.

**Issue**: Did TC abuse its discretion by refusing to admit the IQ test?

**Holding**: Affirmed.

Defendant sought to admit the IQ test results without calling Switzer. COA noted that business records may be self-authenticated pursuant to Evid. R. 902(11) unless the source of info or the circumstances of preparation indicate a lack of trustworthiness.

Here, "sufficient indicia of trustworthiness" was absent.

-The authentication affidavit did not identify a business entity or detail what routine business activity required Switzer to perform psychological assessments.

-The affidavit also did not explain how the maintenance of psychological records is necessary for a business purpose.

-The Rules of Evidence require expert opinion testimony to be rendered by a qualified individual relying on established scientific principles. Evid. R. 702. This requirement ensures that only relevant and reliable expert testimony is presented to the jury.

McGill attempts to sidestep safeguards by introducing the assessment into evidence without allowing the State to examine Switzer regarding her qualifications and methodology.

## Various Hearsay Exceptions

### *Zackery Hurt v. State*, 151 N.E.3d 809 (Ind. Ct. App. 2020)

**Facts:** After a night of drinking, Defendant and his wife returned home. Shortly thereafter, an officer arrived at the home in response to an incomplete 911 call. After hearing a loud noise from inside the home, the officer went to the front door. Eventually, Defendant opened the door. The officer noted that his speech was slurred, his eyes were bloodshot, and he smelled of alcohol. The officer also observed that Defendant had a scratch on his face and a cut on his lip. Defendant's wife then came to the door. She too appeared to be intoxicated and a subsequent test revealed that her BAC was .30. Wife had a bloody nose and a cut on her lip. The officer interviewed Defendant and his wife separately, recording both with his body-camera. Defendant stated that wife hit him. Wife gave several explanations for her injuries, but then finally explained that Defendant deliberately hit her in her face with his elbow. Defendant was arrested and charged with domestic battery and disorderly conduct.

At trial, wife testified that she did not know how she received her injuries and that she did not remember speaking with the officer. Over Defendant's hearsay objection, TC admitted officer's testimony that Wife told him Defendant hit her with his elbow and the body camera recording of the officer's interview of Wife at the scene.

**Issue:** Did TC abuse discretion in admitting officer's testimony recounting Wife's hearsay statements?

**Holding:** Reversed.

Wife's out-of-court statement was used to prove the truth of the matter asserted, i.e., that Defendant struck her. State argued that Wife's statement was admissible under an exception to the hearsay rule. COA disagreed. Statement inadmissible. Not harmless error.

- **Recorded Recollection (Evid. R. 803(5))**: To be admissible under recorded recollection, there must be some acknowledgment that statement was accurate when made. Because Wife did not vouch for the accuracy of her statement to the officer in that she claimed she was heavily intoxicated and she did not remember speaking to him, her statement was not admissible under the recorded recollection exception.
- **Excited Utterance (Evid. R. 803(2))**: Officer arrived at the scene approximately 10 minutes after 911 call and another 15 minutes passed before officer spoke with Wife. Her statement was in response to questioning and she was calm. She became upset only after officer mentioned Defendant might go to jail. COA also found that in the recording, Wife appeared to be deliberating her answers. All taken together, COA concluded Wife was not under stress of event when she made her statement. Thus, not admissible as an excited utterance.
- **Present Sense Impression (Evid. R. 803(1))**: Wife's statement was not during or immediately after she was injured and she had time to deliberate and consider her responses to officer's questions. Exception inapplicable.

Evid. Rule 804(b)(2) Dying Declaration

***Deshay Hackner v. State*, 161 N.E.3d 1287 (Ind. Ct. App. 2021), *trans. denied*.**

**Facts**: Convicted of two counts of murder and two counts of robbery. Victims were shot and left for dead in their home. One of the victims, Broomfield, was able to call 911. During the call and as officers arrived, Broomfield identified the individual who shot him as "Deshaw Hackner," "Deshay. D. and William Rice," and "Deshawn Hackner." Officer Brewer found Broomfield lying on the floor moaning and asked, "Was it Deshay?" Broomfield shook his head yes, which gesture was not captured on camera.

At trial, defendant objected to testimony that victim nodded his head in response to officer's question, which officer interpreted as an affirmative response.

**Issue**: Did TC abuse its discretion by admitting evidence of victim's head nod into evidence?

**Holding**: Affirmed.

COA held that evidence of **victim's nonverbal nod** in response to officer's question about whether it was defendant who shot victim was admissible under the dying declaration exception to the hearsay rule.

> A statement made by the declarant, "while believing the declarant's death to be imminent, made about its cause or circumstances" is admissible under the dying declaration hearsay exception. **Evid. R. 804(b)(2).**
>
> A "statement" is an "oral assertion, written assertion, or nonverbal conduct if the person intended it as an assertion." **Evid. R. 801(a).**

Defendant did not challenge that victim's nonverbal act was made with the belief that his death was imminent while abandoning all hope of recovery.

Instead, he claimed that "given the suffering of Broomfield and his agonal movements, … a nod is too ambiguous to be considered a nonverbal dying declaration." COA rejected this argument.

> The interpretation of Broomfield's alleged nonverbal act, which was not captured on camera, is not a question of admissibility but rather bears more on the testifying officer's credibility.
>
> "The extent to which the jury relies on Broomfield's nod and accepts Officer Brewer's interpretation, and whether or not the evidence connects Hackner with the crimes, ultimately goes to the weight the jury may assign evidence, not admissibility."

## Rule 804(b)(3) Co-Conspirator's Confession

***Daveon Hendricks v. State*, 162 N.E.3d 1123 (Ind. Ct. App. 2021)**

**Facts:** Defendant and cousin (Balfour), with others, planned to rob individuals in a drug house. Defendant and Balfour entered the home wearing hoodies and armed with guns. A victim was fatally shot. Convicted of murder and conspiracy to commit robbery.

At trial, a witness testified, over hearsay objection, that Balfour told her he was involved in the shooting. Recorded jail calls b/w Def. and Balfour also admitted over objection.

**Holding**: Affirmed in part and reversed in part on other grounds.

**Co-conspirator's confession** (only preserved hearsay objection)

**Evid. R. 804(b)(3)** provides an exception to the hearsay rule for statements against interest where the declarant is unavailable.

**BUT** the rule provides: "A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both the declarant and the accused, is not within this exception."

*COA held that Balfour's statement also implicated Defendant, even though it did not refer to defendant &, thus, was inadmissible under the 804(b)(3).*

- Jury had heard other evidence establishing Balfour's involvement in the conspiracy & demonstrating that the men were together.
- As a result, the only purpose in admitting the testimony was to implicate Defendant along with Balfour.

**Error was harmless** though due to other admissible evidence.

**Recorded Jail Calls** between Defendant and Balfour were admissible

Rule 401 - Relevant to show guilt b/c they were trying to influence potential witnesses.
Rule 403 – Recordings contained profanity and used code words to discuss others but were not unduly prejudicial.
Rule 801(d) – not hearsay b/c statement by party opponent
No constitutional confrontation issues because TC instructed jury that Belfour's statements in calls were not to be considered for the truth of the matter asserted.

## Forfeiture by Wrongdoing Doctrine

***Terrance Smoots v. State*, ___ N.E.3d ___ (Ind. Ct. App. 2021)**

**Facts:** Jailhouse beating of inmate by Smoots & others. Victim gave statement to medical providers and identified "Squirt" (Smoots's nickname). After charges were filed with some cooperation from victim, victim became concerned for his safety and reported that he had received calls from Smoots's brother and a woman, who threatened to kill him and his family if he testified. An investigation of jail phone records confirmed that victim had received such calls and that Smoots had communicated with these individuals about victim's potential testimony (using codes). Due to the threats, victim failed to appear for a scheduled deposition.

State filed a motion to present evidence pursuant to a "right of confrontation exception" that would allow hearsay evidence of victim's conversations with law enforcement and others w/o his presence at trial. Following a hearing, the TC granted the State's request, determining that victim's absence was procured by Smoots's acts.

**Issue**: Did TC abuse discretion in admitting victim's out-of-court statements into evidence?

**Holding**: Affirmed.

Smoots contends statements were inadmissible hearsay & admission violated his right to confront and cross-examine witness as guaranteed by the 6th Am to US Constitution.

The **Confrontation Clause** provides in relevant part that "*in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him*." This right allows admission of an absent witness's out of court statement only if the witness is unavailable, and the defendant has had a chance to cross examine.

**An exception to the right, however, exists when the defendant's own wrongdoing caused the declarant to be unavailable to testify at trial** (see also Evid. R. 804(b)(5) which provides similar hearsay exception)

> The "forfeiture by wrongdoing doctrine" is designed to protect the integrity of the judicial process, and when a defendant attempts to undermine that process by procuring or coercing silence, the 6th Am. right may be forfeited.

**State has burden of establishing by a preponderance of the evidence that defendant had in mind the particular purpose of making the witness unavailable**.

> Here, circumstances strongly support such an inference.

## R. 901(a) Authentication (Facebook Messages)

***Michael Parker v. State*, 151 N.E.3d 1269 (Ind. Ct. App. 2020)**

> **Facts:** Lafayette police officers used social media to locate Parker. Officers found what they believed to be his profile on Facebook—confirming his name and date of birth. They also verified his physical appearance through the BMV and compared such with photos from Facebook profile. An officer created a fictitious Facebook profile and initiated a conversation with the individual using Parker's profile by sending messages through the Facebook Messenger app. A discussion ensued, during which the individual using Parker's profile provided an address that had been identified for Parker. The discussion also went in the direction of selling methamphetamine. After Parker was located, a subsequent search of Parker's person revealed several small bags of methamphetamine, a pencil sharpener containing small bags of methamphetamine, and a digital scale with white residue. Parker also had a cell phone on him. Police made a phone call from the fictitious Facebook profile to Parker's profile and Parker's cell phone rang.
>
> At trial, State sought to introduce Facebook messages between Parker and the fictitious account. Parker objected based on authentication. TC admitted the messages.

**Issue:** For purposes of admitting Facebook messages, did the State lay a proper foundation demonstrating that the individual with whom the officer was communicating was Parker?

**Holding:** Affirmed.

**Evid. R. 901(a)** requires the proponent to "produce evidence sufficient to support a finding that the item is what the proponent claims it is." Must establish only a "reasonable probability" that the evidence is what it is claimed to be. Any inconclusiveness goes to weight, not admissibility.

Authentication may be based on **circumstantial evidence**. COA found sufficient authentication of the Facebook messages by

> (1) showing that photo on the Facebook messages was similar to BMV's photo of Parker;
> (2) the user of the Parker profile provided an address that matched an address police had identified for Parker; and
> (3) the Facebook messages between the user of Parker's profile and the officer discussed methamphetamine and the meeting place and Parker showed up at the location with methamphetamine.

Further, the officer made a call from the fictitious Facebook profile to Parker's profile and the phone in Parker's possession rang.

## Evid. R. 901(a) Authentication (Social Media Posts)

***Michael Wisdom v. State*, 162 N.E.3d 489 (Ind. Ct. App. 2020), *trans. denied*.**

**Facts**: In bifurcated trial, convicted of possession of narcotic drug with a gang enhancement. Handgun, drugs, scales found in defendant's bedroom closet. Hand drawn on bedroom wall were the phrases "life of a savage" and "Wagg Block 300," which is a gang in the Evansville area. To prove gang membership, State also presented Instagram and Facebook posts, which were admitted over Wisdom's objection.

**Issue**: Did TC abuse its discretion by admitting the Instagram and Facebook posts?

**Holding**: Affirmed.

**R. 901(a)** provides: "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."

-Absolute proof is not required, just a reasonable probability.

-Any remaining inconclusiveness goes to weight, not admissibility.

Here, posts were properly authenticated with detective's testimony. COA rejected suggestion that State was required to authenticate through user w/ personal knowledge of account owner.

COA distinguished cases that dealt with incriminating text communications through social media where State sought to show authorship. ***Photos and videos posted on social media are different*.**

-Authentication depends on context.

-The posts were not being used to show Wisdom was the source of some incriminating communication. Rather, his mere presence in the Facebook photos and association with the Instagram account were used by the State to show Wisdom was affiliated with other members of Wagg Block 300.

Detective testified she recognized Wisdom and many known gang members in the photos/posts, and that the Instagram account itself appeared to be associated both with Wisdom—as his full name was on the account and the majority of pictures were of him—and with the gang—as the account's username and several photo captions referenced the gang. This was sufficient to authenticate the Facebook photos and Instagram account as being what the State purported them to be.

## Use Immunity

***Alex Hughes v. State*, 153 N.E.3d 354 (Ind. Ct. App. 2020), *trans. denied*.**

> **Facts:** Criminal recklessness conviction. Crossfire between rival gang in Walmart parking lot. During depo, State orally gave use immunity to defendant's girlfriend, Wright, who was present during shooting. She then testified that she "never seen nobody shooting" but had heard shots and called police. Defendant expressly waived cross-examination.
>
> At trial, State declined to give use immunity to Wright, which resulted in her being an unavailable witness due to her invoking the 5th Am. The State then sought to admit depo testimony under Evid. R. 804. Defendant objected, but TC allowed.

**Issue**: Did State abuse witness immunity power such that defendant was denied due process?

**Holding: State abused its power but no due process violation. Affirmed.**

I.C. § 35-37-3-3(a) gives prosecutors authority to grant use immunity to witnesses.

> -No due process right to compel immunization, but State may not use power to interfere with defense's presentation of its case or to prevent its witnesses from testifying.

To show prosecutorial misconduct, defendant must prove State's decisions were made with deliberate intention of distorting fact-finding process. This may be established by showing:

> (a) prosecutorial overreaching, through threats, harassment, or other forms of intimidation, has effectively forced witness to invoke the 5th, or the prosecutor has engaged in discriminatory use of immunity grants to gain tactical advantage;
> (b) the witness's testimony is also material, exculpatory, and not cumulative; and
> (c) the defendant has no other way to obtain the evidence.

"We cannot condone the efforts to lock a witness into her story without any further opportunity for recollection, clarification, or development of detail."

- Prosecutor clearly manipulated immunity power to gain tactical advantage.

That said, defendant has not demonstrated prejudice, so no reversible error.

- Wright claimed to have limited knowledge, defendant has not explained what material or exculpatory evidence was excluded, and defendant does not claim he lacked means to learn what testimony Wright could have been expected to offer.

## Right to Present a Defense; Limits on Expert Testimony Regarding False Confessions

***Courtney Kincaid v. State*, ___ N.E.3d ___ (Ind. Ct. App. 2021), *trans. pending***

> **Facts:** Aggravated Battery and Neglect of a Dependent, following the death of a baby in her care. After making statements to police to explain the injuries, she finally admitted to forcibly throwing the baby to the ground after becoming frustrated. At trial, Kincaid denied injuring the baby and claimed her five conflicting accounts of the baby's injury to police were lies—false confessions. She then claimed for the first time on appeal that the TC improperly limited her expert's testimony on false confessions.

**Issue**: Did TC commit fundamental error in limiting her expert's testimony?

**Holding**: Affirmed.

TC limited expert's testimony to two areas: (1) people sometimes confess to crimes they have not committed; and (2) certain interrogation techniques contribute to false confessions.

> -TC prohibited opinion testimony that the questioning "featured an aggressive application of the interrogation tactics known to contribute to false confessions" and ruled that expert must speak in generalities.

**No error here, let alone fundamental error.** TC did not improperly encroach on constitutional right to present witnesses in defense. U.S. Const. amend. VI; Ind. Const. art. I, § 13.

COA upheld *Jimerson v. State*, 56 N.E.3d 117, 121 (Ind. Ct. App. 2016), which ruled that the jury did not need expert testimony to determine which interrogation techniques described by the expert were used in the defendant's interrogation.

> *Expert testimony crosses the line when it comments on the specific interrogation in a way that may be interpreted by the jury as the expert's opinion that the confession in that particular case was coerced or false.
>
> *Such testimony invades province of jury & violates Evid R. 704(b), which prohibits witnesses offering opinions concerning intent, guilt, or innocence in criminal case.
>
> > Where jury is able to apply concepts w/o further assistance, highlighting exchanges or vouching for the truth/falsity of particular evidence is invasive.

Further, State did not open the door to said opinion testimony when it presented rebuttal testimony from the officers who questioned Kincaid indicating that they did not employ the Reid Technique and did not use any confrontation or minimization tactics.

- Such testimony did not raise same concerns b/c it communicated nothing about veracity of Kincaid's statement, unlike expert's proposed testimony.

## Foundation for Blood Evidence

***John Martin v. State*, 154 N.E.3d 850 (Ind. Ct. App. 2020), *trans. denied.***

> **Facts:** Level 5 Felony OWI. After Martin's car slid off highway into a ditch, responding officers smelled marijuana, smelled alcohol on Martin, noticed that his speech was "very thick, slow, and slurred," and he was having trouble balancing. Martin failed horizontal gaze nystagmus test and tested positive for alcohol through a portable breathalyzer.
>
> The officers took Martin to the sheriff's department to administer more sobriety tests, which Martin refused. They then obtained a search warrant for Martin's blood and took him to a hospital for a blood draw. A registered nurse (RN) drew Martin's blood, and the lab reported 0.242 grams of alcohol per 100 milliliters.
>
> At trial, RN testified that she had received specific training on legal blood draws, the hospital had a policy in place for these draws, and the policy was approved by a doctor. She described the policies and said that she followed them in drawing Martin's blood. After her testimony, the blood draw evidence was admitted over Martin's objection.

**Issues:** Whether the blood draw evidence lacked a proper foundation?

**Holding:** Affirmed.

**IC § 9-30-6-6(a)** requires that blood samples be collected by:

> A physician, a person trained in retrieving contraband or obtaining bodily substance samples and acting under the direction of or under protocol prepared by a physician, or a licensed health care professional acting within the professional's scope of practice and under the direction of or under a protocol prepared by a physician.

The foundation for admission of laboratory blood drawing and testing results, by statute, involves technical adherence to a physician's directions or to a protocol prepared by a physician. This is not a requirement that may be ignored.

> Martin argues that the State failed to show that RN conducted the blood draw pursuant to a protocol prepared by a physician.
>
> However, RN testified that she was trained in legal blood draws, that her hospital had a protocol for legal blood draws, that a physician approved that protocol, and that she followed that protocol. This showing was sufficient for the trial court to find that the State laid the proper foundation for the blood draw evidence.

## Silent Witness Theory/ Authentication of Surveillance Footage

***Bryan Flowers v. State*, 154 N.E.3d 854 (Ind. Ct. App. 2020)**

**Facts:** Convicted by jury of murder. After a verbal altercation outside apartment building, Flowers shot and killed Deandre Voss. A responding officer also happened to be the security director for the company that owned the apartment, so he was familiar with the security camera system and had access to its recordings.

The video system recorded still-frame images with about 2-second lapses. State admitted DVDs containing still images from the video recording of the confrontation between Flowers and Voss and Flowers's subsequent flight.

**Issues:** Whether TC abused its discretion when it admitted the video surveillance evidence.

**Holding:** Affirmed.

**Foundation**: Flowers contends that exhibits were admitted "without requiring any foundation to establish their accuracy or authenticity." Waived for failure to object. Waiver notwithstanding:

**The "silent witness" theory permits the admission of surveillance footage as substantive rather than merely demonstrative evidence**.

There must be a strong showing of authenticity and competency. Authenticating witnesses are not required to testify that video footage is a true and accurate representation of a scene. Rather, they must give identifying testimony of the scene that appears in the photographs, sufficient to persuade the trial court of their competency and authenticity to a relative certainty.

Here, the officer authenticated the surveillance footage in several respects.

-He was the security director and testified he knew how the video security system worked, knew that there was a camera focused on the specific apartment door, accessed footage from the security camera that had recorded the murder, and signed and dated the DVD containing the footage.

**Additional issue**: Officer testified, over objection, regarding the contents of the surveillance exhibits and what they showed.

COA assumed, without deciding, that the testimony was inadmissible because it was not the best evidence (that is, the images spoke for themselves). But COA found that Flowers had **opened the door** to this evidence during cross examination of officer.

The door may be opened when the trier of fact has been left with a false or misleading impression of the facts.

## Experiment by Jury

***Javan Brown v. State*, 160 N.E.3d 205 (Ind. Ct. App. 2020)**

**Facts**: 16-yr-old defendant waived into adult court and charged with murder. Brown was hanging out with several others, driving around and smoking marijuana, while armed with a handgun that he had recently illegally purchased after being released from juvenile detention. While sitting in the back passenger seat behind the victim waiting for another friend, Brown pulled the gun out with his left hand (he's right-handed) and pulled the trigger. The bullet entered the bottom of the driver's headrest and the back of the victim's head from left to right. Brown told the others to tell police it was a drive-by shooting, but he later confessed to his mother. At trial, he testified and claimed it was an accidental shooting. The jury found him guilty of reckless homicide.

**Issue:** Did TC err by allowing the jury to pull the trigger of the gun during deliberations?

**Holding**: Affirmed.

**"An experiment by the jury is improper where it amounts to additional evidence supplementary to that introduced during the trial."**

Here, firearms expert had testified regarding the gun and explained its safety features and testified that four and three-quarters pounds of pressure was required to pull the trigger.

Even if the jurors actually pulled the trigger during deliberations, which is not clear, such actions would be in keeping with the evidence presented.

-Expert testified extensively regarding handgun, including testimony regarding the amount of pressure required to pull the trigger.

-Allowing the jurors to pull the trigger during deliberations under such circumstances would not amount to an experiment that introduced evidence supplementary to that introduced during the trial.

## Informer's Privilege/Discovery

***State v. Justin Jones*, 169 N.E.3d 397 (Ind. 2021) (interlocutory appeal by State)**

> "The confidential informer's privilege allows the government to withhold the identity of those who provide information about crimes, furthering important law-and-order interests. But these interests must be balanced with a defendant's right to prepare a defense and have a fair trial. So, the general rule of nondisclosure can be overcome if a defendant demonstrates that an exception to the privilege should apply. And when a defendant makes an argument for disclosure, a trial court must balance the countervailing concerns at play."
>
> "Yet, courts need not engage in such a balancing inquiry unless the State makes a threshold showing that the confidential informer's privilege even applies—by establishing that fulfilling the defendant's discovery request would reveal the informant's identity."

**Issue**: Whether the State made this threshold showing.

**Holding**: **As a matter of law, an informant's identity is inherently revealed through their physical appearance at a face-to-face interview.**

> When a defendant requests such an interview—as Jones did here—the State has met its threshold burden to show the informer's privilege applies.
>
> > Here, TC ordered face-to-faced interview but directed counsel not to ask any questions that might disclose the CI's identity, identifiers, residence, etc.
> >
> > COA affirmed, determining that State had not shown the CI's identity "would be" revealed by a face-to-face interview with defense counsel.

**Reversed and remanded** b/c record did not show that TC applied the necessary balancing test before ordering disclosure. (TC simply indicated on the record that he had known defense counsel for years and trusted counsel was looking for something real.)

> "In an age where an attorney can appear in a Zoom court hearing as a cat, the State and defendants can certainly work together to provide the information necessary for a full defense without revealing a CI's physical appearance and, thus, identity." ☺

## I.C. § 35-40-5-11.5 Depositions of Certain Child Victims of a Sex Offense

This statute (effective March 2020) restricts a criminal defendant's ability to take the deposition of a child victim of a sex offense less than 16 years of age, providing in part:

> (d) A defendant may not take the deposition of a child victim unless the defendant contacts the prosecuting attorney before contacting the child, and one (1) or more of the following apply:
>
> > (1) The prosecuting attorney agrees to the deposition. The prosecuting attorney may condition agreement to the deposition upon the defendant's acceptance of the manner in which the deposition shall be conducted.
> >
> > (2) The court authorizes the deposition after finding, following a hearing under subsection (f), that there is a reasonable likelihood that the child victim will be unavailable for trial and the deposition is necessary to preserve the child victim's testimony.
> >
> > (3) The court authorizes the deposition after finding, following a hearing under subsection (g), that the deposition is necessary:
> >
> > > (A) due to the existence of extraordinary circumstances; and
> > >
> > > (B) in the interest of justice.

Further, the statue requires defendants who don't get approval from prosecutor to request a hearing & prove by a preponderance of evidence the circumstances set forth in (d)(2) or (d)(3).

*****A line of COAs cases have <u>unanimously</u> held that the statute is a procedural (as opposed to substantive) law that conflicts with the Indiana Trial Rules (T.R. 26 and 30, governing discovery and depositions) and therefore cannot stand.**

> ***Sawyer v. State*, Cause No. 20A-CR-1446 (May 19, 2021), *trans. pending***
> ***Church v. State*, Cause No. 21A-CR-68 (June 28, 2021), *trans. pending***
> ***State v. Riggs*, Cause No. 20A-CR-2144 (July 29, 2021)**
>
> > "Trial Rule 26 provides that, except in the case of protective orders, the frequency of use of discovery methods including depositions 'is not limited.' In addition, Trial Rule 30(A) provides that 'any party may take the testimony of any person, including a party, by deposition upon oral examination' after commencement of the action. Thus, a criminal defendant may freely obtain a child victim's deposition unless a person seeks to limit the defendant's right by filing a motion and establishing good cause for a protective order pursuant to Trial Rule 26(C)."

> ***Pate v. State*, Cause No. 21A-CR-287 (August 9, 2021)**

# Section Ten

# RECENT DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW

By Greg Guevara and Tyler Moorhead
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ATTORNEYS AT LAW

43rd Annual Judge Robert H. Staton Indiana Law Update
September 21-22, 2021

## Section Ten

## Recent Developments in Labor and Employment Law.....Greg Guevara
## Tyler Moorhead

# I. Equal Employment Opportunity Law

## A. Disparate Treatment

*Tonyan v. Dunham's Athleisure Corp.*, 966 F.3d 681 (7th Cir. 2020). The plaintiff suffered a series of injuries leading to permanent restrictions preventing her from lifting more than two pounds. The defendant employer's lean staffing model required that the plaintiff's position be able to perform various physical tasks, so it terminated her employment due to her failure to perform the essential functions of the job. The plaintiff then sued the defendant employer for disparate treatment under the Americans with Disabilities Act. The defendant sought and was awarded summary judgment, and the plaintiff appealed, arguing that physical tasks were not essential functions of her position. To determine whether physical tasks were essential, the Seventh Circuit weighed the job description, the employer's judgment (which courts generally do not second guess), the consequences of not requiring the employee to perform those functions, the amount of time the employee spends performing those functions, and the experience of those who previously and currently hold the position. The Seventh Circuit affirmed, holding that all of these factors weighed in favor of physical tasks being essential functions of the plaintiff's position. The Court was not swayed that the plaintiff could delegate some of the physical tasks to other employees because that merely put additional burdens on those employees that sometimes did not get completed. As such, there was no disparate treatment.

*David v. Bd. of Trs. of Cmty. Coll. Dist. No 508*, 846 F.3d 216 (7th Cir. 2017). The plaintiff, an African-American woman over the age of 40, worked in computer support for the defendant. Her job did not require a bachelor's degree. A month after announcing her retirement, the plaintiff asked for a new job title and a salary increase to account for additional job responsibilities inherited from a male co-worker. Her supervisors failed to properly process her request. When the plaintiff retired, her extra responsibilities reverted back to her male co-worker, but he did not receive a raise for resuming these duties. A year later, another female Hispanic coworker over 40 started performing the plaintiff's old responsibilities, in addition to her original job duties. Both co-workers' job descriptions required a bachelor's degree and both earned annual salaries greater than the plaintiff's. The plaintiff sued the defendant alleging, among other things, that the disparities between her pay and her co-workers' pay evidenced gender, race, and age discrimination in violation of Title VII and the Equal Pay Act. The district court granted summary judgment for the defendant, and the plaintiff appealed. The Seventh Circuit affirmed. The Court analyzed the plaintiff's pay claims using the *McDonnell Douglas* framework, focusing on whether the plaintiff's proffered comparators were similarly situated to her. While the Court acknowledged that the plaintiff's co-workers performed some of the plaintiff's old job duties, it concluded there was no evidence that either co-worker solely performed duties equivalent to those performed by the plaintiff. Moreover, the plaintiff did not maintain that she was qualified for either of her co-worker's jobs. Because neither person was similarly situated to the plaintiff for purposes of her disparate pay claim, she failed to establish a prima facie case of discrimination.

*Baines v. Walgreen Co.*, 863 F.3d 656 (7th Cir. 2017). The plaintiff, an African-American former pharmacy technician for the defendant, alleged that the defendant retaliated against her in violation of section 1981 and Title VII when it refused to rehire her in 2014 based on race bias charges she leveled against the company years earlier. The district court granted summary

judgment for the defendant, finding no evidence linking the plaintiff's protected activity (filing EEOC charges) and the defendant's adverse employment actions (failing to rehire her). The plaintiff appealed, and the Seventh Circuit reversed. The plaintiff offered sufficient circumstantial evidence to satisfy the summary judgment standard. One critical piece of evidence, which the lower court wrongly excluded as inadmissible hearsay, was testimony from the plaintiff's cousin. The plaintiff's cousin—who ironically got the job the plaintiff was denied—stated that the hiring manager let slip that she had wanted to hire someone named "Regina" (the plaintiff's first name), but had been blocked by her district manager. The Court noted that the district manager had been personally involved in handling the plaintiff's EEOC complaints, and the cousin's testimony connected those prior events to the defendant's refusal to rehire the plaintiff. Aside from the cousin's testimony, other evidence of retaliatory intent included: (1) the plaintiff's "mysteriously missing" 2014 application and interview scores; (2) the hiring manager's initial denial to the EEOC that she had interviewed the plaintiff; and (3) the hiring manager possibly lying to the plaintiff about having hired someone else when she told the plaintiff that she had been passed over. Given this circumstantial evidence, a jury could draw a reasonable inference that the employer had acted with unlawful retaliatory intent

*Bagwe v. Sedgwick Claims Mgmt. Servs., Inc.*, 811 F.3d 866 (7th Cir. 2016). The plaintiff, an Indian female, brought claims of discrimination based on her race and national origin, retaliation, and pay discrimination, after the defendant terminated her employment. The defendant contended that it fired the plaintiff because her poor interpersonal skills negatively affected her colleagues' ability to perform their jobs. The district court granted summary judgment for the defendant on all of the plaintiff's claims, and the plaintiff appealed. The Seventh Circuit affirmed. With respect to her race and national origin discrimination claims, the plaintiff argued that she could show direct evidence of discrimination because the decision-makers for her termination gave differing accounts of why the company decided to terminate her. The Court reasoned that where the decision-makers' stated rationales are "sufficiently inconsistent or otherwise suspect," summary judgment cannot stand. However, the explanations must actually be shifting and inconsistent. The Court determined that in the instant case, the decision-makers' explanations for the plaintiff's termination were entirely consistent. Although one decision-maker told the plaintiff her termination had "nothing to do with performance," this explanation was consistent with another decision-maker's assertions that the plaintiff was terminated for interpersonal reasons. The Court ruled that "these semantic differences" were not evidence of pretext. Although the plaintiff met the company's goals, she did so in a manner that jeopardized the ability of others around her to do their jobs. The Court reasoned that the decision-makers provided a consistent rationale for the plaintiff's termination: her demonstrated ineffective leadership skills.

*Ortiz v. Werner Enters.*, Inc., 834 F.3d 760 (7th Cir. 2016). The plaintiff, a freight broker, alleged that his employer subjected him to discrimination and harassment based on his Mexican ethnicity, including that his supervisor subjected him to various ethnic slurs, which increased in frequency toward the time of his termination. The defendant responded that it terminated the plaintiff for falsifying business records. The district court granted summary judgment for the defendant, concluding that the plaintiff failed to present a "convincing mosaic" of evidence under either the direct method or the indirect method of proof. The Seventh Circuit reversed and overruled circuit precedent, which previously required employees to prove bias cases through a "direct" or an "indirect" method to establish a "convincing mosaic of discrimination." The Seventh Circuit held that the "convincing mosaic" term never was intended to be a legal test, but

only a metaphor to illustrate why courts should not try to differentiate between "indirect" and "direct" evidence. The Seventh Circuit further ruled that the correct legal standard did not involve consideration of "indirect" and "direct" evidence separately, but that the standard simply was whether the evidence as a whole would permit a reasonable fact finder to conclude that plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action. Thus, the Seventh Circuit directed district courts to stop separating "direct" from "indirect" evidence and proceeding as if they were subject to different legal standards. Notably, the Seventh Circuit reasoned that its decision to meld consideration of "indirect" and "direct" evidence did not concern *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), or any other burden-shifting framework. Turning to the plaintiff's claim, the Seventh Circuit held that under this "unified" standard, the plaintiff presented sufficient evidence from which a reasonable jury could infer that his supervisors directed ethnic slurs at the plaintiff and tried to blame him for losses related to unprofitable shipping transactions because of his Mexican ethnicity, and thereby raised a triable issue of fact with respect to his discrimination and harassment claims.

*Mourning v. Ternes Packaging, Ind., Inc.*, 868 F.3d 568 (7th Cir. 2017). The plaintiff filed suit against her employer for sex discrimination after she and her supervisor were terminated for performance reasons. Eight of the plaintiff's ten subordinates filed written complaints against her. The district court granted summary judgment for the employer, concluding that the plaintiff had failed to establish a claim of sex discrimination under the "indirect" framework established by *McDonnell Douglas*. The plaintiff appealed and the Seventh Circuit affirmed. The Court clarified that, as of their decision in *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760 (7th Cir. 2016), employment discrimination cases do not have separate evidentiary frameworks for indirect and direct evidence, and that instead, the ultimate inquiry was whether the evidence would permit a reasonable factfinder to conclude the plaintiff's sex caused the adverse action. The Court noted that, although the plaintiff's argument tracked the *McDonnell Douglas* framework, the plaintiff "[did] not focus on trying to show that [the decision makers] acted against her because she is a woman." The Court found that the plaintiff failed to show that similarly situated employees outside of her protected class were treated more favorably by the same decision maker, and failed to show that the proffered reasons for her termination were false.

*Turner v. Hirschbach Motor Lines*, 854 F.3d 926 (7th Cir. 2017). The defendant offered the plaintiff, an African American, a job as a truck driver contingent on his completion of orientation and a drug test. When the plaintiff tested positive for marijuana, he asked the defendant's safety officer for a "split test" so that the second half of his urine could be tested by a different laboratory. The safety officer allegedly cancelled the split test and told the plaintiff the retest would be a "waste of time" and that he was "never going to pass the test" based on his race. The initial drug results were then sent to the defendant, and the defendant refused to hire the plaintiff. The plaintiff subsequently sued under Title VII, alleging that the safety officer's expressed racial animus caused the decision maker not to hire him using a "cat's paw" theory of liability. The district court granted summary judgment for the defendant. The plaintiff appealed and the Seventh Circuit affirmed. The district court correctly concluded that the plaintiff lacked evidence supporting his federal claim for race discrimination under a "cat's paw" theory. The safety officer was not the hiring decision maker, and the cat's paw theory was unavailing because the plaintiff did not show that his drug test was unreliable or that the split test would have been negative. In addition, the hiring decision maker was unaware of the alleged retest request.

Accordingly, there was no evidence that the failure to hire the plaintiff was proximately caused by the safety officer's presumably discriminatory action (cancelling the split test).

### B. Disparate Impact

*Kleber v. CareFusion Corp.*, 914 F.3d 480 (7th Cir. 2019). The plaintiff was a prospective job applicant who was not selected for employment by the defendant. The plaintiff then brought an ADEA claim against the prospective employer based on the theory that the requested three to seven years of job experience created a disparate impact upon those with more experience. The district court dismissed the claim, concluding that the ADEA did not authorize job applicants to bring disparate impact claims against a prospective employer. The Seventh Circuit in a divided panel reversed the district court's decision. The Seventh Circuit then granted *en banc* review. The Court affirmed the district court decision, concluding that the disparate impact provision of the ADEA only authorized current, not prospective, employees to bring disparate impact claims. Thus, the plaintiff's claim was dismissed because he was never an employee of the defendant.

*Ernst v. City of Chicago*, 837 F.3d 788 (7th Cir. 2016). The plaintiffs, five experienced female paramedics, brought claims of gender discrimination after the defendant rejected them for medic jobs when they failed the fire department's physical fitness examination. The plaintiffs challenged the examination as discriminatory based on sex. At the district court level, the case was split into two parts. The plaintiffs' disparate treatment claim was tried by a jury, which ruled against the plaintiffs. The plaintiffs' disparate impact claim was tried in a separate bench trial, at which the Court ruled that the defendant satisfied its burden to validate the examination. The plaintiffs appealed. The Seventh Circuit reversed and remanded. With respect to the disparate treatment claim, the Court held that the district court provided an erroneous jury instruction that the plaintiffs had to satisfy a "but-for" test that the defendant would have hired the plaintiffs if, all other factors being equal, they were male. The Court ruled that the jury should have been instructed that the plaintiffs had to show that the defendant was motivated by anti-female bias when it created the entrance examination that caused the plaintiffs not to be hired. Instead, the instruction led the jury to focus on gender as a factor in the specific decision not to hire the plaintiffs. Therefore, the instruction was misleading or confusing such that it prejudiced the plaintiffs. With respect to the disparate impact claim, the Court reversed because the physical-skills study was neither reliable nor validated under federal law. The Court further held that there were clear errors with the defendant's validation studies for the examination, because the defendant failed to establish that its physical-skills entrance test reflected "important elements of job performance." This lack of connection between real job skills and tested job skills was fatal to the defendant's case.

### C. Race Discrimination and Harassment

*McKinney v. Office of Sheriff of Whitley Cnty.*, 866 F.3d 803 (7th Cir. 2017). In 2013, the plaintiff became the first-ever black police officer to be hired by the Whitley County, Indiana, sheriff's office. After he was fired nine months later by the same sheriff who hired him, the plaintiff sued under Title VII for race discrimination. The district court granted summary judgment to the defendant, and the plaintiff appealed. The Seventh Circuit reversed and remanded. The Court opined that the district court had "overestimated the strength of the 'common actor' inference" when it concluded that, had the hiring sheriff wanted to discriminate against the plaintiff, he would have refused to hire the plaintiff in the first place. The Court noted

that while the inference is useful in limited situations, it should be considered by the ultimate trier of fact and not on summary judgment. The Court also observed that the defendant offered eight different reasons for firing the plaintiff, but that this "ever-growing list of rationales" fell apart in the face of the plaintiff's evidence. Indeed, the Court noted that the lawsuit was most striking because of the sheer number of the defendant's rationales and the quality and volume of the plaintiff's evidence, much of which was so specific that a jury could conclude that the defendant's rationales were not only mistaken, but dishonest.

*Cole v. Bd. of Trs. of N. Ill. Univ.*, 838 F.3d 888 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 1614 (2017). The plaintiff, an African-American employee, alleged that the defendant subjected him to race discrimination, hostile work environment, and retaliation. The plaintiff alleged that he was unlawfully demoted and disciplined for making workplace complaints and that he also discovered a hangman's noose in his newly assigned workspace. The district court granted summary judgment to the defendant, and the plaintiff appealed. The Seventh Circuit affirmed. The Court found that plaintiff's race discrimination claim failed because he failed to present any evidence permitting a reasonable jury to infer discriminatory intent. With respect to the hostile environment claim, the Court reasoned that the plaintiff failed to establish a basis for employer liability. Since there was no evidence that a supervisor was involved in the noose incident, the plaintiff had to present evidence showing that the defendant failed to take prompt and appropriate corrective action to prevent future harassment from occurring. Upon learning about the noose, the defendant's representative reported the incident to the police and also to various members of her administration, but did nothing else. However, the Court held that the representative's actions were reasonable because the plaintiff told her that he had taken the issue to the police, which he believed the noose was intended as a joke by a recently retired employee, that he was not offended by the noose, and that he hoped nothing would come of the matter. With respect to the plaintiff's retaliation claim, the Court held that the plaintiff failed to show that he engaged in protected activity because protected activity "requires more than simply a complaint about some situation at work," and there must be more specificity, or some connection from the complaint to a protected class. Since the plaintiff's complaints did not mention race or race discrimination, his retaliation claim failed. Moreover, the plaintiff's claim that he was implicitly complaining of race discrimination because he was a member of a protected class was not enough to transform his general complaint about improper workplace practices into a complaint opposing discrimination.

*Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887 (7th Cir. 2018). The plaintiffs, a group of African-American hospital janitors, all claimed that they faced race discrimination at the hands of their supervisors. The plaintiffs' five allegations included: (i) janitors were paid unequally based on race; (ii) African-American janitors were regularly denied promotions and raises; (iii) African-American janitors were more scrupulously disciplined than other janitors; (iv) African-American janitors were given more strenuous and less desirable assignments than other janitors; and (v) supervisors subjected African-American janitors to a hostile work environment. The district court granted summary judgment to the employer on all counts, holding that there was no basis for employer liability and that the plaintiffs did not experience severe or pervasive race-based harassment. The plaintiffs appealed. The Seventh Circuit affirmed as to the first four claims, finding that the plaintiffs failed to make a sufficient factual showing, but reversed and remanded the hostile work environment claim. First, considering all the supervisors' racial slurs and negative racial comments, the Court reasoned that a jury could determine that they were sufficiently severe and pervasive. Second, the Court found that the

plaintiffs demonstrated a basis for employer liability by showing that they complained about many of the remarks to human resources, but the remarks persisted. The Court found that there was sufficient evidence of notice to the employer to proceed past summary judgment.

*Fellers v. Brennan*, 699 F. App'x 554 (7th Cir. 2017). The plaintiff, a Caucasian man, worked as a custodian at a United States Postal Service facility. The plaintiff's supervisor asked him to wax the floors in both the men's and women's locker rooms with the specific instruction to discourage his co-workers from entering the locker rooms while he worked. While waxing the men's locker room, a Caucasian co-worker entered the locker room and called the plaintiff a "f------ a--hole" when the plaintiff asked him to refrain from entering. Another male co-worker, this time of Asian descent, entered the locker room immediately after the first co-worker, leaving a series of footprints on the freshly waxed floor. Next, after moving to the women's locker room, the plaintiff again faced opposition from co-workers. Two female co-workers disregarded the plaintiff's sign designating the locker room as closed and proceeded to enter. After the plaintiff asked the two women to stay out, a black female co-worker called the plaintiff a "dumb, stupid snowflake," a "dumb, stupid white boy," and a "dumb, stupid f------ a--hole white boy." The other woman, of Asian descent, did not say anything to the plaintiff, but upset him by changing her clothes in his presence. The plaintiff submitted formal complaints to his direct supervisor as well as the women's supervisor. After the Postal Service failed to take any action, the plaintiff sued alleging that it violated Title VII by subjecting him to a hostile work environment. The district court granted the defendant's motion for summary judgment, holding that the plaintiff's co-workers' comments and actions "were not sufficiently severe, pervasive or offensive" to rise to the level of a hostile work environment. The district court also explained that there was no evidence that the defendant had failed to end the harassment once managers were alerted, explaining that "there is no evidence that the harassment continued after plaintiff reported it." The plaintiff appealed. The Seventh Circuit affirmed, explaining that, although the co-workers' conduct was offensive, the plaintiff was not physically threatened and the comments were not frequent or pervasive, as they all occurred on a single day. Additionally, while the comments referred to race and sex, the Court explained that isolated epithets were not sufficient to defeat summary judgment.

*Cable v. FCA US LLC*, 679 F. App'x 473 (7th Cir. 2017). The plaintiff, an African-American, sued her employer under Title VII, alleging that her employer subjected her to a hostile work environment because of her race. The plaintiff pointed to five different incidents that occurred over a fourteen-month period. She testified, for example, that her team leader displayed a black voodoo doll with string tied around its neck and that letters "NIG" and "N" were etched on control box near one of her workstations. The district court granted summary judgment for the employer because the racial harassment was not sufficiently pervasive or severe and her employer was not liable for the harassment. The plaintiff appealed, and the Seventh Circuit affirmed. The Court questioned the first reason, taking issue with the trial court's observation that the etchings were less severe than seeing or hearing "N-word" spelled out. However, the circuit Court ultimately affirmed the district court's grant of summary judgment because the plaintiff lacked a legal basis to hold her employer accountable. The plaintiff failed to show that her employer was negligent either in discovering or remedying the harassment. The voodoo doll was never seen again after the team leader was told not to bring it back to work, and the offensive etchings were quickly removed or covered up. In addition, the employer promptly interviewed the plaintiff's co-workers and supervisors to ascertain who had made the etchings.

Because the employer acted reasonably in responding to the racial harassment, the district court correctly concluded that there was no basis for liability.

*Gates v. Bd. of Educ. of the City of Chicago*, 916 F.3d 631 (7th Cir. 2019). The plaintiff was subjected to three racial slurs from his supervisor which occurred within a sixth-month period. The Seventh Circuit reversed the district court's summary judgment ruling in favor of the defendant employer and instead found that the plaintiff was subjected to a hostile work environment. The Court noted that harassment from a supervisor, rather than a coworker, is more pervasive and can quickly lead to a hostile work environment claim. The Court weighed the fact that the district court incorrectly used the "hellish" standard as the required standard for harassment instead of recognizing that a hostile work environment can occur well before it reaches a hellish atmosphere. Finally, the Court held that three racial slurs within a six-month period were sufficiently frequent and severe because a supervisor said them directly to the employee.

*Davis v. Ford Motor Co.*, 751 F. App'x 949 (7th Cir. 2019). The defendant's Indianapolis plant closed, and the plaintiff agreed to a permanent transfer to the defendant's Kentucky plant. When the defendant opened another Indianapolis plant years later, the plaintiff's request to transfer back to Indianapolis was denied so she sued the defendant for race and gender discrimination. The Seventh Circuit affirmed the district court's summary judgment ruling in favor of the defendant because the plaintiff failed to show similarly situated employees who were treated more favorably. Further, the record showed no mention of the plaintiff's race or gender; her sheer belief there was discrimination was insufficient. The defendant also sufficiently supported its position with a nondiscriminatory explanation – that the signed agreement stated she would remain at the Kentucky plant *permanently*.

*Friend v. Nice-Pak Prod., Inc.*, No. 117CV03033JPHDML, 2019 WL 2476680 (S.D. Ind. June 13, 2019). The plaintiff was terminated by the defendant after he threatened to put a co-worker "in the concrete." The plaintiff sued the defendant for discrimination and retaliation under Title VII alleging he was punished more severely because he is white and complained of discrimination. The defendant filed for summary judgment. The Court stated that when a plaintiff is not a member of a protected class, he can allege "reverse discrimination" by showing "background circumstances showing that the employer has reason or inclination to discriminate invidiously against whites or evidence that there is something 'fishy' about the facts at hand." The plaintiff argued he met this standard by showing a similarly situated African-American co-worker who was not disciplined for violating the defendant's violence policy and by showing that the plaintiff's performance was satisfactory up until his termination. The Court agreed, concluding that the plaintiff established a prima facie case of discrimination. The Court found pretext because even though the plaintiff violated the policy, there was sufficient evidence to create an issue of fact as to whether the defendant was selectively enforcing the policy against whites. The Court denied summary judgment on the retaliation claim for the same reasons.

### D. Sex and Pregnancy Discrimination

*Eggl v. Chosen Healthcare*, No. 1:18-CV-310, 2020 WL 4059184, at *1 (N.D. Ind. July 20, 2020). The plaintiff, a pregnant woman, was close to her due date when she submitted FMLA paperwork to cover the time she expected to be off work after having her baby. Around that same time she received a complaint from a customer that led to her suspension pending an

investigation at work. While on suspension, the plaintiff had her baby and was fired one week later as a result of the investigation into the customer complaints. The plaintiff then brought suit, in part, claiming that her previous employer discriminated against her in violation of Title VII, as amended by the Pregnancy Discrimination Act. The defendant employer sought summary judgment, arguing that the plaintiff could not satisfy her *prima facie* case because the decision makers did not know she was pregnant. The District Court for the Northern District of Indiana agreed, explaining that though HR might have known about her pregnancy due to the FMLA paperwork, there was no evidence that the upper level management who made the termination decision know of her pregnancy. The Court did not find a cat's paw theory (where the lower level employee improperly influenced the decision maker) because the HR employee who knew of the pregnancy had no discriminatory animus towards the plaintiff. Summary judgment on the pregnancy discrimination claim was granted in favor of the employer.

*Owens v. Old Wis. Sausage Co., Inc.*, 870 F.3d 662 (7th Cir. 2017). The plaintiff, a human resources manager, sued her employer for sex discrimination and retaliation under Title VII after being terminated for failing to disclose her personal relationship with a subordinate, poor performance, and uncooperative behavior. After the plaintiff's other subordinates submitted complaints about their relationship and preferential treatment, the company attempted to interview the plaintiff to ascertain the nature of her relationship with her subordinate, as was the company's practice. The plaintiff stated that the questions she was asked were "borderline sexual harassment," and she refused to answer any questions about her relationship with her subordinate. After the plaintiff's termination, she filed a lawsuit against the company alleging sex discrimination and retaliation under Title VII. The plaintiff argued that she was terminated for refusing to answer questions about her relationship with her subordinate, which constituted sex discrimination, and for complaining about "borderline sexual harassment" during her questioning, which constituted retaliation. The district court granted summary judgment for the employer, and the plaintiff appealed. The Seventh Circuit affirmed. The Court noted that the plaintiff failed to present evidence that similarly situated employees outside her protected class were treated more favorably. The plaintiff attempted to introduce three male supervisors as proper comparators, but the first male manager had informed the company of his relationship with his subordinate, the second male manager did not directly supervise the employee with whom he was in a relationship with, and the third male manager attempted to hide the relationship with his subordinate, but was questioned about his relationship by the company. As to the plaintiff's retaliation claim, the Court found that the plaintiff did not engage in protected activity because she did not have a good-faith, reasonable belief that the questioning was "borderline sexual harassment." The Court noted that the plaintiff knew other employees had complained about her relationship with her subordinate and potential conflicts of interest, and the plaintiff further testified that she was aware of another manager who was questioned about his relationship with his subordinate.

*Kuttner v. Zaruba*, 819 F.3d 970 (7th Cir.), *cert. denied*, 137 S. Ct. 398 (2016). The plaintiff, a former deputy sheriff, brought a claim of sex discrimination against the sheriff's department. The defendant responded that that it terminated the plaintiff's employment in 2010 after she wore her uniform and badge while trying to collect on a loan for a friend. The district court limited discovery and decided that the plaintiff could only look as far back as January 2006 for evidence of men who had been disciplined more leniently for a similar offense. Lacking direct evidence of discrimination, the plaintiff offered four male comparators based on the discovery taken. However, the district court held that none of these officers' misconduct was sufficiently similar

to the plaintiff's to make them comparators. Accordingly, the district court granted summary judgment in favor of the sheriff's department, and the plaintiff appealed. In a 2-1 decision, the Seventh Circuit affirmed the district court's ruling, finding that the district court did not abuse its discretion in restricting discovery and properly granted summary judgment. The Court reasoned that the burden to produce more disciplinary records for the plaintiff to determine comparators would be too great on the sheriff's department compared to the probative value of such evidence. The requested discovery lacked any time limitation and was based on "an overbroad definition of similarity of misconduct." Dissenting, Judge Posner condemned the majority for upholding the district court's "arbitrary" discovery cutoff date, calling the sheriff's department a "boy's club." Judge Posner noted that due to the cutoff date, the plaintiff was prevented from presenting comparator evidence that would establish with a "virtual certainty that [she] was disciplined far more harshly than male counterparts who engaged in far more egregious conduct."

### E. Sexual Orientation/Gender Identity Discrimination

*Hively v. Ivy Tech Comm. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017). The plaintiff, a part-time adjunct professor, alleged that she was "[d]enied full time employment and promotions based on sexual orientation" in violation of Title VII. The district court granted the defendant's motion to dismiss on the ground that Title VII does not apply to claims of sexual orientation discrimination. The plaintiff appealed. After a panel affirmed the district court's ruling, the Seventh Circuit granted the plaintiff's petition for rehearing *en banc*, and ultimately reversed the district court's dismissal. The Court found that sexual orientation necessarily falls within unlawful sex discrimination under Title VII, stating that "it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex[.]" The Court noted that had the plaintiff been a man, but everything else remained the same, including the sex or gender of her partner, the defendant would not have discriminated against her. Thus, the Court explained, the defendant "is disadvantaging [the plaintiff] because she is a woman." The Seventh Circuit further held that the line between a gender nonconformity claim and one based on sexual orientation "does not exist at all." Lastly, the Court held that sexual orientation discrimination also constitutes sex discrimination under an associational theory. Relying on *Loving v. Virginia*, 388 U.S. 1 (1967), and its progeny holding that an employer violates Title VII when it discriminates against an employee because the employee's spouse is married to a racial minority, the Seventh Circuit held, "[T]o the extent that [Title VII] prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of … the sex of the associate." The dissent criticized the majority's opinion for providing a meaning to Title VII that was not within Congress's contemplation at the time the statute was enacted.

*Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), *cert. dismissed sub nom.* 138 S. Ct. 1260 (2018). The plaintiff, a transgender student, brought this action against the board of education and superintendent in his school district, alleging that the school's unwritten policy barring him from using the boy's bathroom after he started his female-to-male transition violated Title IX and the Equal Protection Clause of the Fourteenth Amendment. The district court denied the defendants' motion to dismiss and granted the plaintiffs' motion for preliminary injunction. The defendants appealed. The Seventh Circuit affirmed, concluding that the plaintiff was likely to succeed on the merits of his Title IX claim under a theory of sex discrimination based on sex-based stereotyping. The Court explained that a policy that requires an individual to use a bathroom that does not conform to his or her gender

punishes the student for his or her gender stereotype non-conformance – violating Title IX. The defendants providing a gender-neutral restroom as an alternative was seen by the Court as merely continuing to treat the plaintiff differently than other students. The Court also determined that the plaintiff was likely to succeed on the merits of his Equal Protection Clause claim. The Court explained that the school's policy treats transgender students, who do not conform to the sex-based stereotypes associated with their sex at birth, differently. The defendants' legitimate interest in protecting student privacy in the restrooms did not dissuade the Court, as the record showed no complaints from other students regarding the plaintiff's use of the restroom.

*Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020). The U.S. Supreme Court consolidated three cases regarding whether sexual orientation and gender identity discrimination are prohibited forms of sex discrimination under Title VII. In the first case, *Altitude Express v. Zarda*, the plaintiff filed suit in a New York district court claiming his employer terminated his employment because he was gay in violation of Title VII. The district court dismissed the case, stating that Title VII did not allow for claims alleging discrimination based on sexual orientation. The plaintiff appealed, and the U.S. Court of Appeals for the Second Circuit reversed the holding, concluding that Title VII does apply to discrimination based on sexual orientation as a form of sex discrimination. In the second case, *Bostock v. Clayton County, Georgia*, the plaintiff brought a claim under Title VII alleging that his employer falsely accused him of mismanaging public money so that it could fire him, when in reality he was fired for being gay. The Georgia district court dismissed his claim, stating that Title VII did not apply to discrimination based on sexual orientation, and the U.S. Court of Appeals for the Eleventh Circuit affirmed. Finally, in *R.G. & G.R. Harris Funeral Homes v. EEOC*, the formerly male plaintiff told her employer that she now identified as a female and wanted to begin wearing women's clothing to work. The employer fired the plaintiff, and the Equal Employment Opportunity Commission filed suit alleging that the plaintiff was fired based on her transgender status violating Title VII's prohibition of sex discrimination (and sex stereotyping under the *Price Waterhouse v. Hopkins* decision). The Michigan district court ruled in favor of the employer, and the U.S. Court of Appeals for the Sixth Circuit reversed, ruling in favor of the employee. In a 6-3 opinion, the SCOTUS ruled upon these cases collectively concluded that Title VII's prohibition on sex discrimination encompasses discrimination based upon a person's sexual orientation and transgender status. The Court explained that discrimination based on homosexuality or transgender status requires one to treat the individual differently because of their sex, the very status that Title VII protects. In other words, the Court explained that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second."

### F. Sexual Harassment

*Equal Employment Opportunity Comm'n v. Costco Wholesale Corp.*, 903 F.3d 618 (7th Cir. 2018). The EEOC brought a Title VII claim on behalf of a female former employee, alleging that the employer had subjected her to a hostile work environment by tolerating a male customer's harassment of her. Over a 13-month period, the customer followed the employee through the employer's warehouse while she worked, at times disguising his appearance or filming her. The customer touched the employee with his shopping cart multiple times and touched her face and wrist. He repeatedly asked her on dates; commented on her appearance; asked which male employees she spoke with and whether she had a boyfriend, among other things; and acknowledged that his attention scared her. When the employee complained to management, the

employer told the customer to avoid her, but the employer denied her request to park near the store entrance to avoid being alone in the parking lot. The employee ultimately obtained a restraining order against the customer and went on a medical leave of absence. The employer could not confirm a violation of its harassment policy through its investigation, but instructed the customer to shop at a different location. Pursuant to company policy, the employer terminated the employee because her medical leave of absence had extended beyond 12 months. The jury returned a verdict for the EEOC, and the district court denied the employer's motion for judgment as a matter of law. The employer appealed, but the Seventh Circuit affirmed. The Court rejected the employer's argument that the at-issue conduct was not objectively severe or pervasive enough to create a hostile work environment. Instead, the Court held, a reasonable jury could find that the customer's behavior, which continued despite the involvement of management and the police, was pervasively intimidating or frightening to an average person. The employer did not challenge the decision that while it did respond to the employee's complaints about the customer, its response was unreasonably weak.

*Smith v. Rosebud Farm, Inc.*, 898 F.3d 747 (7th Cir. 2018). The plaintiff, a butcher, sued his employer, a small grocery store, alleging sex discrimination in violation of Title VII. Within weeks of starting work, male co-workers began consistently—if not constantly—grabbing the plaintiff's genitals and buttocks, groping and grabbing him, and miming oral and anal sex on the plaintiff and each other. The behavior continued for years, and the plaintiff's supervisor participated in the behavior on one or two occasions. After the plaintiff filed a charge of discrimination with the EEOC, the supervisor told the meat-counter employees to stop the "goofing off" and "horseplay." The employees reacted by banging meat cleavers and pointing large knives at the plaintiff, and on one occasion the plaintiff found his car—which he had parked in a gated employee parking lot— with slashed tires and a cracked windshield. The jury returned a verdict for the plaintiff, and the district court denied the employer's motions for judgment as a matter of law and a new trial. The defendant appealed, and the Seventh Circuit affirmed. The Court agreed that unwanted sexual behavior is not necessarily actionable under Title VII, but rejected the employer's argument that the plaintiff experienced "sexual horseplay" and not sex discrimination. The Court held that the plaintiff had offered direct comparative evidence that only male employees experienced the same treatment as the plaintiff, and thus the jury was free to conclude that the plaintiff had been discriminated against on the basis of sex. The Court also rejected the argument that the plaintiff's comparative evidence was insufficient because the meat counter was exclusively staffed by male employees. Even were that true, the Court noted, the alleged male-on-male harassment took place elsewhere in the store, including in areas where female employees worked.

*Hunt v. Wal-Mart Stores, Inc.*, 931 F.3d 624 (7th Cir. 2019). The plaintiff was subjected to several unprofessional remarks made by her supervisor over a four month period. The plaintiff filed a complaint with the defendant's human resources. The defendant investigated the matter and concluded it was unable to substantiate the plaintiff's claim. The plaintiff then filed this suit claiming her supervisor sexually harassed her by creating a hostile work environment in violation of Title VII. The district court granted the defendant's motion for summary judgment concluding that the defendant established the *Faragher-Ellerth* affirmative defense. The plaintiff appealed. The Seventh Circuit affirmed the decision, concluding that the defendant satisfied this affirmative defense because it: (1) exercised reasonable care to prevent and promptly correct the sexually harassing behavior; and (2) the plaintiff unreasonably failed to take advantage of

preventive or corrective opportunities provided by the defendant. The plaintiff could not defeat this defense because she was not subject to an adverse employment action.

### G. Age Discrimination

*Lauth v. Covance, Inc.*, 863 F.3d 708 (7th Cir. 2017). The plaintiff began working for the defendant in 2006 at the age of 54. Following six years of mediocre performance reviews, the plaintiff was placed on a performance improvement plan in 2012, which indicated, among other things, that he needed to improve his "communication practices." In October 2012, four of the plaintiff's subordinate employees complained that the plaintiff was "intimidating," "unprofessional, condescending, and non-communicative." The plaintiff's supervisors investigated the complaints, and ultimately terminated the plaintiff based on "continued performance deficiencies in violation of his PIP." The plaintiff subsequently sued, alleging age discrimination and retaliation under the ADEA. The defendant moved for summary judgment, arguing that the plaintiff failed to establish a dispute of material fact as to why the plaintiff was terminated. The district court granted summary judgment for the defendant, and the plaintiff appealed. The Seventh Circuit Affirmed. The plaintiff offered only his own arguments that concerns about his purported problematic and condescending communication style with managers, peers, and subordinates had no basis. His belief was not enough to counter the defendant's performance concerns about the plaintiff, which were raised repeatedly over six years. Further, the plaintiff failed to identify younger supervisors who received more lenient discipline despite similar behavior.

*Huttle v. Porter Hospital, LLC*, 2019 WL 3216011 (N.D. Ind. July 17, 2019). The defendant initiated a reduction in force and chose those employees it was letting go based upon an evaluation completed by one manager. The plaintiff, a 64 year old, was one of the individuals terminated because he had the second to lowest score on the evaluation sheet. Another 28 year old employee had the second to highest score and survived the reduction in force. The plaintiff filed suit against the defendant claiming discrimination on the basis of age in violation of the ADEA, pointing to the 28 year old as a similarly-situated younger employee who received more favorable treatment and claiming that the evaluation sheet was mere pretext. The defendant moved for summary judgment. The Court denied the defendant's motion by concluding that a jury may see the evaluation as mere pretext because the evaluation's credibility was questionable. The plaintiff successfully created issues of fact regarding the evaluation because the 28 year old's score in certain categories was not supported by his personnel file. For example, his perfect score in attendance was countered by multiple write-ups for missing shifts or being tardy. Further, the plaintiff's personnel file did not justify his low scores. This was additionally supported by the plaintiff's supervisor's testimony that the evaluation was incorrect based upon the plaintiff's behavior and experience.

*Marnocha v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 986 F.3d 711 (7th Cir. 2021). The plaintiff, a neonatologist, alleged an age discrimination claim asserting that the defendant terminated her employment and failed to rehire her for an open position related to a reduction in force due to her age. The district court granted summary judgment in favor of the defendant, and the Seventh Circuit affirmed. As a required element of an age discrimination claim, the Court weighed whether similarly situated substantially younger employees were treated more favorably by the employer. The neonatologists who worked at the employer's other facility (where the plaintiff did not work) were not similarly situated to the plaintiff. With respect to the facility in

which the plaintiff worked, all five of the neonatologists were terminated, including one under age 40. Therefore, there was no disparate treatment.

### H. Disability Discrimination and Reasonable Accommodation

*Whitaker v. Wisconsin Dep't of Health*, 849 F.3d 681 (7th Cir. 2017). The defendant terminated the plaintiff, a support specialist with chronic back pain, when she did not come back to work after exhausting her unpaid medical leave. In response, the plaintiff sued the defendant, claiming that it failed to accommodate her disability and terminated her employment in violation of the Rehabilitation Act. The district court granted summary judgment for the defendant, concluding that (1) the plaintiff failed to establish that she was capable of performing essential functions of her job with or without a reasonable accommodation; (2) the plaintiff admitted she was not terminated "solely by reason of her disability;" and (3) the plaintiff's accommodation request "amounted to an open-ended leave request." The plaintiff appealed. The Seventh Circuit affirmed, explaining that the plaintiff was unable to show that she was an "otherwise qualified" employee under the Act. Her position required regular attendance as she was responsible for answering telephone calls, attending in-person meetings with clients, and using the defendant's internal computer system. The plaintiff was unable to provide any evidence that attendance was not an essential function of her job; nor did the plaintiff offer evidence regarding the effectiveness of her treatment or likelihood of recovery. Accordingly, there were no genuine issues of material fact, and the plaintiff's claims could not survive summary judgment.

*Guzman v. Brown Cnty.*, 884 F.3d 633 (7th Cir. 2018). The plaintiff, a former 911 dispatcher, sued her employer, alleging it discriminated against her because she was disabled and refused to accommodate her disability. After being diagnosed with sleep apnea, the plaintiff used a machine to treat the condition until she underwent gastric bypass surgery, at which point she disposed of the machine. She was not re-diagnosed with sleep apnea following the gastric bypass surgery, but over the next several years she was disciplined a number of times for violations of the employer's policy requiring employees to report to work on time. When the plaintiff eventually was suspended for an incident of tardiness, she blamed sleeping through alarms, but did not mention her sleep apnea diagnosis. When the plaintiff was again late for work, her supervisor reported it to the call center supervisor, who decided to terminate the plaintiff's employment. The plaintiff offered to provide a doctor's note in a meeting with her supervisor that day, and may have mentioned her sleep apnea, but her supervisor did not inform the call center supervisor. The plaintiff then obtained a note from her doctor stating that she probably suffered from recurrent sleep apnea. In a meeting shortly thereafter, the employer terminated the plaintiff's employment and she provided the doctor's note, but the parties dispute the order of events. The district court granted summary judgment for the employer and the plaintiff appealed. The Seventh Circuit affirmed. The Court held that the plaintiff could not establish that any adverse action occurred as a result of her alleged disability because she failed to identify any evidence showing that the employer knew of her sleep apnea before deciding to terminate her. That the plaintiff's repeated violations of the employer's tardiness policy were a side effect of undiagnosed sleep apnea, the Court opined, did not change the analysis. Further, the plaintiff could not show that the employer failed to accommodate her disability because there was no evidence that the employer was on notice of her disability, and the conduct for which the plaintiff was terminated had already occurred by the time the plaintiff first mentioned the sleep apnea diagnosis.

*Monroe v. Ind. Dep't of Transp.*, 871 F.3d 495 (7th Cir. 2017). The plaintiff sued his former employer alleging that it violated the ADA and the Rehabilitation Act when it terminated his employment. The plaintiff's supervisor initiated an investigation of the plaintiff's conduct after seven or eight of the plaintiff's subordinates complained about his treatment of them. During the investigation, the plaintiff disclosed that he recently had been diagnosed with PTSD. Decision makers for the defendant extensively discussed this claimed diagnosis and ultimately decided to terminate the plaintiff for creating a hostile and intimidating work environment. The plaintiff contended that by discussing his diagnosis during meetings about his conduct and the proper course of action, the defendant had discriminated against him because of his diagnosis. The district court granted summary judgment to the defendant, and the plaintiff appealed. The Seventh Circuit affirmed. The Court held that the fact that the decision-makers discussed the plaintiff's claimed diagnosis during the meeting at which they decided to discharge him did not establish that their stated reason for discharge was a pretext for discrimination. The Court observed that the at-issue discussion concerned whether the plaintiff actually had PTSD, given the fortuitous timing of his diagnosis, and thus it was "illogical" to argue that the discussion proved the decision-makers' intent to discriminate based on the diagnosis. Moreover, the Court noted, even if the defendant believed that the plaintiff's PTSD caused his volatility and sleeplessness, this still would not establish pretext because employers may terminate employees for inappropriate behavior even when the employee's disability precipitates that behavior.

*Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017). A former employee brought a claim against his employer for terminating his employment in violation of the ADA rather than providing additional unpaid leave as a reasonable accommodation. The plaintiff had exhausted the entirety of his FMLA allotment, and on the final day of his protected leave, he had back surgery and requested an additional two to three months off from work. The district court granted the defendant's motion for summary judgment, and the plaintiff appealed. The Seventh Circuit affirmed, and held that a long-term leave of absence cannot be a reasonable accommodation, stating that "the ADA is an antidiscrimination statute, not a medical-leave entitlement." The Court did not analyze whether granting the plaintiff additional time off would constitute an undue hardship on the employer. Rather, it disagreed with the EEOC's position that extended leave may be required under the ADA because an employee who needs long-term medical leave cannot work and therefore is not a "qualified individual" under the ADA. However, the Seventh Circuit noted that a brief leave of absence of "a couple of days or even a couple of weeks" may be analogous to a part-time work schedule, and thus, that short medical absences may be required by the ADA in certain circumstances.

*Painter v. Ill. Dep't of Transp.*, 715 F. App'x 538 (7th Cir. 2017). A former employee alleged that her employer required her to undergo unnecessary mental health examinations in violation of the ADA. At issue were two of five fitness-for-duty examinations ordered by the defendant. The first exam was conducted by a psychiatrist and precipitated by the plaintiff's colleagues' complaints that she "snapped and screamed at them, gave blank stares and intimidating looks, ranted, constantly mumbled to herself, repeatedly banged drawers in her office, and had mood swings," "glared and growled at them," "was rude, angry, abrasive, aggressive, and threatening," kept a log detailing coworkers' conversations and actions, and generally inspired fear. The second exam occurred after complaints that the plaintiff engaged in argumentative, confrontational, insubordinate, and disruptive behavior. The psychiatrist also reviewed e-mails suggesting that plaintiff suffered from a personality disorder and paranoid thinking, which he observed is a risk factor for violence. The district court granted summary judgment to the

defendant, reasoning that the challenged examinations were job-related and consistent with business necessity. The plaintiff appealed. The Seventh Circuit affirmed. The Court observed that "[p]reventing employees from endangering their co-workers is a business necessity," and that even multiple inquiries concerning an employee's psychiatric health may be permissible where they reflect concern for the safety of other employee and the public. Because both examinations were based on the defendant's reasonable concern for its employees' safety, the defendant met its "quite high" burden of establishing business necessity for the examinations.

*Scheidler v. Indiana*, 914 F.3d 535 (7th Cir. 2019). A discharged state employee who had been diagnosed with mental health conditions filed an action against the state agency employer and state officials, alleging claims for disability discrimination and retaliation under the ADA, sex discrimination and retaliation under Title VII, First Amendment retaliation under § 1983, and other claims. The district court granted summary judgment in favor of the defendants, in part, and subsequently entered judgment in favor of the defendants, upon a jury verdict, on the remaining claims. The plaintiff appealed. The Seventh Circuit affirmed the dismissal of the ADA claim because the plaintiff's single event did not create a need for accommodation, and it was permissible for the defendant to terminate her based on threatening conduct – even if her mental illness was the cause of her threatening conduct. The plaintiff's retaliation claim failed because she never alleged discrimination to her employer, and thus, did not engage in protected activity.

*Atkinson v. SG Americas Sec.*, LLC, 693 F. App'x 436 (7th Cir. 2017). After suffering an off-duty accident that led to his hearing loss and brain injury, the plaintiff returned to work for the defendant. The plaintiff did not like his workspace, his password expired, and he did not like his laptop. He complained to the defendant, and the defendant gave him a new workspace, a different computer, an ergonomic keyboard, and a new fixed start time that he wanted. Despite these accommodations, he continued to complain about his workspace, access to systems, and start time. The defendant asked that the plaintiff undergo an independent medical examination to determine if the further accommodations he sought were medically necessary, but the plaintiff refused. Due to unsatisfactory job performance, the plaintiff was then reassigned to a new position. He resigned a year later. The plaintiff filed suit alleging that his former employer did not accommodate his hearing loss and brain injury disability and discriminated and retaliated against him in violation of the ADA. The district court granted defendant's motion for summary judgment, and the plaintiff appealed. The Seventh Circuit affirmed. His retaliation claim was quickly disposed of because the evidence showed that the defendant accommodated his requests and was justified in seeking medical evidence regarding further accommodation. His other claims were similarly dispelled due to the lack of evidence that his reassignment was motivated by his disability.

*Lawler v. Peoria School District No. 150*, 837 F.3d 779 (7th Cir. 2016). The plaintiff, a special education school teacher, suffered from PTSD years before she was employed by the defendant school. She performed her job satisfactory for a number of years before she was transferred to another school to teach students with behavioral issues. After an attack by a student, she experienced a relapse of severe PTSD. Her doctor informed the school that she should be transferred, but the school accelerated her next performance review, found her performance unsatisfactory, and fired her as part of an announced reduction in force. The plaintiff then filed this suit under the Rehabilitation Act for failure to accommodate her PTSD. The district court granted the defendant's motion for summary judgment, and the plaintiff appealed. The Seventh Circuit reversed. The Court held that the plaintiff adequately sparked the interactive process

when she brought in a doctor's note stating that she needed to be transferred to a different job where she would not be required to work with students who had behavioral or emotional disorders. The Court noted that the "school district simply sat on its hands instead of following-up… or asking for more information." The defendant failed to accommodate the plaintiff.

*Wells v. Winnebago Cty., Ill.*, 820 F.3d 864 (7th Cir. 2016). The plaintiff, a former county courthouse assistant with chronic fatigue syndrome and anxiety, requested that her employer install a counter or partition to separate her from the members of the public that she aided as part of her job performance. The defendant refused to install the counter or partition. The plaintiff then filed suit against her employer alleging that the refusal to create a barrier from abusive members of the public constituted, among other things, disability discrimination and failure to accommodate under the ADA. The district court granted the defendant's motion for summary judgment, and the plaintiff appealed. The Seventh Circuit affirmed. The Court explained that the employee's mere statements that she needed to be separated from the public by a counter or partition because she had anxiety was not enough to "link that anxiety to a qualifying disability." The Court noted that, "many people suffer anxiety without being disabled by it." The Court observed that the employee did not demonstrate "that a reasonable employer would understand every mention of an employee's anxiety as a disability or understand, without medical knowledge, how anxiety and chronic fatigue syndrome are related." The Court further affirmed judgment against the discrimination claim because no evidence of racial motivation existed.

*Freeman v. Metro. Water Reclamation Dist. of Greater Chicago*, 927 F.3d 961 (7th Cir. 2019). While working for the defendant, the plaintiff drove a company vehicle to transport water samples. He was then arrested for a DUI, lost driving privileges, and underwent alcohol counseling. Since he could not drive, the plaintiff brought a bike to work to transport water samples, he asked to use a go-cart to transport water samples, and he applied for an occupational driving permit from the state. The defendant subsequently terminated the plaintiff. The plaintiff, an African-American man who suffers from alcoholism, sued the defendant for discrimination, retaliation, and failure to accommodate under 42 USC §§ 1981 and 1983, Title VII, and the ADA. The district court dismissed the complaint for failure to state a claim due to its lack of specificity, and the plaintiff appealed. The Seventh Circuit overturned the district court's decision to dismiss the discrimination and retaliation claim under the ADA because only notice pleading was required. The Court did not require the plaintiff to allege his alcoholism substantially limited a major life activity because he sufficiently alleged he was *regarded* as an alcoholic by the defendant. He also sufficiently alleged he could perform his job duties with a reasonable accommodation (bike, go cart, or occupational permit). In totality, these allegations stated a claim for discrimination and retaliation under the ADA.

*Mack v. Chicago Transit Auth.*, 732 F. App'x 480 (7th Cir. 2018). The plaintiff, a former bus driver who is visually impaired, filed suit under the ADA against her former employer after it fired her without considering her for a position that does not require driving. The district court granted the defendant's motion to dismiss, concluding that the ADA never requires an employer to accommodate an employee's disability by placing her in a different position. The plaintiff appealed. The Seventh Circuit reversed because the district court erred in the legal proposition that accommodating a new position was not required. The Court concluded that the ADA does require employers to appoint disabled employees to vacant position for which they are qualified if doing so is reasonable and would not present an undue hardship. Under that legal premise, her complaint did state a claim.

## I. Retaliation

*Hamer v. Neighborhood Hous. Servs. of Chicago*, 897 F.3d 835 (7th Cir. 2018). The plaintiff worked at a mortgage help center. After a younger, male colleague received a promotion that the plaintiff had applied for, she met with a human resources director to voice her concern that she was not given the promotion due to age and sex discrimination. During the meeting, the plaintiff discussed her intention to file a charge with the EEOC. A few days later, a deputy director of the help center informed the director that the plaintiff would be removed from the mortgage help center, explaining that the plaintiff's removal was due to the plaintiff's ongoing communication issues, which the plaintiff's supervisor had observed for some time. The plaintiff's employer did, however, allow the plaintiff to work temporarily at the employer's central office, where she was ultimately offered a permanent position that came with a 25% pay cut. The plaintiff then sued her employer for discrimination and retaliation under Title VII and the ADEA. The district court granted summary judgment to the employer, and the plaintiff appealed the retaliation claim only. The Seventh Circuit affirmed, holding that the plaintiff had failed to develop a causal link between her discrimination complaint and either adverse action. The Court explained that the plaintiff only offered mere speculation, as the director was the only person who knew about the plaintiff's EEOC charge, and the director neither told anyone about the charge nor made any decisions regarding the plaintiff's employment. Moreover, the managers who decided to remove the plaintiff from her position all filed affidavits asserting they were never told about the EEOC charge. Thus, because it is impossible to retaliate against a complaint that a person does not know about, the plaintiff failed to establish a causal nexus.

*Owens v. Chi. Bd. of Educ.*, 867 F.3d 814 (7th Cir. 2017). The plaintiff was a 61-year old former janitor in the Chicago public school system. When the plaintiff was placed under a new manager, he told the manager about a pending age discrimination lawsuit he had filed against the school system. The manager allegedly told the plaintiff that he was crazy if he thought that he could keep his job after filing a lawsuit against his employer. The manager gave the plaintiff an unsatisfactory rating, which meant during the next string of layoffs, due to budget concerns, the plaintiff was selected for layoff. The plaintiff subsequently brought suit against his employer for retaliation and age discrimination. The district court granted summary judgment to the school on both claims, and the plaintiff appealed. The Seventh Circuit affirmed the district court's summary judgment with regards to the age discrimination claim and reversed as to the plaintiff's retaliation claim. The Court held that there was sufficient evidence to show that the employer's proffered reasons were legitimate and that the plaintiff failed to show pretext because other similarly-aged managers had not been let go during the layoffs. However, the Court reversed the district court's order regarding the retaliation claim, finding that the manager's alleged statements were sufficient to create a dispute of fact regarding whether the unsatisfactory rating was given for performance reasons or in response to the plaintiff's lawsuit.

*Lord v. High Voltage Software, Inc.*, 839 F.3d 556 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 1115 (2017). The plaintiff, a male video game producer, was terminated on August 1, two days after telling human resources that his male co-workers had sexually harassed him multiple times between July 18 and 27. The plaintiff had previously reported alleged harassment and had been told to report further incidents of harassment to human resources "immediately." In its personnel records, the employer indicated that the plaintiff was terminated, in part, for failing to report immediately alleged harassment as instructed. The plaintiff sued for discrimination and

retaliation under Title VII. The district court granted summary judgment for the defendant, and the plaintiff appealed. The Seventh Circuit affirmed. A divided panel held that the plaintiff could not show that the reasons given for his termination, including his failure to "immediately" report alleged harassment, were pretextual. The dissent argued that this holding would prompt employers to place "handcuffs on Title VII retaliation claims, with the employers holding the keys," by creating "unreasonable time and manner restrictions on the reporting of harassment."

*Barter v. AT&T, Inc.*, No. 117CV00622SEBDML, 2019 WL 483648 (S.D. Ind. Feb. 7, 2019). The plaintiff filed suit against the defendant employer because she believed she was retaliated against after complaining of sexual harassment. The Court denied the defendant's motion for summary judgment because the plaintiff showed sufficient suspicious timing and pretext. There was suspicious timing because the plaintiff was fired the day after she complained of sexual harassment. The Court stated there were also genuine questions of material fact regarding pretext because the plaintiff might have sufficiently been performing her job duties at the time of her termination.

*Igasaki v. Illinois Dep't of Fin. & Pro. Regul.*, 988 F.3d 948 (7th Cir. 2021). A 62-year-old gay Japanese man with gout brought claims of race discrimination, sex discrimination, age discrimination, disability discrimination, and retaliation against his former employer. As it relates to his retaliation claim, Title VII prohibits employers from retaliating against employees for engaging in the protected activity of opposing an unlawful employment practice or making a charge, testifying, assisting, or participating in an investigation, proceeding, or hearing. The question is whether a retaliatory motive caused the discharge or other adverse employment action. The district court granted, and then the Seventh Circuit affirmed, summary judgment against the plaintiff. The Court explained that for an inference of the required element of causation to be drawn solely on the basis of suspicious timing, the Court usually allows no more than a few days to elapse between the protected activity and the adverse action. Therefore, the two-month gap between the plaintiff's protected activity and requesting a reasonable accommodation, without any other evidence, was insufficient to show retaliation on its own. When suspicious timing alone is insufficient to carry the plaintiff's burden, a plaintiff may survive summary judgment if there is other evidence that supports the inference of a causal link. However, the plaintiff did not present additional evidence that could corroborate and strengthen his assertion of a causal connection based on suspicious timing.

### J. Religious Discrimination and Accommodation

*Demetria Tomlinson v. Heart of CarDon, LLC*, Case No. 3:17-cv-00129-RLY-MPB (S.D. Ind. May 23, 2019). After working for the defendant as an activities assistant for four years, the plaintiff became a practicing Jehovah's Witness which precluded her celebrating holidays, birthdays, or materially participating in holiday or birthday-themed events and activities. Many of these abstentions directly conflicted with her responsibilities as an activities assistant charged with planning and furthering birthday and holiday parties and events. After a year of accommodating the plaintiff's numerous requests to abstain from these events, the defendant finally refused to continue accommodating the plaintiff and instead offered her the accommodation of a transfer to a lateral certified nursing assistant position with the same compensation and benefits and which did not present any job duties conflicting with her Jehovah's Witness faith. The plaintiff initially accepted the new position but then later refused to report to that position for work and was terminated for insubordination. The plaintiff then filed

suit against the defendant claiming failure to accommodate her religion, religious discrimination, and retaliation in violation of Title VII. The defendant moved for summary judgment, which the Court then granted. The Court reasoned that the plaintiff's failure to accommodate claim failed because the plaintiff could not perform the essential functions of her job and that the defendant correctly responded by offering the reasonable accommodation of a position with the same pay and benefits and that solved any religious conflict. The plaintiff further failed to establish a *prima facie* case of religious discrimination because she was not legitimately meeting her job expectations because she could not perform the essential functions of her job, and the evidence showed she was terminated for the non-discriminatory reason of insubordination. Similarly, her retaliation claim failed because there was no causal link between her protected activity and being fired for insubordination.

*Demkovich v. St. Andrew the Apostle Par., Calumet City*, 3 F.4th 968 (7th Cir. 2021). The plaintiff, a gay man with diabetes, worked as a music teacher at a religious school in Chicago, and he was supervised by the school's priest. The plaintiff filed a complaint against the school alleging a hostile work environment on the basis of sex, sexual orientation, marital status, and disability under federal, state, and county statutes. After several rounds in the district court, it certified a question of law for the Seventh Circuit: does the ministerial exception ban all claims of a hostile work environment brought by a plaintiff who qualifies as a minister, even if the claim does not challenge a tangible employment action? (The ministerial exception is a legal doctrine stemming from the First Amendment of the Constitution's Religion Clauses. Specifically, the Establishment Clause and the Free Exercise Clause have led courts to determine that the government, including courts, cannot interfere in disputes between religious institutions and certain employees. While these employees are often labeled as "ministers" for purposes of analyzing the exception's application, the employees who qualify have extended beyond clergy.) In a 7-3 decision, the majority found that adjudicating the plaintiff's hostile work environment claims would "lead to impermissible intrusion into, and excessive entanglement with, the religious sphere." The majority focused on how the plaintiff's allegations would force the court to involve itself in the dispute between one ministers and the priest. According to the majority, how these individuals interacted and the work environment that resulted is "a religious, not judicial prerogative." Three judges issued a dissent, in which they argued that the majority overly weighed the religious liberty interest without properly weighing other interests that favored the hostile work environment claims being heard.

### K. Coverage of EEO Laws

*Perkins v. Mem'l Hosp. of S. Bend*, 121 N.E.3d 1089 (Ind. Ct. App. 2019). The plaintiff, an employee at the hospital defendant, was terminated for stealing food from the cafeteria. The plaintiff brought a claim for wrongful termination alleging that he was actually terminated for testifying at a former co-worker's unemployment benefits hearing, even though he only testified because he believed he had been subpoenaed to do so. The defendant sought summary judgment, arguing that the plaintiff was an at-will employee, and because he was not actually subpoenaed to testify, no exception to the at-will doctrine applied. The trial court accepted as true that Plaintiff was terminated in retaliation for testifying at a former co-worker's unemployment benefits hearing, but nonetheless determined that because the plaintiff did not have a duty to testify under Indiana law, he did not establish that he was entitled to the protections of the public policy exception to the employment-at-will doctrine. The Indiana Court of Appeals affirmed, concluding that the plaintiff had no statutory right or duty to testify because he was never issued

a subpoena. Thus, regardless of the plaintiff's honest belief he was subpoenaed, absent the exercise of a statutory right or a duty, the public policy exception did not apply.

### L. Arbitration

*Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018). The defendant maintained an arbitration agreement with its employees that required its employees to resolve employment disputes via individual arbitration and to waive their right to participate in or receive benefits from any class or collective action. A former employee then sued the defendant, on behalf of himself and others similarly situated, for overtime violations under the FLSA. The defendant moved to dismiss the action based on the waiver provision of the arbitration agreement. The district court and then the Seventh Circuit both denied the defendant's motion to dismiss, stating that the arbitration agreement violated the NLRA and FAA. The Supreme Court held (in a 5-4 decision) that neither the FAA nor the NLRA provided a basis for refusing to enforce arbitration agreements with class and collective action waivers. The Court explained that the FAA instructs courts to enforce arbitration agreements according to their express terms, and the NLRA does not even mention class or collection action procedures so it cannot displace the FAA. Further, the Court refused to accord *Chevron* deference to the NLRB's contrary interpretation of the NLRA and FAA. Properly drafted arbitration agreements between employers and employees providing for individualized proceedings should be enforced.

### M. Litigation and Trial Issues

*Beverly v. Abbott Labs.*, 817 F.3d 328 (7th Cir. 2016). The plaintiff, a senior financial analyst, alleged national origin discrimination and retaliation claims under Title VII and disability discrimination claims under the ADA. During mediation, both parties to the action signed a handwritten document which reflected that the defendant offered the plaintiff $200,000 plus mediation costs to settle her claims. It also reflected that the plaintiff demanded $210,000 plus mediation costs to settle, and that each side left its offer open for five days. The following day, the defendant's attorney communicated to the plaintiff's attorney that the defendant agreed to the $210,000 settlement demand. As a result, the plaintiff's attorney responded, "Oh happy days! Best $10,000 Abbott has ever spent. You are a gem." However, the plaintiff later refused to sign the draft settlement agreement. The defendant moved to enforce the handwritten agreement. The district court found the handwritten agreement sufficient to settle the plaintiff's employment discrimination claims, and the plaintiff appealed. The Seventh Circuit affirmed. The Court reasoned that state law governed the enforceability of settlement agreements, where a meeting of the minds on all materials is required, and objective proof of the parties' intent governs. The Court found the handwritten document enforceable because it sufficiently defined the intentions of the parties. Furthermore, the fact that both sides and their attorneys signed the handwritten document constituted further evidence that both parties intended to be bound by the terms within. The Court determined that the jubilant response of the plaintiff's attorney served as further evidence that the handwritten agreement's terms should govern.

*Sommerfield v. City of Chicago*, 863 F.3d 645 (7th Cir. 2017). The plaintiff, a German-Jewish police officer, sued his employer, alleging discrimination based on ethnicity and religion in violation of Title VII. He alleged that his supervisor made offensive remarks about the plaintiff's ethnicity. A jury awarded the plaintiff $30,000 and his attorney requested attorneys' fees of $1.5 million. The district court reduced the award to $430,000. The plaintiff appealed, challenging the

district court's handling of the case and its refusal to grant his attorney the full $1.5 million in fees. The Seventh Circuit affirmed. The district court properly adjusted the award to $430,000. Among other reasons, the officer lost on most claims, the requested hourly rate was not justified, and over 800 of the claimed hours of work were found to be unnecessary or frivolous.

## II. Retaliation and Whistleblowing Claims

### A. Element One: Protected Activity

*Scheidler v. Indiana*, 914 F.3d 535, 543 (7th Cir. 2019), *reh'g and suggestion for reh'g en banc denied* (Mar. 1, 2019). The plaintiff, who had been diagnosed with mental health conditions and was being provided reasonable accommodation based on those conditions, was terminated for improper conduct after making the following comment in regards to the state employer's promotion practices: "It's who you know and who you blow." The plaintiff then brought suit, in part, based on retaliation, claiming that this comment was protected activity. The district court granted summary judgment for the defendant, and the plaintiff appealed. The Seventh Circuit affirmed, explaining that the plaintiff's comment was not a complaint of *quid pro quo* sexual harassment. Protected activity requires a subjective (sincere, good faith) belief that the plaintiff is opposing an unlawful practice, and it requires an objectively reasonable belief that the complaint must involve discrimination that is prohibited by Title VII. Fatal to her claim, the plaintiff testified that she believed her comment was not sexual in nature at all, and that she was merely referencing blowing hot air. Further, the plaintiff presented no other evidence that suggested improper hiring or promotion practices. Because the plaintiff was not complaining of sex discrimination, she was not engaging in protected activity under Title VII. Summary judgment in favor of the defendant was affirmed.

### B. Element Two: Adverse Employment Action

*Malekpour v. Chao*, No. 16-3440, 2017 WL 1166872 (7th Cir. Mar. 29, 2017). The plaintiff, while employed by the defendant, was reassigned to a new job, was told by management there would be consequences if he did not attend a meeting, and was suspended without pay after personal charges were found on his company credit card. The plaintiff then filed suit against his employer claiming he was discriminated against because of his religion and national origin and was retaliated against in violation of Title VII. The district court granted summary judgment to the defendant, and the plaintiff appealed. The Seventh Circuit affirmed, concluding that the first two incidents did not rise to the level of an adverse employment action. His job reassignment was not adverse because it did not affect his hours, compensation, or career prospects. Further, no evidence suggested the threat of consequences for missing a meeting was adverse, regardless of if the EEOC thought the threat was retaliatory. As such, these actions did not satisfy the initial element required for his claims. The Court reasoned that the only action that was actually adverse was his suspension without pay. However, the Court explained that though it was an adverse action, there was no inference that his suspension was discriminatory; he was suspended for the legitimate reasons of improper spending on the company credit card.

*Burton v. Bd. of Regents of Univ. of Wisconsin Sys.*, 851 F.3d 690 (7th Cir. 2017). The plaintiff, a professor at the defendant school, filed with the EEOC a charge of discrimination and retaliation against the defendant. The plaintiff was then subjected to pressure from coworkers to drop the charges, a threat of discipline for canceling a classroom session, and a letter of direction and

subsequent complaint to the chancellor; all of which the plaintiff relied upon for her subsequent suit claiming retaliation. Regarding this retaliation suit, the district court granted summary judgment for the defendant, and the Seventh Circuit affirmed. First, the Court explained that pressure from others was not an adverse action because it did not cause the plaintiff any harm. Similarly, unfulfilled threats of discipline are not materially adverse actions. The only actual adverse action was the letter of direction and complaint to the chancellor, for which there was no indirect or direct evidence suggesting retaliation or discriminatory motive.

### C. Element Three: Proof of Causal Connection

*Robinson v. Perales*, 894 F.3d 818 (7th Cir. 2018), *reh'g denied* (July 24, 2018). One of the plaintiffs, an African American police officer with the university defendant, experienced several incidents in which he was directed to take action in a retaliatory manner against a fellow African American officer. The plaintiff refused and was subjected to discipline. He then brought suit against the defendant claiming race-based discrimination, harassment, and retaliation in violation of Title VII. The district court granted summary judgment in favor of the defendant on the retaliation claim because the employee who demoted the plaintiff did not know the plaintiff engaged in protected activity, i.e. the causation element was not met. The plaintiff appealed. The Seventh Circuit reversed, concluding that there was causation because even if the employee who demoted the plaintiff did not have a retaliatory motive, the supervisor who did have motive was the individual who convinced the other employee to demote the plaintiff. This was sufficient to establish causation for the adverse employment action.

## III. Wage and Hour and Wage Payment Law

### A. General Issues

*Berger v. National Collegiate Athletic Association*, 843 F.3d 285 (7th Cir. 2016). Former student athletes at private universities brought FLSA minimum wage claims against more than 120 universities, claiming student athletes were entitled to wages. The defendants' motion to dismiss was granted, and plaintiffs appealed. The Seventh Circuit affirmed, concluding that student athletes are not employees for purposes of the FLSA. The Court refused to use the traditional multi-factor employee to employer relationship analysis because the student athletes failed to capture the true nature of the employment relationship. Further, the department of labor handbook indicates student athletes are not employees under the FLSA and athletics are a mere "extracurricular" under the FLSA. The FLSA never intended student athletes to be employees of their respective universities.

*Simpkins v. Dupage Housing Authority*, 893 F.3d 962 (7th Cir. 2018). The plaintiff entered into an "Independent Contractor Agreement" with the defendant governing his work for general labor on vacant properties. After working for the defendant for a few years, the plaintiff sued his employer for FLSA overtime violations. The district court granted the defendant's motion for summary judgment based upon the plaintiff's status as an independent contractor and not an employee. The plaintiff appealed, and the Seventh Circuit reversed. The Court explained that there were a number of issues of fact as to the economic reality of the employee to employer relationship. For example, the defendant controlled the plaintiff's work schedule, purchased his tools, he performed unskilled labor, and the termination date of the agreement was uncertain. These factual disputes precluded summary judgment.

### B. FLSA Exemptions.

On January 1, 2020 an important change to the overtime exemption for "white collar" workers under the FLSA took effect. The rule amended the overtime eligibility of over one million workers who were previously classified as "exempt" (non-overtime eligible) under the executive, administrative, and professional exemptions. The DOL utilized 2020 salary projections to increase the minimum salary threshold – commonly known as the "salary basis test" for the white collar exemptions under the FLSA – from $455 per week ($23,660 annually) to $679 per week ($35,308 annually). Under the new rule, the DOL will conduct reviews of the salary threshold every four years and require fresh notice-and-comment rulemaking for any new proposed increase in the threshold. Other highlights of the rule include that employers are now allowed to use nondiscretionary bonuses and incentive payments (including commissions) that are paid annually or more frequently to satisfy up to 10 percent of the standard salary level, and certain "catch up" payments are permissible as well. The total annual compensation threshold for highly compensated employees subject to a "minimum duties test" increased from $100,000 to $147,414 – the 90th percentile of all salaried workers. The "duties tests" for the executive, administrative, and professional exemptions remain unchanged.

### C. Wage Claims.

*Duvall v. Heart of CarDon, LLC,* No. 117-CV-04439-JRS-MJD, 2020 WL 1274992 (S.D. Ind. Mar. 17, 2020). The plaintiff brought a class and collective action suit against her former employer for Indiana state wage and FLSA overtime violations resulting from wage deductions that covered the cost of her criminal history check, and purchase of uniforms and a laptop through third-party providers. The parties cross-moved for summary judgment. The plaintiff challenged the form of the criminal history check and uniform wage assignments because they were revocable at any time "upon ten days' written notice" rather than "revocable at any time" which is the language in the wage assignment statute. (*See* Ind. Code § 22-2-6-2.) As a matter of first impression, the Court held that "a wage assignment is revocable 'at any time' within the meaning of the statute so long as it is revocable at any time before the wages are earned. Given Heart of CarDon's practice of issuing paychecks nine days after the end of each pay period, the ten-day notice provision did not impair Duvall's option to revoke the assignments 'at any time' as to unearned, future wages, but only as to earned but unpaid wages, so the assignments complied with" the statute. The plaintiff also challenged the laptop wage assignment because it was entered into between the third-party provider and not the employer, and because a copy was not delivered to the employer within ten days of its execution as required by the wage assignment statute. Again, the Court ruled in favor of the employer, holding that a wage assignment does not have to be entered into solely between an employer and employee, and that the employer substantially complied with the statute because it still timely made the deduction that was required even if it didn't have a copy of the agreement within ten days. The plaintiff then challenged the purpose of the uniform and criminal history check wage assignments. The wage assignment statutes permits wage assignment covering the amount of a loan as evidenced by a written instrument. The criminal history check and uniform wage assignments stated that the employer considered and would treat the transaction like a loan, and thus, the employer argued that it fell within the permitted purposes of statute. The plaintiff, however, argued that the transaction was not really a loan because the employer did not extend money to the plaintiff; the employer just paid the third-party entities itself and then deducted that expense from the

plaintiff's wages. The Court agreed with the defendant employer, stating that the plaintiff's interpretation of a loan was too narrow, as many loans are handled in the same manner that the employer handled this loan. Though the uniform deduction wage assignment had the same language, the Court ruled in favor of the plaintiff to the extent that the deduction for uniforms was greater than five percent of the employee's net wages, the statutory limit imposed by the wage assignment statute.

*Allen v. City of Chicago*, 865 F.3d 936 (7th Cir. 2017). Current and former police officers filed suit against the defendant for FLSA violations relating to the off-duty work they performed on their phones and electronic devices. After a bench trial, the district court entered judgment in favor of the defendant, and the plaintiffs appealed. The Seventh Circuit affirmed. The Court explained that while the FLSA defines employ broadly to include time that employers "permit" employees to work, it does not require the employer to pay for work it did not know about and had no reason to know about. The Court concluded that there was no evidence that the defendant had even constructive knowledge about this off-duty work or that it should have acquired knowledge through reasonable diligence. Further, the Court ruled that the defendant did not discourage its employees from completing the time slips upon which the employees should have recorded off duty time.

*Melton v. Tippecanoe County*, 838 F.3d 814 (7th Cir. 2016). A former employee brought suit against the defendant alleging violations of the FLSA and Indiana Wage Claim laws based on unpaid lunch hours and having to come into work early. The district court granted summary judgment in defendant's favor, and the plaintiff appealed. The Seventh Circuit affirmed. The Court presented the standard that where an employee alleges that his employer kept inaccurate records, he has carried out his burden of proving that he performed work for which he was not properly compensated if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. However, the plaintiff failed to support his claim because his hour spreadsheet built from his own memory was insufficient and was contradicted by his pay stubs. Further, while the plaintiff's testimony regarding coming to work may have been credible, it was not a material factual dispute because merely coming to work early does not evidence that the plaintiff worked more hours than his pay stubs reported. The plaintiff's evidence was so implausible and unbelievable that he failed to establish a *prima facie* case.

*Tesler v. Miller/Howard Investments, Inc.*, No. 116CV00640TWPMPB, 2019 WL 1003334 (S.D. Ind. Mar. 1, 2019). The plaintiff, a former employee of the defendant, filed suit against the defendant, asserting that the "Terms of Employment and Compensation" handed to him on his first day of employment was a contract that promised an ongoing three percent commission on accounts generated while he was employed there. On summary judgment, the Court dismissed the plaintiff's unjust enrichment, negligence, and breach of fiduciary duty claims, but denied summary judgment as to the breach of contract claim. The Court ultimately concluded that not all contracts can be interpreted as a matter of law so that the Court was not obligated to make a determination on the existence of a contract. On reconsideration, the Court did reverse its previous determination and applied the two-year statute of limitations for claims based upon conditions of employment, rather than a six-year statute of limitations for claims based upon contracts for the payment of money. Thus, the plaintiff could only pursue claims of lost commission from the two-year period before he filed suit.

*Weil v. Metal Technologies, Inc.*, 925 F.3d 352 (7th Cir. May 29, 2019). The plaintiffs filed class and collective actions against the defendant alleging that the defendant paid employees only for the hours that they were scheduled to work even when the employees' timecards showed they were clocked in longer. The district court conditionally certified, then decertified, these claims and the plaintiffs proceeded in their individual capacities and secured a modest damages award. The plaintiffs also alleged that the defendant withheld wages from employees' paychecks for uniform *rentals*, even though Indiana law authorized withholding wages only for uniform *purchases*. The district court entered summary judgment for the class on the wage deduction claims and the plaintiffs' secured a large damage award. Both sides appealed. The plaintiffs contested the decertification of their time-rounding claims, amount of attorneys' fees awarded, and that costs were not awarded. The defendant contested the wage deduction ruling, that the plaintiffs recovered too much in attorneys' fees, and that the defendant was not awarded costs. The Seventh Circuit first vacated the judgment in favor of the plaintiffs' wage deduction claims. The Court acknowledged that a recent amendment to Indiana wage deduction law authorized withholdings for uniform *rentals*, and that the amendment was retroactive. Thus, the Court remanded the issue for the district court to consider the wage deduction claim in light of the recent amendment – noting that it was unlikely the plaintiffs would be successful, but stating that they should at least be given a try. The Seventh Circuit also concluded that the district court should reconsider the attorneys' fees award on remand as well. The Seventh Circuit then affirmed the decertification of the time-rounding claim, stating that the district court was correct in determining that the employees' timecard is not a *per se* record of the time worked because FLSA regulations support the interpretation that employees should not be compensated for early or late clock punching if they are not actually working during those times.

Indiana Code § 22-2-6-2. The Indiana wage deduction statute was amended to include uniform *rentals*, rather their previously including solely uniform purchases. The language of that specific section reads a wage assignment may be made for the purpose of paying for "The purchase, rental, or use of uniforms, shirts, pants, or other job-related clothing at an amount not to exceed the direct cost paid by an employer to an external vendor for those items." Ind. Code § 22-2-6-2(b)(14).

## IV. Family and Medical Leave Act

### A. Practical Issues Facing Employers Under the FMLA

*Lutes v. United Trailer Inc.*, No. 2:17-CV-00304 RLM, 2019 WL 1285418 (N.D. Ind. Mar. 20, 2019). The plaintiff injured his rib while playing with his grandchildren. The plaintiff received medical treatment that confirmed he fractured his rib. The plaintiff refrained from work for 17 days. For the first 11 days, the plaintiff called his employer's hotline to report his absence – as required per the employer's policy. However, the last six days of work the plaintiff failed to report his absences to his employer. The employer terminated the plaintiff for failing to abide by its attendance policy. The plaintiff sued his employer for interference and retaliation under the FMLA. The Court granted the employer's motion for summary judgment, concluding that the plaintiff cannot establish a *prima facie* case of interference or retaliation because the employer terminated the employee for the legitimate reason of failing to abide by the employer's absentee policy. The Court further reached this conclusion because the plaintiff failed to provide notice to his employer that he intended to take FMLA leave. The plaintiff is currently appealing this matter.

*Purvis v. Wal-Mart Stores E., LP*, No. 1:17-CV-102-TLS, 2019 WL 1361866 (N.D. Ind. Mar. 26, 2019). The defendant maintained two policies important to this case. First, that no-call / no-show absences by employees would subject the employee to occurrences, which could lead to their termination. Second, that if employees wanted to request FMLA leave, they had to contact the defendant's third-party FMLA vendor. The plaintiff, a former employee of the defendant, attempted to request FMLA leave via the third-party vendor. The third-party vendor did not have the plaintiff's correct address so communications were delayed. The plaintiff eventually obtained her FMLA form from the third-party vendor two days before the deadline to submit the form. The plaintiff provided the form to the third-party vendor after the deadline. The plaintiff did not show for work the following day because she was unaware of the status of her FMLA leave application and whether her missing the deadline had already resulted in her termination. The plaintiff's supervisor informed her that the FMLA had been granted, but that the plaintiff did not call-in when she failed to show up for work the previous day. The defendant terminated the plaintiff because her no-call / no-show resulted in sufficient occurrences for her termination per its attendance policy. The plaintiff subsequently brought suit against the defendant for interference under the FMLA, and the defendant sought summary judgment. The Court granted the defendant's motion for summary judgment, concluding that the plaintiff was fired for violating the defendant's attendance policy for an absence not related to her request for FMLA leave.

## V. Traditional Labor Law Developments

### A. Recent Significant Labor Law Decisions

*Jam Prods., Ltd. v. NLRB*, 893 F.3d 1037 (7th Cir. 2018). Jam petitioned the Seventh Circuit for review of an NLRB order requiring it to bargain with the union. Jam alleged that in the period prior to the election, the union sought to influence the election by steering high-paying jobs to Jam employees. When it raised these concerns with the Regional Director, the Regional Director declined to interview any of the individuals named in Jam's offer of proof, or to require the union to turn over any business records. Further, in rejecting Jam's request for a hearing on the issue, the Regional Director acknowledged that the employees had received union jobs during the critical period but concluded that Jam had not demonstrated that the union made a gift of "tangible economic value" to garner union votes. Noting that the Act prohibits "both crude and subtle forms of vote-buying" by unions, the Seventh Circuit concluded that the "financial benefit of higher-paying jobs immediately preceding the election could plausibly be seen as an economic inducement to secure votes in favor of [the union]."As a result, the Seventh Circuit found that Jam raised "substantial and material factual issues" sufficient to find that the NLRB abused its discretion by failing to hold an evidentiary hearing regarding Jams' objections. The Court granted the employer's petition for review and remanded the case to the NLRB for a hearing on its election objections.

*Operating Engineers Local 399 v. Village of Lincolnshire*, No. 17-1300, 2018 BL 353521 (7th Cir. Sept. 28, 2018). The defendant maintained an ordinance that purported to (1) forbid the inclusion of union-security or hiring-hall provisions in collective bargaining agreements; (2) forbid the mandatory use of hiring halls; and (3) forbid dues checkoff arrangements. The union sought an injunction and won summary judgment on preemption grounds. The defendant appealed, and the Seventh Circuit affirmed. The Seventh Circuit, noting a split on the issue, held

that the authority conferred on states in Section 14(b) does not extend to political subdivisions of states, and affirmed the district court's holding that the defendant's ordinance was preempted by the NLRA. Specifically, the Court first conducted an analysis of whether such ordinance provisions would be preempted by the NLRA. It noted that laws banning union security and hiring hall provisions clash with Section 8 of the NLRA, and thus can be "saved only if the fall within the scope of Section 14(b)." Further, the Court reasoned that "[a] local union-security provision would seriously undermine the objectives of the NLRA in any state that has not taken advantage of section 14(b) to forbid agency shops." Finally, the Court held the dues-checkoff regulation was preempted because "it permits employers to remit dues only pursuant to fully revocable checkoffs, while federal law requires employers to bargain in good faith over checkoff proposals that bind both parties for up to one year." Having found each provision of the ordinance preempted, the Court analyzed whether these provisions could be saved by the defendant's argument that Section 14(b) authorizes political subdivisions, as well as states, to override federal law. The Court held that interpreting the words "State or Territory" in 14(b) to permit state delegation of labor law to local units of government "would thus do violence to the broad structure of labor law – a law that places great weight on uniformity." As a result, the Court held that "Section 14(b) of the NLRA does not permit local governments on their own authority to ban agency-shop, hiring hall, or checkoff agreements."

*Constr. & Gen. Laborers' Union No. 330 v. Town of Grand Chute*, 915 F.3d 1120 (7th Cir. 2019). The union brought suit against the town alleging that the town's sign ordinance prohibiting all signs violated the union's free speech rights under the First amendment. The union believed it should be able to voice its protesting message on a twelve foot inflatable rat. The Seventh Circuit affirmed the district court's ruling in favor of the town. The Court concluded that the sign ordinance placed reasonable restrictions and that there was no evidence the ordinance was enforced selectively. The Court further concluded that the union's attempt to replace the sign ordinance did not present a ripe Article III case or controversy.

## VI. Labor and Employment Law Developments Related to the Coronavirus

### A. Families First Coronavirus Response Act

Until December 31, 2020, the FFCRA required employers of 500 or fewer employees to provide employees with paid sick leave or expanded family and medical leave for specified reasons related to the coronavirus. Effective January 1, 2021, this paid sick leave and expanded family and medical leave became optional. Employers who provide paid sick leave will be eligible to receive a dollar-for-dollar tax credit for these leave payments, until the program expires on September 30, 2021. Generally, the FFRCA provides that employees of covered employers are eligible for: (1) two weeks (up to 80 hours) of paid sick leave at the employee's regular rate of pay where the employee is unable to work because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a health care provider), and/or experiencing coronavirus symptoms and seeking a medical diagnosis; or (2) two weeks (up to 80 hours) of paid sick leave at two-thirds the employee's regular rate of pay because the employee is unable to work because of a bona fide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider), or to care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to the coronavirus; and (3) up to an additional 10 weeks of paid expanded family and medical leave at two-thirds the employee's regular rate of pay where an

employee, who has been employed for at least 30 calendar days, is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to the coronavirus. The paid sick leave and expanded family and medical leave provisions of the FFCRA apply to certain public employers, and private employers with fewer than 500 employees.

*New York v. United States Dep't of Labor*, No. 20-CV-3020 (JPO), 2020 WL 4462260 (S.D. N.Y. Aug. 3, 2020). The State of New York brought suit under the Administrative Procedure Act, claiming that many features of the U.S. Department of Labor's Final Rule implementing the FFCRA exceed the agency's authority under the statute. New York challenged the Final Rule's exclusion of paid leave to those whose employers did not have work for them, the definition of "health care provider" being too broad, that it requires employer consent for intermittent leave, and that the Final Rule required the employee to provide documentation prior to taking leave under the FFCRA. The Court ruled that the Department of Labor exceeded its authority by: excluding employees from family and sick leave provisions of the FFCRA when their employers had no work for them; broadly defining "health care provider," for purposes of the Act, as anyone employed at any doctor's office, hospital, health care center, clinic, nursing home, pharmacy, post-secondary educational institution offering health care instruction, or many other similar entities; requiring employer consent for intermittent leave; and requiring that employees submit to their employer, prior to taking leave under the Act, certain documentation. The Court ruled that the agency did not exceed its authority, however, insofar as it promulgated Final Rule provision banning intermittent leave based on qualifying conditions that implicated an employee's risk of coronavirus transmission.

### B. Coronavirus Aid, Relief, and Economic Security Act

The CARES Act is a two trillion dollar coronavirus stimulus bill enacted in March 2020 to help combat the hardships the coronavirus imposed on individuals and businesses across the nation. The CARES Act provided $100 billion to hospitals and health providers and increases Medicare reimbursements for treating coronavirus; $750 million to food banks, to Puerto Rico and the other territories for food assistance, and to programs for food distribution on American Indian reservations; and relief to those with federally-backed mortgages and delayed certain student loan payments. The CARES Act's more familiar provisions, the Paycheck Protection Program and federal pandemic unemployment compensation program, have since expired.

### C. EEOC Guidance on Coronavirus in the Workplace

**In May 2021, the EEOC issued technical assistance guidance concerning employer compliance with applicable EEO laws in relation to the COVID-19 pandemic. The regulations can be found here: https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws. Some of the key guidance is explained below.**

#### 1. Mandatory Vaccines

The federal EEO laws, like Title VII and the ADA for example, do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for the Coronavirus. Such a mandate, however, would be subject to reasonable accommodation requirements of the

ADA and Title VII (religious discrimination). Employers should be sure that the vaccine mandate does not create a disparate impact on employees based on their protected status, with the concern being that some segments of the population may have less ready access to the vaccine. Employers making the vaccine available to all employees at the place of employment may be one method to curb any disparate impact. As with all policies, the vaccine mandate must be implemented in a way that treats all employees the same regardless of their protected status.

#### 2. Incentives to Vaccinate

Employers are permitted to offer employees certain incentives to obtain the Coronavirus vaccine and offer proof of vaccination. This may include, for example, offering modest bonus payments, extra days or time off, or prizes. The incentive, however, must not be so substantial as to be coercive. The incentive must also not be so substantial that it unfairly discriminates against those that cannot obtain the vaccine. For example, the incentive must be sufficiently de minimis so that those that cannot obtain the vaccine are not precluded from a benefit of employment offered to other employees.

#### 3. ADA Disability and Title VII Religious Accommodations Related to Vaccine Mandates

Any employer policy requiring that employees obtain a Coronavirus vaccine would be subject to reasonable accommodation requests under both the ADA and Title VII. As it relates to the ADA, employees may be unable to receive the vaccine due to preexisting health conditions or a disability. Employers may require the employee to provide medical documentation verifying their medical restriction in relation to vaccination. As it relates to Title VII, employees may request reasonable accommodation due to a sincerely held religious belief that precludes them from being vaccinated. In this context, sincerely held religious beliefs are defined broadly, and employers should likely not question an employee's religious beliefs other than in narrow exceptions. Upon request for such accommodations, the employer must engage in an interactive discussion with the employee to determine if reasonable accommodations exist that do not otherwise impose an undue burden on the employer. Examples of reasonable accommodations may be that the employee must wear a mask while at work, socially distance, be tested for the Coronavirus weekly, telework, job reassignment, or daily temperature checks. These are all likely reasonable accommodations that satisfy the company's objective of workplace health and safety without interfering with the employee's disability or sincerely held religious belief.

#### 4. Treatment of Vaccination Records as Confidential Health Records Under the ADA

With limited exceptions, the ADA requires employers to keep confidential any medical information regarding employees or applicants. As related to the Coronavirus, this includes records of diagnosis, treatment, temperature checks, vaccination records, and the fact that the individual requested or is receiving a reasonable accommodation. Employers should store this information in the employee's medical file, which should be maintained separately from the employee's standard personnel file so as to keep it secure and confidential. Though medical information should be kept confidential, this does not prevent supervisors from reporting to the company their knowledge that another employee has the Coronavirus or is exhibiting symptoms. The company may then contact the employee and obtain a list of coworkers with whom the infected employee was in contact. Employers may then contact coworkers to inform them that

"someone" they were in contact with tested positive for the Coronavirus, but the employer should not name the specific infected employee unless the employee gives permission to do so.

### D. Occupational Safety and Health Administration

OSHA issued emergency temporary standards specifically for the healthcare industry regarding the coronavirus and how such healthcare employers should protect workers and patients from the coronavirus. (29 C.F.R. § 1910.502.) OSHA has not otherwise issued new regulations regarding health and safety practices in the workplace related to coronavirus. Its general duty clause, however, requires employers to furnish to each worker "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." As a general principle, employers are expected to comply with CDC guidelines as well as state and local health requirements in their workplaces. OSHA did enact a regulation governing reporting of coronavirus in the workplace. In all instances in which a worker tests positive, the employer must make a determination as to whether the illness is work-related and, if so, record the illness on OSHA logs. Workplace deaths related to the coronavirus must be reported immediately. OSHA will evaluate the reasonableness of the employer's investigation and the evidence available to the employer at the time of the investigation in determining whether the employer properly reported workplace coronavirus instances.

### E. Case Law

*Klaassen v. Trustees of Indiana Univ.*, No. 21-2326, 2021 WL 3281209 (7th Cir. Aug. 2, 2021). Indiana University issued a policy that required students to be vaccinated against COVID-19 or wear masks and be tested twice a week, and the students sought an injunction claiming the policy violated the Due Process Clause of the Fourteen Amendment. The district court denied the injunction, and the students filed a motion for injunction pending appeal. The Seventh Circuit denied the requested injunction, relying heavily on legal precedent from 1905 that permitted statewide vaccination against smallpox. The Court reasoned that here, Indiana University's policy was enforceable because it was less problematic than the prior statewide vaccination case law. Specifically, Indiana University's policy permitted exceptions for medical necessity and religious belief, the policy applies only to students seeking to attend the university, and the students were free to pursue their education elsewhere if they did not agree with the policy. As such, the Court determined the policy was not constitutionally problematic.

## VII. Indiana Restrictive Covenant Updates

*Heraeus Med., LLC v. Zimmer, Inc.*, 135 N.E.3d 150 (Ind. 2019). After a former employee created a competing company and solicited employees away from his former employer, the employer brought suit to enforce the employment agreement entered into by the parties. Specifically, the employment agreement contained a non-solicitation covenant that prevented the former employee from soliciting "any" of the employer's employees to work for a competing business. The employer sought an emergency injunction, and the trial court granted the injunction and enjoined the former employee from soliciting these employees. The former employee appealed, and the Indiana Court of Appeals determined that the non-solicitation provision was overly broad and unenforceable because it applied to "any" of the employer's employees, not just those who possessed knowledge that would give a competitor an unfair advantage. The Court of Appeals, however, made the non-solicitation provision enforceable by

adding limiting language to this effect pursuant to a provision in the employment agreement giving courts authority to amend the agreement should it be found to be unenforceable. Upon transfer, the Indiana Supreme Court vacated the Court of Appeals decision because the blue pencil doctrine does not allow courts to add language to the agreement, even if a provision in the agreement says that courts have that authority. As a result, the Indiana Supreme Court ruled that the non-solicitation agreement was void and unenforceable because it applied to all of the employer's employees, rather than solely to those employees that possess knowledge that would give a competitor an unfair advantage.

Indiana Code § 25-22.5-5.5 *et seq.* (Physician Non-Compete Agreements). In July 2020, Indiana passed a new statute relating to physician non-compete agreements entered into after July 1, 2020. To be enforceable, the physician non-compete agreement must include provisions relating to notifying patients of the physician's departure from employment, requiring the employer to provide the physician's current contact information to patients that request it, requiring that the physician have access to his or her patients' medical records upon receipt of consent, and allowing the physician the option to purchase a release from the non-compete for a "reasonable price." What constitutes a "reasonable price" is not defined by the statute, and case law has yet to determine how this term will be interpreted.

# Indiana Continuing Legal Education Forum

## Employment Law Update 2021

Presented by Greg Guevara

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September 22, 2021

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# Impact of COVID-19 on Employers

- Challenges in managing increasingly remote workforce
- Reallocation/restructuring of physical workspaces
- Managing employee absences/requests for leave
- Developing/enforcing vaccination, testing, and masking rules
- Maintaining productivity while protecting employees
- Keeping up with constantly changing regulations/guidance
- Employee morale/mental health: fear/anger/frustration/ fatigue/depression
- Shortage of available workers across many industries

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# Families First Coronavirus Relief Act

- FFCRA became effective April 1, 2020
- Covers employers of fewer than 500 employees
- Required employers to provide leaves of absence reimbursed through payroll tax credit for certain reasons related to COVID-19
- Mandatory leave expired December 31, 2020
- Has not led to significant litigation as some anticipated

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# American Rescue Plan Act (March 2021)

- Extended FFCRA tax credits through September 30, 2021
- Paid leave is now voluntary on part of employer
- Reasons for leave include:
  - Federal, state, or local quarantine or isolation order
  - Directive by health care provider to quarantine
  - Covid testing and awaiting test results/diagnosis
  - Covid vaccination and recovery
  - Care for child whose school/day care is closed
- https://www.irs.gov/newsroom/tax-credits-for-paid-leave-under-the-american-rescue-plan-act-of-2021-for-leave-after-march-31-2021

# Federal Unemployment Benefits

- American Rescue Plan provided enhanced federal unemployment benefits that ended September 5, 2021
  - Federal Pandemic Unemployment Compensation – additional $300 per week
  - Pandemic Emergency Unemployment Compensation – extended state U/C benefits by 13 weeks (from 26 weeks to 39 weeks)
  - Pandemic unemployment assistance – provided benefits for some workers not eligible for state U/C (i.e., independent contractors)

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# OSHA Requirements

- General Duty clause – employers must furnish "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm."
- In general, employers must take reasonable cautions to protect employees from risks associated with CV19 exposure
- Employers must report Covid cases in their OSHA 300 logs if:
  - Confirmed case of CV19
  - Reasonable basis to conclude it is work-related
  - Illness is otherwise reportable (i.e., medical treatment, lost time, etc.)

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# OSHA Requirements

- Employee death related to workplace Covid exposure must be reported to OSHA immediately
- On June 21, 2021, OSHA issued an Emergency Temporary Standard (ETS) addressing workplace safety requirements and guidance in healthcare settings in light of COVID-19
- On July 7, 2021, OSHA issued an Interim Enforcement Response Plan for worksites not covered by the ETS
- https://www.osha.gov/SLTC/covid-19/standards.html

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# Employee Health Screening/Testing

- Americans with Disabilities Act (ADA) considerations
  - Medical exams/inquiries under ADA (employees only) must be "job-related and consistent with business necessity"
  - Employers may require negative CV19 test as condition of entering the workplace
  - Test results are confidential medical records under ADA
  - Identity of CV19-positive employee also must remain confidential
  - HIPAA does not apply to most employers as non-covered entities, but does apply to contract nurses or health care professionals

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# Workplace Vaccine Mandates

- EEOC Guidance on COVID-19 in the Workplace (Updated May 28, 2021)
- New guidance specifically addresses vaccine mandates
  - Employers may require vaccinations as a condition of employment for all employees entering the workplace, with two exceptions
  - Under the ADA, employers must accommodate employees whose medical condition prevents them from being vaccinated
  - Under Title VII, employers must accommodate the "sincerely held religious beliefs" of employees who are opposed to vaccination on religious grounds, as well as employees who are pregnant

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# Workplace Vaccine Mandates

- Reasonable accommodation may include:
  - Remote work
  - Socially distanced work space
  - Mandatory Covid testing
- Vaccination records are considered confidential medical records under the ADA and should be kept in a separate medical file
- Employers may also create incentives for employees to be vaccinated, as long as those incentives are not coercive
  - Common incentives include extra PTO/holidays, vaccination bonuses, and gifts/prizes

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# Workplace Vaccine Mandates

- Health care premium surcharges for non-vaccinated plan participants have not been addressed by the EEOC
- https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

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# COVID-19 and Disability Accommodation

- COVID-19 usually will not be considered a “disability” under the ADA because of its short-term nature; long COVID may be considered a disability, however
- Underlying health conditions that make employee at higher risk of CV19 illness may be a disability (e.g., diabetes, auto-immune disorders, etc.)
- If potential disability is identified, may need to evaluate reasonable accommodation
- Reasonable accommodation may include remote work, extended leaves of absence, modified work schedule
- Age is not a disability so no accommodation is required

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# President Biden's COVID-19 Action Plan

- Six Pronged Strategy Announced by President Biden on September 9, 2021
- Key component of plan is mandatory vaccinations (with limited exceptions) for certain employees:
  - All federal employees and contractors (~4 million workers)
  - Health care workers in hospitals, clinics, and nursing homes that accept Medicare and Medicaid payments (~17 million workers)
  - Employees of Head Start early childhood education and other federal education programs (~300K workers)

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# President Biden's COVID-19 Action Plan

- Employees of private sector employers with 100 or more workers (~80 million workers)
  - If employees are not vaccinated, they must be tested weekly for Covid
  - Paid time off for vaccination and recovery will also be required
- Fines of up to $14,000 for noncompliance
- OSHA will implement emergency temporary standard to implement these rules
- The private sector vaccine mandate and paid time off requirements are likely to face significant legal challenges

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# Selection of Workers for RIFs/Layoff/Recall

- Risk of EEO claims under disparate treatment or disparate impact theories
- Employers should identify and document legitimate, non-discriminatory criteria for selecting workers
- Selection criteria may have a disparate impact on certain workers in protected classifications (e.g., age, race, national origin, etc.)
- If so, selection criteria must be job-related and consistent with business necessity

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# Sexual Orientation/Gender Identity Discrimination

- *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (June 15, 2020): Title VII prohibits discrimination against an employee or applicant on the basis of such individual's sexual orientation or transgender status
  - Three consolidated cases from the Second, Sixth, and Eleventh Circuits which resolved a circuit split on this issue
  - The Court found that discrimination on the basis of sexual orientation or transgender status is a form of sex discrimination: "That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."

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# Indiana Non-Compete Law

- *Heraeus Medical, LLC v. Zimmer, Inc.*, 135 N.E.3d 150 (December 3, 2019):
  - Indiana continues to follow the blue-pencil rule in enforcing restrictive covenants (i.e., non-competition/non-solicitation provisions); courts cannot "reform" an overbroad covenant even if the parties included a reformation provision in their agreement
  - Employee non-solicitation provisions must be limited to those employees who "have access to or possess any knowledge that would give a competitor an unfair advantage."

# Salary Threshold for "White Collar" Exemptions

- FLSA Overtime Exemptions: Executive, Administrative, Professional, Computer, Outside Sales
  - One criterion for most executive, administrative, professional, and some computer employee exemptions is a minimum weekly salary (the salary basis test)
  - Effective January 1, 2020, minimum weekly salary increased from $455/week (23,660/year) to $684/week ($35,568/year)
  - Highly Compensated Employee salary threshold increased from $100,000/year to $107,432/year
  - Nondiscretionary bonuses and incentive payments may be considered to satisfy up to 10 percent of salary level

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# Sexual Harassment

- Sexual Harassment is form of prohibited sex discrimination under Title VII and the Indiana Civil Rights Act
- Defined as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when submission or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile or offensive work environment" – U.S. Equal Employment Opportunity Commission

# Elements of Sexual Harassment

- Conduct may be *verbal or physical* (including visual)
- Conduct must be *sexual in nature*
- Conduct must be *unwelcome*
- Conduct must be *intimidating, hostile, or offensive* – both objectively and subjectively
- Conduct must be *sufficiently severe or pervasive* to affect the victim's work environment
- The harasser can be a supervisor, a co-worker, or a non-employee of the same or opposite gender

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# Types of Harassment Claims

- *Quid Pro Quo*: Required to submit to sexual advances as a condition of employment
- *Hostile Work Environment*: Severe or pervasive behavior of a sexual nature that interferes with the employee's ability to perform his or her job

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# Other Types of Harassment

- Other Hostile Environment Claims (not *quid pro quo*):
  - Gender (including sexual orientation or transgender status)
  - Race
  - National origin
  - Religion
  - Age
  - Disability

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# Affirmative Defense To Liability

- Strict liability for employers in *quid pro quo* sexual harassment cases
- Affirmative defense available in hostile environment cases if:
  - Employer exercises reasonable care to prevent and correct promptly any sexually harassing behavior (*e.g*. sexual harassment policy and reporting procedure with prompt remedial action)
  - Victim unreasonably failed to take advantage of any preventative or corrective opportunities (*e.g.*, knew about the anti-harassment policy but failed to report)

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# Workplace Drug Testing Rules

- In general, employers may continue to enforce drug-free workplace and drug testing rules
  - Pre-employment drug screens
  - Random testing
  - "Reasonable suspicion" testing following workplace accident or injury
- Due to shortages of qualified workers, many employers are choosing to relax drug testing standards or eliminate pre-employment testing
  - Risks must be assessed in safety sensitive positions
  - Co-worker liability limited to worker's compensation, but not customers or members of the public

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# Mandatory Arbitration of Class Claims

- *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018): The Federal Arbitration Act requires the enforcement of arbitration agreements even when such agreements waive the right to proceed on a class (or collective) basis
  - Three consolidated cases from the Fifth, Seventh, and Ninth Circuits resolving a circuit split on enforceability of class and collective action waivers in arbitration
  - The right to participate in class action lawsuits or collective claims under the Fair Labor Standards Act is not a form of "protected concerted activity" under the National Labor Relations Act

# Thank You!

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# Section Eleven

# State and Federal Tax Update

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Lafayette, Indiana

## Section Eleven

## State and Federal Tax Update…….....Richard L. Bartholomew

PowerPoint Presentation

# 43rd ANNUAL JUDGE ROBERT STATON INDIANA LAW UPDATE

## STATE AND FEDERAL TAX UPDATE

BY RICHARD BARTHOLOMEW, JD, CPA

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# IRS IS TIRED

- As of May 2021 the IRS had over 8.3 million returns from last year (2019) still waiting to be processed. (1,200% increase)
- On March 1 the IRS was waiting for 70,000 tax return requests to be fulfilled

# AND THAT'S NOT ALL

- Just 14% of call to toll free management help lines were answered
- 2% (1 in 50 callers) were being answered on the 1040 help lines
- 29 million returns were being held for some sort of manual processing

# BUDGET INCREASE

- The current administration has proposed a $1.2 billion budget increase
- More than 800 new auditors have been hired so far and the IRS wants to hire more auditors and collection agents

# IRS COMPUTER

- One downside of the backlog is that IRS personnel can't get things done in a timely manner
- But the IRS computer still uses the same time frames to send out notices and start collections
- What if you respond but the IRS agents haven't read it?

# TAX COURT IS BEHIND

- The National Taxpayer Advocate just issued guidance on what to do if the IRS assesses taxes and starts collections even after you have filed in Tax Court
- Email taxcourt.petitioner.premature.assessment@irs.gov

# BUT WHAT ABOUT REGULAR IRS CORRESPONDENCE

- Not a chance it will be read on time
- Might have to get call IRS and ask for freeze on account while they look at your response

# CONGRESS SENDS $

- Congress in response to COVID-19 pulled out all the stops to help keep the economy going
- Lets look at a few items

# RECOVERY REBATE CREDIT

- First and second payments were applicable to 2020 tax returns
- Third payment applies to 2021
- Will be paid in advance
- The 2020 payments are causing some of the hold ups with 2020 returns as the IRS tries to confirm payments were made

# 3rd ROUND

- If your income is lower in 2021 and you didn't get the full advanced payment, you will get the difference on your 2021 return
- One big change is that now all dependents (not just those under 17) qualify for the credit

# TAX PLANNING

- $1,400 rebate per person for 2021
- Is your college student still your dependent (if they worked and had income)? (Assuming mom and dad are phased out of the credit 150K)
- The child's rebate is likely to be bigger then other tax benefits mom and dad get with them as a dependent
- Remember exemptions are gone

# ADVANCED CHILD TAX CREDIT

- IRS is sending out monthly checks as advance child tax credit
- Taxpayer might owe it back when they file their return if their income goes up too much
- There are procedures for taxpayers to return or refuse the money

# PPP LOANS

- Payroll Protection Program loans were administered by the SBA though lenders
- They can be forgiven if certain criteria is met
- The forgiveness won’t be taxable

# PPP CRITERIA

- 60% of the forgiven amount must be used for payroll
- Costs must be incurred or paid within 24 weeks of getting the loan
- There are rules about reduction in employees but there are several exceptions

# PPP - 2

- Congress liked PPP so much they came up with PPP-2
- Requirements were loosened up (for example perishable supplies were included as expenses that could be paid with PPP loan money)

# PPP-2 cont.

- Loan forgiveness for PPP-2 is about to open
- So if you got a second loan, get ready to submit  the forgiveness application

# FAMILIES FIRST

- Under the Families First provision, an employer can keep tax deposits equal to amounts paid to sick employees or employees that have to take care of sick or quarantined people (including spouses and dependents, up to limits)
- This is still in effect

# Employee Retention Credit

- If an employer was closed, or operated at reduced rates because of government orders (like restaurants), or had a quarter with a reduction of 50% in 2020 (or 20% in 2021) compared to 2019, the employer may take a credit of 50% of wages paid to non-owners during that time up to $5,000 per employee in 2020

# ERC cont.

- Up to 70% on the first $10,000 per quarter in 2021
- If income dropped instead of forced closures, then the period that counts is the quarter of the drop and the following quarter
- Amounts paid only during closures if mandated reductions

# TAX INCREASES ANYONE?

- The current administration has proposed significant tax increases, including lower death tax exemptions, modified step up in basis at death, higher capital gains income tax rates and higher ordinary income tax rates
- But will they be passed, and will they be retroactive?

# NO ONE KNOWS

- With the new Delta variant, there is less pressure to raise taxes now, but big plans for big spending in Congress might change that

# ESTATE TAX EXEMPTION

- Currently $11,700,000 in 2021
- It’s scheduled to come back down to around $6,000,000 in 2026
- Now might be a good time to dust off the estate plans and rethink them, (especially if the exemption is changed to the worst case suggestion of $3,500,000)

# NEW POA PROCEDURES

- IRS just launched Tax Pro Account Website (7-19-21)
- It allows individual taxpayers to control online who can represent them and/or view their tax records.
- No more manual processing (which is running more than 6 weeks at this point)
- Transcripts will be almost immediately available (actually taxpayers can get them immediately)

# LLC MAKING "S" ELECTION

- A common problem is using a standard partnership agreement for the LLC and then the LLC makes an "S" election
- Biggest problem is the tax language in a normal partnership agreement destroys an S election

# ABA TAX MEETING

- Dailey Tax Report reported in the May 2021 meeting, the IRS said they were considering automatic relief for the fact pattern above
- However, it hasn’t been done yet, and has been in the hoper for 3 years now
- You better check your operating agreements

# BIT COINS

- Can you buy a Tesla with Bit Coins this month (I think you could last month).
- Understandably, the IRS is concerned and has been issuing rules about the tax treatment of virtual currency

# BIT COINS cont.

- For example if you own a virtual currency and you receive a different version (“Bit Coin” holders got “Bit Coin Cash”), you have income to report and pay tax on?
- These are generally called Air Drops, or Hard Forks

# HIDE AND SEEK

- The IRS has already issued John Doe Subpoenas to organizations like Google asking for the name of people who downloaded virtual currency software (like virtual currency wallets)

# CATCH ME IF YOU CAN

- The commissioner of the IRS has asked Congress for legislation to help regulate (tax) cryptocurrency
- When the Senate passed the Infrastructure bill, it included reporting requirements for those who transfer cryptocurrency in excess of $10,000 to report it to the IRS, just like banks do

# TAX PREPARER CONVICTED

- John Nardozzi (CPA)((not for long)) with over 40 years experience was convicted of conspiracy to defraud the US government and 8 counts of aiding and assisting in filing false tax returns (U.S. v. Nardozzi 127 AFTR2d 2021-XXX 6/24/2021)

# THE PLOT THICKENS

- John's client was Brian Joyce Attorney at Law and Massachusetts State Senator
- Joyce was indicted on 113 felony counts…
- The bribes etc. were reported as law firm fees by the Joyce law firm

# GOOD NEWS-BAD NEWS

- Good news – reporting the bribes was the right thing to do
- Bad News – making up phony deductions wasn't
- It cost the government over $598K
- Jury didn't believe the CPA just relied on the bookkeepers representations
- Did I mention the Senator was his brother in law?

# MORAL OF THE STORY

- According to the IRS (and AICPA) you can rely on representations by the client unless you know (or should know) they aren't true, or
- The facts would put a reasonable person on notice to dig further

# CPA RECKLESS IN FAILING TO FILE FBAR'S

- FBAR is the reporting of foreign financial (typically bank) accounts if the balance exceeds $10,000 at any time during the year

# FBAR cont.

- Mr. Kronowitz was a US citizen and a long time CPA.
- He didn’t file FBAR’s on his own foreign accounts that totaled in excess of $10,000.
- He didn’t dispute his failure, just the amount of the penalty

# PENALTY

- The penalty for non-willful failure is generally limited to $10,000
- The penalty for willful failure is generally the greater of $100K or 50% of the largest account balance
- Standard for willful is “Clearly ought to have known there was a grave risk that an accurate FBAR was not being filed, and
- The taxpayer was in a position to find out for certain very easily”

# FBAR NOW FinCEN Form 114

- Even though most preparers still call it FBAR filing, the technical name has been changed to FinCEN Form 114
- In the worst situations the penalty can equal 100% of the highest balance of the foreign accounts
- One penalty was $12.9 million

# DISTRIBUTIONS FROM FOREIGN TRUST

- US owners of foreign trusts must report annually to the IRS or face a 5% penalty
- Recipients of distributions must also report annually or face a 35% penalty on the gross amount of the distribution
- The Form to use is Form 3520

# EMILY WILSON

- Wilson v. U.S. 128 AFTR 2d 2021-5294 7/28/21, held that the owner and beneficiary of the trust can not escape the 35% penalty by claiming that they already had to pay the 5% penalty
- 35% of 9.2 MM was over $3.2 MM

# PANAMA LAW FIRM

- July 29, 2021, the IRS issued a press release that the Justice Department obtained a court order to issue a John Doe summons for US taxpayers who used a Panamanian law firm to evade federal income taxes

# POLS

- POLS is a law firm that openly advertises it can help US clients conceal their ownership of off shore accounts and entities
- Summons will be served on 10 entities including couriers and financial institutions

# POSSIBLE PENALTIES

- The press release says that penalties will include failure to file FinCEN Form 114 (FBAR's) and failure to report ownership and/or distributions from foreign trusts
- And of course tax fraud

# $300,000 IN CREDIT CARD REWARDS

- Mr. Anikeev figured out how (in two years) to earn over $300,000 of American Express credit card rewards on a card with a $35,000 credit limit

# IRS OBJECTS

- The IRS wanted Mr. Anikeev to pay tax on the rewards
- However, the Tax Court found that the IRS "Long Standing policy of holding that card rewards are not taxable, applied to almost all of the rewards"
- Anikeev v. Commissioner, TC Memo 2021-23
- But you better read it for the details.

# Want to turn in a Church?

- The IRS has updated its web site with information on how a person who suspects that a tax exempt organization may not be operating in compliance with the tax laws can report them
- Form 13909 is submitted

# WHAT YOU WILL FIND OUT

- The IRS will acknowledge the complaint, but unless you read about it in the papers, you will not find out what the results were because of restrictions on disclosing tax information

# EXECUTOR LIABLE

- Mr. Frese, a licensed attorney was the executor of an estate
- After receiving an IRS notice of deficiency, he made a distribution to the heirs which meant the estate couldn’t pay the tax liability after they lost in Tax Court

# GOT NO MONEY

- Mr. Frese made an offer in compromise based on doubt as to collectability
- Mr. Frese forgot about the Federal Priority Statute which creates personal liability to the fiduciary who makes distributions while the estate is insolvent, or makes it insolvent and had knowledge or notice of the IRS claim

# THE IRS WANTS YOU TO PUT IN A PRIVATE BATHROOM AT WORK

- With Bonus Depreciation a taxpayer can expense the cost of new assets
- The Coronavirus Aid, Relief and Economic Security Act (CARES Act) retroactively added what can be expensed

# QUALIFIED IMPROVEMENT PROPERTY

- Qualified Improvement Property includes most improvements to the interior portion of a non-residential building if the improvement was placed in service after the date the building was placed in service

# PRIVATE BATHROOM

- In Rev. Proc 2017-33 the IRS gave an example of a taxpayer who had a building built and then added a private bathroom one day later
- The interior improvement to a non-residential building qualified to be written off in the year it was placed in service.

# YOUR OFFICE

- Do you need some sprucing up of the office?
- Private bathroom?
- Jacuzzi?

# INDIANA COMPLIANCE

- Indiana has adopted a number of federal provisions, including the three year spread of income for pension and IRA distributions caused due to complications from COVID-19
- They did not adopt the exemption from tax for unemployment benefits

# HAPPY NOTE?

- The IRS is planning on hiring an additional 87,000 enforcement employee's (audit and collections) if they get the budget infusion they are anticipating
- Somebody's going to be busy

# 43rd ANNUAL JUDGE ROBERT STATON INDIANA LAW UPDATE

## STATE AND FEDERAL TAX UPDATE

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# Section Twelve

# Cybersecurity and Ethical Pitfalls of Everyday Law Office Computing

**Paul J. Unger**
Affinity Consulting Group, LLC
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## Section Twelve

## Cybersecurity and Ethical Pitfalls of Everyday Law Office Computing…… Paul J. Unger

# Cybersecurity and Ethical Pitfalls of Everyday Law Office Computing

## *Presented for Indiana Law Update 2021*

*Paul J. Unger, Esq. (punger@affinityconsulting.com)*
*Affinity Consulting Group*


Protection of client information, confidences and secrets is one of the most sacred traits defining the relationship between attorneys and their clients. Without a proper understanding of technology, you may be compromising that relationship. Email, cloud computing, traditional computers, smartphones, tablets, networks, viruses, worms, spyware, metadata, electronic court filings, just to name a few, may already be compromising that relationship without you even knowing it.

Take email as an example. In 2020, the average legal professional will receive between 125-150 messages daily. Without question, email is one of the most important technological communication advancements of the past 100 years. It has fundamentally changed the way we communicate with clients and the way that we do business. Major corporations and law firms are run via email communication instead of face-to-face communication. For lawyers, emails present a wide array of issues that most of the business world and ordinary consumers will never face.

Under ABA Model Rule 1.6, Attorneys have a broad obligation to act competently and reasonably protect client information and confidences. Rule 1.6 (replacing DR 4-101) revised the scope of confidential information. Similarly, in Canada, Model Code of Professional Conduct, Rule 3.3 requires the same protection of client information and confidences. Practicing law without technology (and email) has almost become an impossibility. However, law and technology have become so intertwined that you can find yourself in many ethical dilemmas pretty quick. This seminar and article seek to address these issues that may lead to an ethical violation or malpractice.

## "Competence" Re-Defined and Taking Reasonable Steps to Protect Client Information

**National Trend – Examples**

**Pennsylvania (approved October 22, 2013)**

**Rule 1.1 – Comment 8: Maintaining Competence**
[8] To maintain the requisite knowledge and skill, a lawyer must keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Pennsylvania was the first state to adopt the new language. 38 states have adopted the Duty of Technical Competence. Some of those include:

Alaska (effective October 15, 2017)
Arkansas (effective June 26, 2014)
Arizona (effective January 1, 2015)
Colorado (approved April 6, 2016)
Florida (effective January 1, 2017)
Indiana (effective January 1, 2018)
Illinois (effective January 1, 2016)
Kansas (effective March 1, 2014)
Kentucky (effective January 1, 2018)
Louisiana (adopted April 11, 2018)
Michigan (effective January 1, 2020)
Minnesota (approved February 24, 2015)
Missouri (approved Sept. 26, 2017)
New Hampshire (effective January 1, 2016)
New York (adopted March 28, 2015)
North Carolina (approved July 25, 2014)
Ohio (effective April 1, 2015)
Oklahoma (adopted September 19, 2016)
Pennsylvania (effective October 22, 2013)
South Carolina (approved November 27, 2019)
Virginia (effective March 1, 2016)
Washington (effective Sept.1, 2016)
West Virginia (effective January 1, 2015)
Wisconsin (effective January 1, 2017)

Some states have not yet adopted the new language within their rules of professional responsibility. As of February of 2021, those include:

Oregon
Nevada
Mississippi
Alabama
Georgia
Maine
Maryland
New Jersey

Some states have not adopted the rule change but have addressed it in an ethics opinion. For example, **California** has not formally adopted the change to its rules. However, they expressly acknowledge the duty of technical competence in Formal Opinion No. 2015-193, and even cites ABA's Comment 8.

As another example, **Oregon** in Formal Opinion 2011-187 imposes a duty of technical competence *when dealing with metadata* and cites Arizona Ethics Op No. 07-03. It is reasonable to conclude that all Oregonian attorneys should have general technical competence (not just technical competence with metadata) in light of this opinion on metadata and the national trend.

**Acting Competently to Preserve Confidentiality**

**Indiana Rule 1.6, Comments 16 & 17**

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

**Ohio Rule 1.6 (and Model Rule 1.6) and Comments 18 & 19**

**Rule 1.6(c) – Confidentiality of Information**: A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

**Rule 1.6 – Comment 18 & 19: Acting Competently to Preserve Confidentiality**

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule.

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Similarly, many other states have taken the same approach in their comments, as the ABA and Ohio. Take Maine, New Hampshire and Oklahoma as an example:

**Maine Rule 1.6**
**Acting Competently to Preserve Confidentiality – Comments 16 & 17**

*Acting Competently to Preserve Confidentiality*

*[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. Consistent with Section 66 of the Restatement, a lawyer who takes action or decides not to take action allowed under this Rule is not, solely by reason of such action or inaction, subject to professional discipline, liable for damages to the lawyer's client or any third persons, or barred from recovery against a client or third persons. The legal effect of the lawyer's choice, however, is beyond the scope of the Model Rules of Professional Conduct.*

*[17] When transmitting a communication that includes confidences or secrets of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.*

**New Hampshire Rule 1.6**
**Acting Competently to Preserve Confidentiality - Comments 18 & 19**

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these rules.

**Oklahoma Rule 1.6**
**Acting Reasonably to Preserve Confidentiality – Comments 16 & 17**

[16] Paragraph (c) requires a lawyer to act reasonably to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern date privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3] -[4].

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

**Louisiana Rule 1.6 – Comments 18 and 19**

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

**Mississippi Rule 1.6 + Comments**

Mississippi requires reasonableness and competency, but they don't provide as much guidance in their comments as other states:

> **Acting Competently to Preserve Confidentiality.** A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See rules 1.1, 5.1 and 5.3.
>
> When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule.

## Cloud Computing

Cloud computing is an umbrella term that covers several concepts. Within the scope of legal technology, it most often refers to Software-As-A-Service ("SaaS"). There are a ridiculous number of definitions of SaaS, but I think this one sums it up succinctly without using 15 more acronyms requiring definitions:

> "Generally speaking, it's software that's developed and hosted by the SaaS vendor and which the end user customer accesses over the Internet. Unlike traditional packaged applications that users install on their computers or servers, the SaaS vendor owns the software and runs it on computers in its data center. The customer does not own the software but effectively rents it, usually for a monthly fee. SaaS is sometimes also known as hosted software or by its more marketing-friendly cousin, 'on-demand.'"

To be clear, this means that you do not have the software installed on your computer - it is accessible only via a browser on the Internet. Further, your data and/or documents are located on the vendor's servers and not on your computer or server.

This obviously raises ethical concerns because you are entrusting client confidential information with someone other than you and your employees.

An excellent compilation of ethics decisions around the country can be found at the ABA Law Practice Management Section's Legal Technology Resource Center (LTRC).

http://www.americanbar.org/groups/departments_offices/legal_technology_resources.html

Probably the best decision that I have read to date in the U.S. comes from Pennsylvania:

http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/saas.html

Pennsylvania, and nearly every jurisdiction who has addressed the issue employ a standard of reasonableness and typically requires segregation of data, privacy/security of data, ability to keep a local download, and reliability of the vendor. The court stated:

The standard of reasonable care for "cloud computing" may include:

- Backing up data to allow the firm to restore data that has been lost, corrupted, or accidentally deleted;

- Installing a firewall to limit access to the firm's network;
- Limiting information that is provided to others to what is required, needed, or requested;
- Avoiding inadvertent disclosure of information;
- Verifying the identity of individuals to whom the attorney provides confidential information;
- Refusing to disclose confidential information to unauthorized individuals (including family members and friends) without client permission;
- Protecting electronic records containing confidential data, including backups, by encrypting the confidential data;
- Implementing electronic audit trail procedures to monitor who is accessing the data;
- Creating plans to address security breaches, including the identification of persons to be notified about any known or suspected security breach involving confidential data;
- Ensuring the provider:
    - explicitly agrees that it has no ownership or security interest in the data;
    - has an enforceable obligation to preserve security;
    - will notify the lawyer if requested to produce data to a third party, and provide the lawyer with the ability to respond to the request before the provider produces the requested information;
    - has technology built to withstand a reasonably foreseeable attempt to infiltrate data, including penetration testing;
    - includes in its "Terms of Service" or "Service Level Agreement" an agreement about how confidential client information will be handled;
    - provides the firm with right to audit the provider's security procedures and to obtain copies of any security audits performed;

- will host the firm's data only within a specified geographic area. If by agreement, the data are hosted outside of the United States, the law firm must determine that the hosting jurisdiction has privacy laws, data security laws, and protections against unlawful search and seizure that are as rigorous as those of the United States and Pennsylvania;

- provides a method of retrieving data if the lawyer terminates use of the SaaS product, the SaaS vendor goes out of business, or the service otherwise has a break in continuity; and,

- provides the ability for the law firm to get data "off" of the vendor's or third-party data hosting company's servers for the firm's own use or in-house backup offline

- Investigating the provider's:

  - security measures, policies and recovery methods;

  - system for backing up data;

  - security of data centers and whether the storage is in multiple centers;

  - safeguards against disasters, including different server locations;

  - history, including how long the provider has been in business;

  - funding and stability;

  - policies for data retrieval upon termination of the relationship and any related charges; and,

  - process to comply with data that is subject to a litigation hold.

- Determining whether:

  - data is in non-proprietary format;

  - the Service Level Agreement clearly states that the attorney owns the data;

  - there is a 3rd party audit of security; and,

  - there is an uptime guarantee and whether failure results in service credits.

- Employees of the firm who use the SaaS must receive training on and are required to abide by all end-user security measures, including, but not limited to, the creation of strong passwords and the regular replacement of passwords.

- Protecting the ability to represent the client reliably by ensuring that a copy of digital data is stored onsite.

- Having an alternate way to connect to the internet, since cloud service is accessed through the internet.

In Oregon, while the model rule language in Comments 18 & 19 has not been explicitly adopted, in Formal Opinion No. 2011-188 (revised 2015) they have adopted "the rule to act reasonably" as it applies to an attorneys obligation under Rule 1.6 to protect client confidential information. Opinion 2011-188 specifically concludes that an attorney may contract with a third-party vendor to store and retrieve files online via the Internet (i.e., cloud computing).

In Canada, only the Law Society of British Columbia has directly addressed cloud computing, and the Legal Education Society of Alberta has adopted the same standard. It seems to be a higher standard than the U.S., and many practicing in other areas of Canada that haven't addressed it have felt comfortable following the U.S. rules. The Law Society of BC developed an extensive checklist that is submitted as a separate paper hereto. The checklist encourages potential cloud service users to consider, among other things:

- use of a private cloud, which is designed to offer the same features and benefits of public cloud systems without some of the typical cloud computing concerns such as data control, security, and regulatory compliance;
- encryption of data using a 3rd party encryption product and the compatibility of the 3rd party product with the cloud provider's product and services;
- data security and responsibility for specific aspects of security, including firewall, encryption, password protection and physical security;
- regulatory requirements, including statutory privacy requirements, retention periods indicated in the LSBC Rules, the ability to produce documents with respect to a LSBC investigation in the form and time prescribed, and the retention of custody over client data;
- adequacy of remedies in the event of data breaches, data loss, indemnification obligations, and service availability failures;
- the cloud provider's breach notification obligations;
- termination of the services agreement with the cloud provider, specifically as it relates to issues including cost, service level failures (bandwidth, reliability, etc.), data availability after termination, and transition services;

- technical considerations, including compatibility with existing systems, uptime, redundancies, bandwidth requirements, security measures, and technical support service availability; and
- the track record of the cloud services provider (such as uptime, security, support service level, etc).

The above is neither an exhaustive list of applicable considerations nor a complete summary of the Checklist.

**Advantages of Cloud Computing (Saas):**

- Up Front Price Advantage: Let's say you want to start using a case management application for your practice. If you were to buy one such as Time Matters, you would have to pay for the software outright along with the annual maintenance contract which is mandatory ($905 for the first license and $525 for each license thereafter). You may have to buy a file server or otherwise upgrade your hardware in order to run the program. For an example cost, a new server plus installation and setup could easily run $5,000 - $8,000. Therefore, buying software may turn out to be quite expensive. In the alternative, you would begin subscribing to something like www.rocketmatter.com in which case you would pay $59.99 for the first user per month and $49.99 per user for the next 5 users per month. You wouldn't have to buy a server and you probably wouldn't have to upgrade any of your existing equipment assuming you already have high speed Internet access.

- Ease of Use

- World-Class Data Security

- New Hardware often NOT Required: If you already have a computer and high speed Internet access, then you probably don't need anything else from a hardware perspective.

- Works in Apple or Windows: Since these applications are browser based, they will usually work with both Apple and Windows computers.

- Updates Included: Most cloud application include all updates which are installed for you.

- Technical Support Included: With most cloud applications, you get "free" technical support included with your monthly subscription fee. Of course, purchased software also provides technical support but it is often an extra fee on top of the original software purchase price.

- Access From Anywhere: As long as you're using a computer with internet access, you can probably use your cloud applications. You wouldn't need a VPN, GotoMyPc, or any other type of additional remote access application to accomplish this.

- Share Applications Among Users Spread Out Geographically: For lawyers with multiple offices or who wish to work from multiple locations, cloud applications provide a lot of flexibility. Of course, there are other ways to gain access to programs besides subscribing to cloud applications, but this feature is obviously built in to cloud apps without buying anything else.

- Redundancy Provided: Since your data is stored on the host company's servers, they almost always provide redundant data storage along with that so that there is little (if any) risk that you would lose your data or access to your application due to a physical hardware failure.

## E-Mail Encryption and Other Pitfalls

### ❶ To Encrypt or Not to Encrypt?

According to most jurisdictions in the United States, a lawyer does not violate the duty to preserve confidences and secrets if an email is sent without encryption technology.

In Canada, the rules do not explicitly say that encryption is not required. Instead, the rules imply a duty to act reasonably to protect client confidences. Lawyers should consider the use of information technologies to communicate with the client in a timely and effective manner appropriate to the abilities and expectations of the client. Lawyers may use email (see Rule 3.1-1(d) and 3.1-2 of the Rules of Professional Conduct).

Lawyers must display the same care and concern for confidential matters regardless of the information technology being used. When communicating confidential information to or about a client, lawyers should employ reasonably appropriate means to minimize the risk of disclosure or interception of data by malicious intruders.

What are the risks that a particular information technology poses for inadvertent disclosure or interception? Lawyers should inform a client of the risks of unauthorized disclosure and interception before using information technologies. Lawyers need to ensure that their clients, too, understand that they need to protect the confidentiality of communications to them. Seeking client consent before using a particular technology for communications may be appropriate.

In Ohio, Ethics Opinion 99-2, issued April 9, 1999, by contrast states that a lawyer does not violate the duty to preserve confidences and secrets if an email is sent without encryption technology citing DR 4-101 of the Ohio Code of Professional Responsibility. An attorney must use his or her professional judgment in choosing the appropriate method of each attorney-client communication. Most jurisdictions in the U.S. are consistent with Ohio.[1] Also see Formal Opinion No. 99-413 of the American Bar

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[1] Excerpt from Ohio Op. 99-2:

The trend among advisory bodies in other states (and the District of Columbia) is that electronic mail without **encryption** is ethically proper under most circumstances.

In the District of Columbia, "[i]n most circumstances, transmission of confidential information by unencrypted electronic mail does not per se violate the confidentiality rules of the legal profession. However, individual circumstances may require greater means of security." District of Columbia Bar, Op. 281 (1998).

In Illinois, "[l]awyers may use electronic mail services, including the Internet, without **encryption** to communicate with clients unless unusual circumstances require enhanced security measures." Illinois State Bar Ass'n, Op. 96-10 (1997).

In New York, the state bar association advised that "lawyers may in ordinary circumstances utilize unencrypted Internet **e-mail** to transmit confidential information without breaching their duties of confidentiality under Canon 4 to their clients, as the technology is in use today. Despite this general conclusion, lawyers must always act reasonably in choosing to use **e-mail** for confidential communications, as with any other means of communication. Thus, in circumstances in which a lawyer is on notice for a specific reason that a particular **e-mail** transmission is at heightened risk of interception, or where the confidential information at issue is of such an extraordinarily sensitive nature that it is reasonable to use only a means of communication that is completely under the lawyer's control, the lawyer must select a more secure means of communication than unencrypted Internet **e-mail**." New York State Bar Ass'n, Op. 709 (1998). The city bar association advised that "[a] law firm need not **encrypt** all **e-mail** communications containing confidential client information, but should advise its clients and prospective clients communicating with the firm by **e-mail** that security of communications over the Internet is not as secure as other forms of communication." Ass'n of the Bar of the City of New York, Formal Op. 1998-2 (1998).

In North Dakota, "Rule 1.6 of the North Dakota Rules of Professional Conduct is not violated by a lawyer who communicates routine matters with clients, and/or other lawyers jointly representing clients, via unencrypted electronic mail (**e-mail**) transmitted over commercial services (such as America Online or MCI Mail) or the Internet unless unusual circumstances require enhanced security measures." State Bar Ass'n of North Dakota, Op. 97-09 (1997).

In Vermont, "[a] lawyer does not violate DR 4-101 by communicating with a client by **e-mail**, including the Internet, without **encryption**." Vermont Bar Ass'n, Op. 97-5.

One state is reticent in its advice regarding unencrypted electronic communication with clients. In Arizona, the state bar responded "Maybe" to the question "Should lawyers communicate with existing clients, via **e-mail**, about confidential matters?" They advised "it is not unethical to communicate with a client via **e-mail** even if the **e-mail** is not **encrypted**" but suggested "it is preferable to protect the attorney/client communications to the extent it is practical." The committee suggested using a password known only to the lawyer or client, using **encryption** software, or at a minimum using a cautionary statement such as "confidential" and "Attorney/Client Privileged" either in the "re" line or beginning the communication. An additional suggestion was to caution clients about transmitting highly sensitive information via **e-mail** if the **e-mail** is not **encrypted** or otherwise secure from unwanted interception. Attorneys were "reminded that **e- mail** records may be discoverable." State Bar of Arizona, Op. 97-04 (1997).

Several states have reconsidered their initial views on the issue. In South Carolina, the bar association first advised that "unless certainty can be obtained regarding the confidentiality of communications via electronic media, that representation of a client, or communication with a client, via electronic media, may violate Rule 1.6, absent an express waiver by the client." South Carolina Bar, Op. 94-27 (1995). Later, the bar advised that "[t]here [now] exists a reasonable expectation of privacy when sending confidential information through electronic mail (whether direct link, commercial service, or Internet). Use of electronic mail will not affect the confidentiality of client communications under South Carolina Rule of Professional Conduct 1.6." South Carolina Bar, Op. 97-08 (1997).

In Iowa, the bar association rescinded Formal Op. 95-30 and replaced it with Formal Op. 96-1 advising that "with sensitive material to be transmitted on **E-mail** counsel must have written acknowledgment by client of the risk of violation of DR 4-101 which acknowledgment includes consent for the communication thereof on the Internet or non-secure Intranet or other forms of proprietary networks, or it must be **encrypted** or protected by password/firewall or other generally accepted equivalent security system." Iowa State Bar Ass'n, Op. 96-1 (1996). See also Iowa State Bar Ass'n Op. 96-33 (1997). Later, the bar

Association Standing Committee on Ethics and Professional Responsibility, *Protecting the Confidentiality of Unencrypted Email*, dated March 10, 1999.

The opinion contains an important caveat that should not be ignored:

> The conclusions reached in this opinion do not diminish a lawyer's obligation to consider with her client the sensitivity of the communication, the costs of its disclosure, and the relative security of the contemplated media of communication. Particularly strong protection measures are warranted to guard against the disclosure of highly sensitive matters. Those measures might include the avoidance of e-mail, just as they would warrant the avoidance of the telephone, fax and mail.

Is there a problem with this decision that is was issued so long ago? What effect do the newer Model Rules have on this opinion? Despite advances in technology, and the rules in most jurisdictions, the opinion would stand up today.

First, the same opinion is shared in well over a majority of jurisdictions, many of which had the New Model Rules already in place. Comment 17 to Rule 1.6 states:

> [17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. **Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement.** A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule.

The ABA accepted the same approach in Comment 16 to Model Rule 1.6.

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association amended Opinions 96-1 and 96-33 by advising that "with sensitive material to be transmitted on **e-mail** counsel must have written acknowledgment by client of the risk of violation of DR 4-101 which acknowledgement includes consent for communication thereof on the Internet or non- secure Intranet or other forms of proprietary networks to be protected as agreed between counsel and client." Iowa Bar Ass'n, Op. 97-1 (1997).

Second, email is a very efficient form of communication. Third, the same security issues exist in other forms of communication such as wiretapping phone lines or stealing U.S. mail. Fourth, any interception of email or older forms of communication such as US mail or telephone calls is illegal. Finally, there is support in case law for the proposition that a reasonable expectation of privacy may exist even though a form of communication is capable of being intercepted, citing *State v. Bidnost*, 71 Ohio St. 3d 449, 461 (1994).

Ohio accepted the same approach in Comment 19 to its rule 1.6:

[19] When transmitting a communication that includes information relating to the representation of a client, **the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients**. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. **A client may require the lawyer to implement special security measures not required by this Rule** or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

## Duty to Do More? … Some Say Yes

Pennsylvania and New Jersey have adopted the same rule, but added a little more stringency to it. In Pennsylvania, Informal Opinion 97-130, issued September 26, 1997, concluded:

1. A lawyer may use e-mail to communicate with or about a client without encryption;
2. A lawyer should advise a client concerning the risks associated with the use of e-mail and obtain the client's consent either orally or in writing;
3. A lawyer should not use unencrypted e-mail to communicate information concerning the representation, the interception of which would be damaging to the client, absent the client's consent after consultation;
4. A lawyer may, but is not required to, place a notice on client e-mail warning that it is a privileged and confidential communication; and,
5. If the e-mail is about the lawyer or the lawyer's services and is intended to solicit new clients, it is lawyer advertising similar to targeted, direct mail and is subject to the same restrictions under the Rules of Professional Conduct.

**While other jurisdictions are not bound by rules 1 through 5, above, I recommend them as best practices to follow.**

The New Jersey Advisory Committee on Professional Ethics, in Opinion 701, issued in April 2006, states in a footnote that confidential documents sent over the Internet should be password protected.

In conclusion, in light of evolving technology and rules, it is my recommendation that attorneys (1) should advise clients verbally and in their engagement letter about email, as described in the Pennsylvania opinion, and (2) should have encryption available for use in appropriate circumstances.

## ❷ Email Encryption Solutions

Office 365 w/hosted Exchange and E3 licensing
www.office.com

Protected Trust
www.protectedtrust.com

Mail It Safe
www.mailitsafe.com

AppRiver
http://www.appriver.com/services/email-encryption/

Send
www.sendinc.com

TrendMicro
http://www.trendmicro.com/us/enterprise/network-web-messaging-security/email-encryption/index.html

## ❸ Retracting Sent E-Mails

Are there times when you wish that you could UNSEND something? This is actually something that can be done to prevent a known ethical violation where it may not be possible with ordinary U.S. Mail. With U.S. Mail, once the mail is in the post box, good luck getting it back!

I have 2 suggestions in this regard:

- If your firm uses Exchange Server, be sure to tell your system administrator to set a 5 minute delay before the email is actually sent from your server. This may give a user in your office enough time to catch it before it goes out.

- You may want to try out something like www.mailitsafe.com, or similar functioning service, which is an email verification program, but also allows retraction so long as it hasn't been retrieved by the recipient. You can also encrypt emails and attachments, requiring recipients to use passwords to open. The cost is $150 per year.

### ❹ E-Mail Addressing: AutoComplete can be an AutoDisaster

Outlook and other popular email programs have an ”Auto-Complete” function that saves you the time of having to type out someone’s complete email address if the name already exists in the program’s address book. Once you type the first character in the TO field, Outlook starts guessing the name of the recipient and will display potential names. If to quick and careless, you could accidentally hit ENTER and auto-complete the wrong recipient. While a nifty feature if used correctly, this can get you into trouble if you are careless.

As an example, if you intend to send something to your client “Brian Cluxton”, you could accidentally send something to opposing counsel “Brian Clayton” by typing B-R-I and hitting ENTER too quickly. If you don’t catch it, you could send something really damaging to the wrong person. I don’t think this warrants disabling the feature … just be careful!

## Metadata Pitfall

You just hit the SEND button. You start to sweat and suddenly experience a panic attack. You and your associate were revising a contract for a client. Before sending it on to your client, you forgot to accept or reject tracked changes and remove all the hidden text from the word processing document. You also forgot to remove any other "metadata" before sending it. Anyone who receives the file can easily find out the following information:

- All the people who authored any part of the document … including the original author who happens to be a managing partner at a competing law firm
- The hidden text that states the client "is a moron!"
- The suggested changes made by a 1st year associate in your office (half of which were a bit moronic)
- The total time you spent revising the document … 15 minutes (even though you billed the client 8 hours – which is a big ethical problem of its own!)

This story is not fictional. It actually happened. This is just one of many bad messes that you can get yourself into if you are not using technology correctly.

The Bad News … Say goodbye to the glory days when you could simply draft and send a word processing document to opposing counsel or your client.

The Good News … Most technology-created pitfalls are easily avoidable if reasonable steps are taken.

### Metadata … Is it really a "Nightmare"?

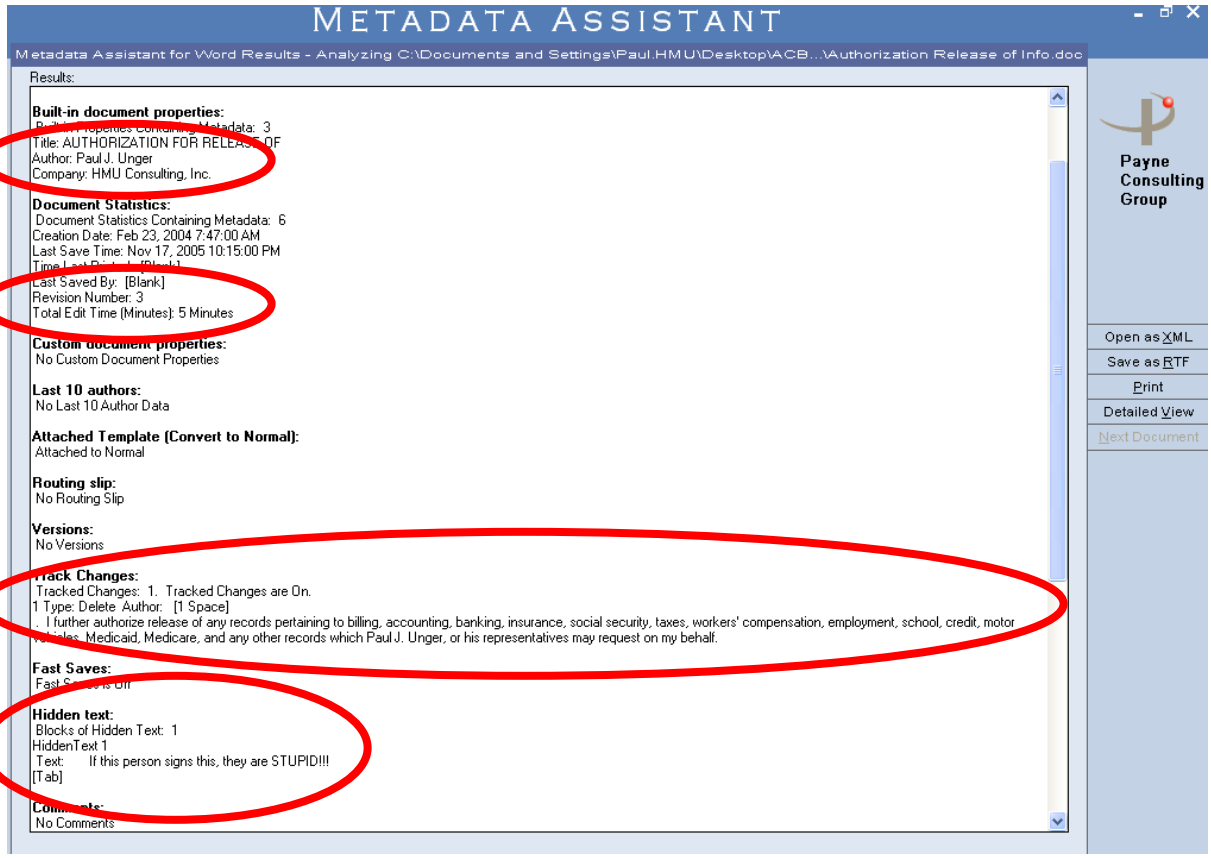
**What is Metadata?** Literally, metadata means "data about data." In the personal & business computing world, it is the hidden or invisible information contained within computer files. Most notably in the legal technology field, lawyers worry about metadata found in Microsoft Word, PowerPoint, Excel, Corel WordPerfect and Adobe Acrobat files.

The kind of information that can be found under the surface a Word document, for example, might be:

- Last 10 authors
- Firm name
- File locations

- Tracked changes
- Hidden text
- Deleted document comments
- Routing slip information
- Document versions
- Revision time
- Document properties (file size, modification date, etc.)
- Fast saves
- Hyperlinks
- Linked objects

As an example, below is part of a report showing metadata using a widely-used metadata remover called "Metadata Assistant" created Payne Consulting Group.




Why have metadata if it is so bad? Well, quite frankly because it is really useful information and it was never intended to be bad. Microsoft designed its programs to store metadata for a variety of reasons, one of which was for document management before Document Management Systems (DMS) existed.

As a very simple example, if one wanted to find all documents created or modified between December 1, 2005 and December 31, 2005 as a way to verify that you created

timesheets for all your billable time in December, you would perform a search using a Microsoft Find Files or Folders utility or a third-party program like dtSearch that searches … yes … metadata.

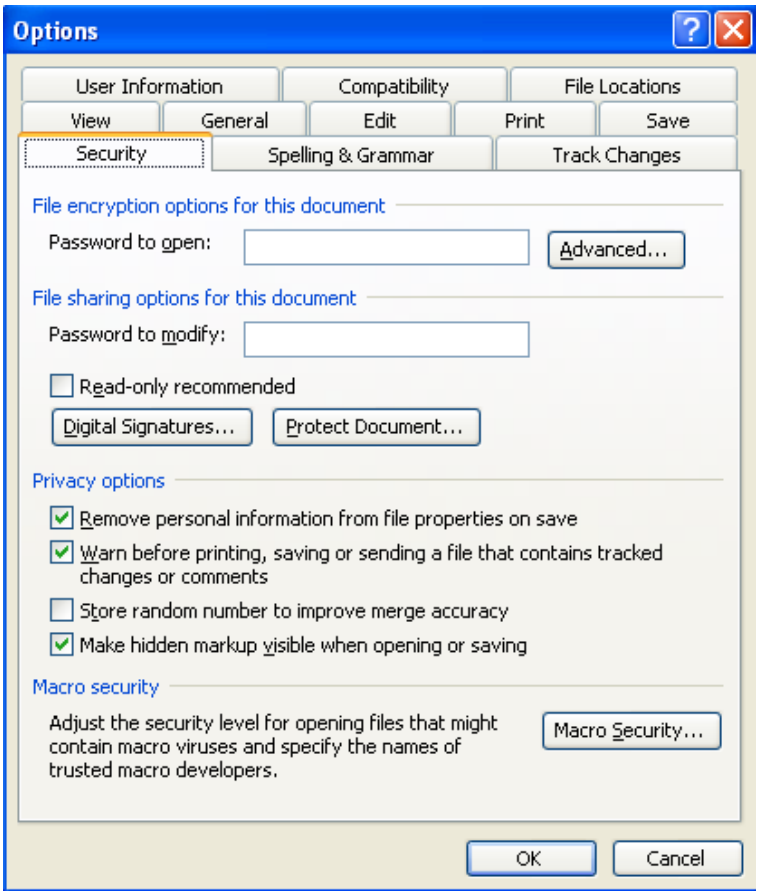
If you exchange electronic word processing files with anyone outside your office and do nothing to remove metadata it can result in a nightmare if the file contains metadata that was intended to be confidential. So, yes, it can indeed be a nightmare as many legal technologists claim. However, if you are not careless, these problems are not a nightmare at all. You just need to know what to do. Below is a list of what you need to do to avoid the word processing so-called "metadata nightmare."

### ❶ Learn the Security Settings within Microsoft Word

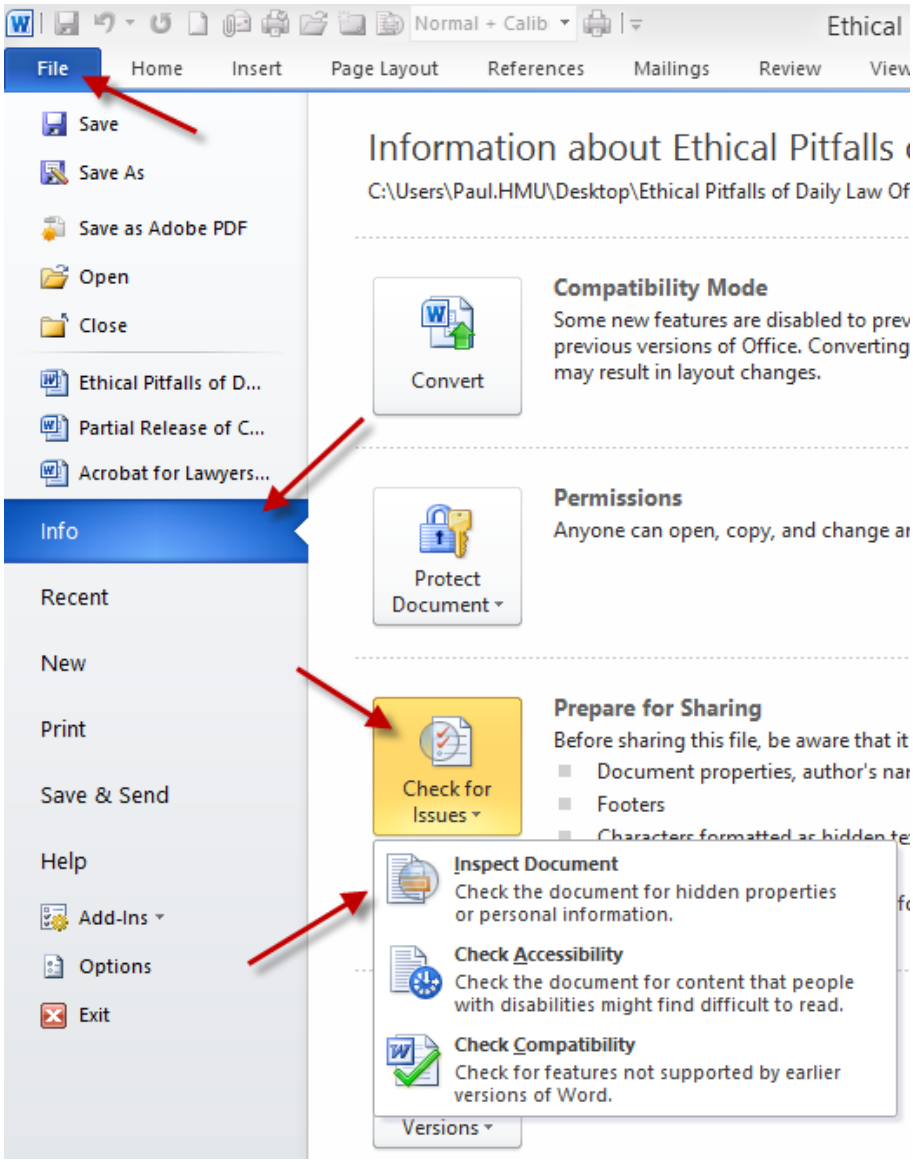
Much of the "dangerous" metadata contained in Microsoft Word documents can be prevented from transmission if certain security features are turned on.

In Word 2003 and earlier, open Word and select **Tools** and then **Options** and select the **Security** tab:

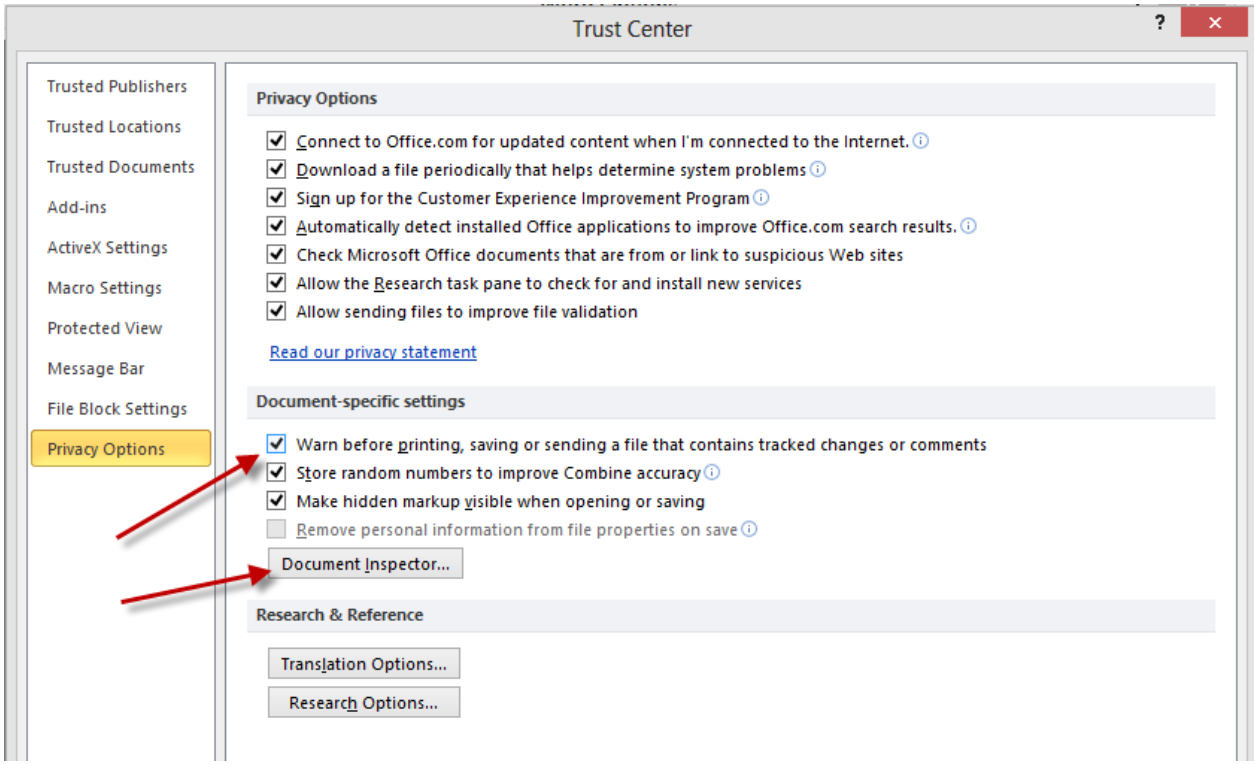
- Check "Remove personal information from file properties on save"
- Check "Warn before printing, saving or sending a file that contains tracked changes or comments"
- Check "Make hidden markup visible when opening or saving"




In Word 2010 and later, you must run the document inspector, which is most easiest found at **File > Info > Check for Issues > Document Inspector.**


Normal + Calib
Ethical
File
Home
Insert
Page Layout
References
Mailings
Review
View
Save
Save As
Save as Adobe PDF
Open
Close
Ethical Pitfalls of D...
Partial Release of C...
Acrobat for Lawyers...
Info
Recent
New
Print
Save & Send
Help
Add-Ins
Options
Exit
Information about Ethical Pitfalls
C:\Users\Paul.HMU\Desktop\Ethical Pitfalls of Daily Law Of
Convert
Compatibility Mode
Some new features are disabled to prev
previous versions of Office. Converting
may result in layout changes.
Protect Document
Permissions
Anyone can open, copy, and change ar
Check for Issues
Prepare for Sharing
Before sharing this file, be aware that it
Document properties, author's nar
Footers
Inspect Document
Check the document for hidden properties or personal information.
Check Accessibility
Check the document for content that people with disabilities might find difficult to read.
Check Compatibility
Check for features not supported by earlier versions of Word.
Versions

You may want to have Word warn you if there are tracked changes comments on save, print or send commands. It is found under **File** and then **Options**, **Trust Center, Trust Center Settings**, and then **Privacy Settings**.




You can also download and install a free add-in from Microsoft - Office 2003/XP Add-in: Remove Hidden Data. CAUTION: This will not remove all metadata. Metadata still exists. The question is whether it is benign or damaging metadata.

## ❷ Learn About Tracked Changes in Word

"Track Changes" is a fantastic feature available in Microsoft Word that allows multiple reviewers of a document to literally track changes or compare documents electronically to see what edits have been made to a document. My first suggestion is to start using it if you have the need for that type of feature. My second suggestion is to learn how to use it correctly so those internally tracked changes do not end up in the hands of opposing counsel or even your own client. Here is an example of a paragraph that has tracked changed turned on.


"Track Changes" is a fantastic feature available in Microsoft Word that allows multiple reviewers of a document to literally track changes or compare documents electronically to see what edits have been made to a document. My first suggestion is to start using it if you have the need for that type of feature. My second suggestion is to learn how to use it correctly so those internally tracked changes do not end up in the hands of opposing counsel or even your own client so you don't look like a freaking idiot. ~~Here is an example of a paragraph that has tracked changed turned on.~~

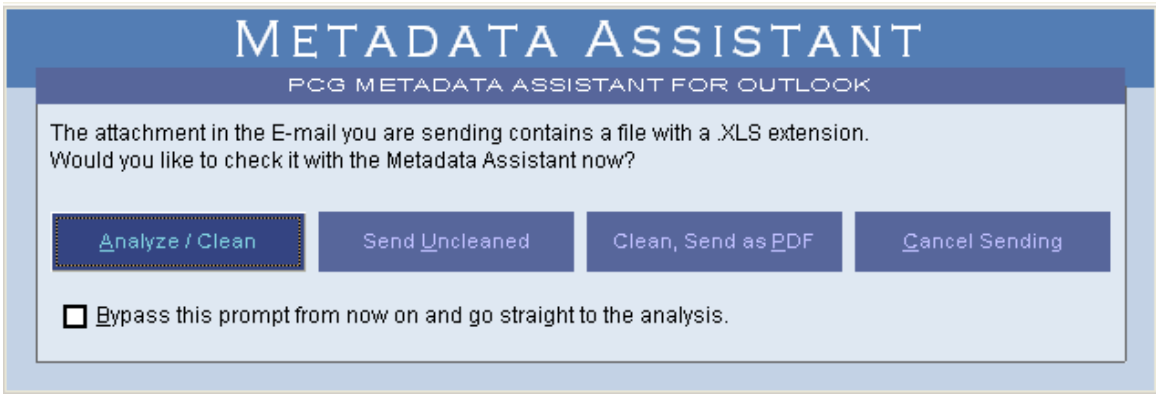
Added Text & Deleted Text

The first big mistake that people make is not accepting or rejecting all changes before sending the document on to opposing counsel for their review. It is imperative that you go through the entire document and accept or reject all the changes made in the document. Changes that were made between versions that are not **accepted** or **rejected** will show up in a metadata analysis. This may expose your thought process or a weakness that you knew about, but the other side didn't think of … at least until now!

The second critical thing that you do is make sure that you can see the tracked changes (the marked up or redlined version). Be sure that you select **Final Showing Markup** in the reviewing toolbar. Otherwise, you may not even realize that there are tracked changes in the document. Also remember in the security settings (discussed above) there is an option that will warn you before printing, saving or sending a document that has tracked changes.

### ❸ Consider a Third-Party Meta Data Removal Tool

Another option which I generally favor is investing in a metadata removal tool. These are programs that strip the metadata out of electronic documents before you send it to another party. You can either run the cleaner manually on a document OR intercept, evaluate and clean all attached documents when you are emailing it to the outside world. This makes the process much easier and requires no working knowledge of how tracked changes work or security settings within the program. As an example, Donna Payne's Metadata Assistant intercepts attachments with this dialog box when you hit the **Send** key from Outlook's email:




I suggest a metadata remover for those people who actually exchange electronic documents containing potentially harmful metadata. Many attorneys don't do this. If you do not exchange documents, don't spend the money.

Metadata removal tools to consider:

- Metadata Assistant (Payne Consulting Group – www.payneconsulting.com). Cost is $79 per license.
- CleanDocs (www.cleandocs.com)
- Workshare Protect (www.workshare.com). Cost is $29.95 per year.
- iScrub by Esquire Innovations (www.esqinc.com).
- Out-of-Sight by SoftWise (www.softwise.net). Cost is $30 per user.
- ezClean by KKL Software (www.kklsoftware.com). You must buy at least 20 licenses at $20 per license.

### ❹ Exchange PDF Documents

Although PDF documents do contain some metadata, they do not contain as much. Tracked changes can indeed be passed on from a Word document to PDF, but you would have to do it one of two ways. First, the person converting the document would have to attach the Word file into the PDF in its native format (Acrobat allows you to attach files into a PDF document). While possible, I know of no one who uses that function. So…just don't do it that way. A second way is if you have the tracked changes visible when you convert to PDF. That would create a PDF with the tracked changes blatantly showing. You would have to be blind or extremely careless not to see the tracked changes in the Word document and the resulting PDF. Also, if you have your printing configuration in Word set to print 'tracked changes' along with the document. In this instance, again, you would have to be blind and 100% careless by failing to review the newly created PDF before sending it.

Another benefit sending a PDF is that PDF documents are less editable, especially if you have security turned on. This has less to do with metadata, but it is a nice benefit if you send a PDF to a client, for instance, and tell them to print and sign the attached. If the document is editable, the client could change the text using Adobe Acrobat and then sign it (and not tell you). If the PDF document is secure, the signing party would have to go to greater lengths to make a deceptive change that is not noticeable.

### ❺ WordPerfect also contains Meta Data

Contrary to popular belief, WordPerfect also contains metadata. Examples of metadata stored in WordPerfect documents include:

- Authors
- Tracked changes
- Comments and hidden text
- Document revision annotations
- Undo/Redo history
- User names, initials and company
- Document summary information
- Header/Footer information
- Hyperlinks

*See Minimizing Metadata in WordPerfect 12 Documents,* Corel Corporation, copyright 2004.

Like Microsoft, Corel also made available a metadata removal tool which is available on their website. Also check WordPerfect Universe (www.wpuniverse) which offers a metadata removal tool for WordPerfect.

## Keeping Information Safe from Disaster, Accidental Loss, Theft, Viruses and Malicious Intruders

ABA Model Rule 1.6 also imposes a duty upon attorneys to keep their technology in safe and working order to protect client information. Similarly, in Canada, Section 3.3 of the Rules of Professional Conduct requires competence and confidentiality.

As an example, section 5.7 of the Law Society of Upper Canada's Technology Practice Management Guidelines states:

**5.7 Confidentiality**

Lawyers using electronic means of communications shall ensure that they comply with the legal requirements of confidentiality or privilege. (Section 3.3 of the Rules of Professional Conduct).

When using electronic means to communicate in confidence with clients or to transmit confidential messages regarding a client, a lawyer should

- develop and maintain an awareness of how to minimize the risks of disclosure, discovery or interception of such communications
- discuss the inherent security risks associated with each technology with the client and confirm in writing that the client wishes to communicate using that method
- use firewalls and security software to protect at-risk electronic information
- use and advise clients to use encryption software to assist in maintaining confidentiality and privilege
- take appropriate measures to secure confidential information when using cloud-based services
- develop and maintain law office management practices that offer reasonable protection against inadvertent discovery or disclosure of electronically transmitted confidential messages.

**ABA Model Rule 1.6(a) states:**

> (a) A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by division (b) or required by division (c) of this rule.

**Comment 16 further states:**

> Acting Competently to Preserve Confidentiality [16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3.

The State Bar of Arizona issued an opinion in response to an inquiry about the steps a law firm must take to safeguard data from hackers and viruses. They stated:

> ER's 1.6 and 1.1 require that an attorney act competently to safeguard client information and confidences. It is not unethical to store such electronic information on computer systems whether or not those same systems are used to connect to the internet. However, to comply with these ethical rules as they relate to the client's electronic files or communications, **an attorney or law firm is obligated to take competent and reasonable steps to as-sure that the client's confidences are not dis-closed to third parties through theft or inadvertence.** In addition, an attorney or law firm is obligated to take reasonable and competent steps to assure that the client's electronic information **is not lost or destroyed.** In order to do that, an attorney must either have the competence to evaluate the nature of the potential threat to the client's electronic files and to evaluate and deploy appropriate computer hardware and software to accomplish that end, or if the attorney lacks or cannot reasonably obtain that competence, to retain an expert consultant who does have such competence. (Emphasis added.)

State Bar of Arizona, Opinion No 05-04, July, 2005.

The ABA Standing Committee on Ethics and Professional Responsibility has stated something similarly. In Opinion 95-398, they concluded "[a] lawyer who gives a computer maintenance company access to information in client files must make reasonable efforts to ensure that the company has in place, or will establish, reasonable procedures to protect the confidentiality of the client information."

In 2006, Nevada spoke to a similar issue relating to offsite storage of data and reached a consistent conclusion. They stated that a lawyer may store confidential information electronically with a third party to the same extent and subject to the same standards as storing confidential paper in a third party warehouse. In doing so, the lawyer must act" competently and reasonably to ensure the confidentiality of the information. Opinion 33 (February 9, 2006), Nevada Standing Commission on Ethics and Professional Responsibility.

David Reis, a partner with Thorp, Reed & Armstrong, LLP in Pittsburgh, PA, and a colleague legal technologist suggests the following basic steps:

1. Keep your operating systems patched.

2. Install and use anti-virus and spyware protection on all computers (and keep them all current with updates).

3. Use Care with Email attachments and Embedded Links.

4. Make backups of important files and folders.

5. Use strong passwords or other authentication (combine numbers and characters).

6. Use care when downloading and installing programs.

7. Install and use a hardware firewall.

8. Install and use a file encryption program.

Additionally, I recommend:

1. Apply the above principles to laptops and PCs that are used at home for business purposes.

2. Have a secondary backup system (consider an online backup service like Iron Mountain, MozyPro or Carbonite).

3. Encrypt laptops and external hard drives or flash drives where you store or transfer client information.

4. Use Adobe Acrobat Pro (or similar competing products like Kofax PowerPDF Advanced, pdfDocs, etc.) to redact important client information (social security numbers, billing information, etc.) contained in documents that you may have to file with the court electronically.

## Disposing of Old Computer Equipment

You just got all new workstations for your staff. What do you do with the old workstations? What about all the confidential information contained on the hard drives? If you think that you deleted the information, think again! You may be violating Model Rule 1.6, HIPAA and opening yourself up to liability.

According to a study performed at the Massachusetts Institute of Technology (MIT), two graduate students scavenged through the data inadvertently left on 158 used disk drives. They found more than 5,000 credit card numbers, detailed personal and corporate financial records, numerous medical records, gigabytes of personal email and pornography. The disk drives were purchased for less than $1,000 from eBay and other sources of used computer hardware. Only 12 were properly sanitized (http://web.mit.edu/newsoffice/2003/diskdrives.html) .

### ❶ Avoiding the Ethical Pitfall – What is Required?

An attorney must act reasonably to preserve confidences and secrets of his/her client. The rules in the U.S. and Canada impose the same duty. ABA Rule 1.6 (and old rule DR 4-101) imposes a duty to preserve confidences and secrets. In all likelihood, disposing of employee workstations was not contemplated when DR 4-101 was adopted by the Supreme Court of Ohio on October 5, 1970 and likewise in other jurisdiction following suit; nevertheless, the rule applies. The New Rule as written, establishes a broad duty to preserve confidences and secrets that applies to all methods of communication. The duty clearly extends to disposing of client information and communication.

What does this mean in practical terms? Reasonableness, in my opinion, requires one of the following:

(A) Retain the hard drive(s) of the computer(s) for safe keeping; or
(B) Hire a company to erase and reformat the hard drives[2]; or
(C) Hire a company that uses a special data erasing program; or
(D) Purchase and utilize a special data erasing program. Using data erasing/rewriting programs to mask data stored on the hard drive is much more effective than just deleting it. This is a time-consuming process. Most of these programs claim they delete data to Department of Defense (DOD) level data

[2] Erasing and reformatting hard drives will not completely protect the data. A skilled computer technician or forensic expert can likely recover some (not all) data from that hard drive using specialized software. This process is time-consuming and expensive.

destruction specifications (DOD sanitizing standard 5220.22-M). These programs delete the data and then rewrites data to the hard drive using a series of meaningless information in binary code patterns of "ones" and "zeros." These programs perform this function multiple times. Using very expensive technology, someone really talented could read something on a disk several rewrites deep, but it is unlikely and extremely costly.

❷ **Use a Service like PCDisposal (www.pcdisposal.com)**

PCDispoal is probably the largest computer disposal service in the country. It handles more than 10,000 computers per week thrown out by the U.S. Government. They will pick up your units (or have them shipped), properly delete data, provide a certified report detailing the services performed and confirming software removal (listed by hardware serial number)(Services are HIPAA compliant), and if possible, refurbish computers and may resell to companies looking for a bargain, sharing profits with you. They offer free shipping if it is over 10 units.

Contact Information:
Telephone: Toll Free 1-877-244-0250
FAX: (509) 562-4323
Postal address: 900 E. Loula, Olathe, Kansas 66062
E-mail: isales@pcdisposal.com

Also check out:

www.retire-IT.com (nationwide service)

http://www.ohiodropoff.com (Ohio Computer and Recycling Center)

**IMPORTANT: Most computer recycling companies will not delete data or reformat hard drives. Make sure that you specifically request this, or it will not be done.**

### ❸ Do-It-Yourself

You could do the DOD-level data destruction yourself with programs like the ones listed below, OR simply take out your screwdriver and physically remove the hard drive and throw it in a locked file cabinet. Programs that you can buy to erase data yourself are:

- cyberCide Data Destruction (www.cyberscrub.com) offers a product for $29.00.
- Active@ Kill Disk - Hard Drive Eraser (www.killdisk.com/eraser.htm) offers a free version and a professional version for about $30.
- OnTrack DataEraser™ (www.ontrack.com) offers a personal version for $29.

**IMPORTANT NOTE**: If trying to **sanitize data on a solid state drive (SSD)** (most hard drives after 2013), I recommend that you use Parted Magic (www.partedmagic.com), or rely on an expert to do it for you and provide written certification. The above tools will not work on SSDs.

### ❹ Don't Forget SmartPhones, Tablets, and Copy Machines!!

Be sure to follow manufacturer's instructions on wiping all data from smartphones and tablets.

Copy machines are the most often forgotten about devices that contain an enormous amount of potentially confidential client information. Copy machines just don't copy anymore. They first take a snapshot image of the document, stores it on a hard drive, and then prints a copy per your instructions. Depending on the size of the hard drive and the volume you scan, your machine can hold days, weeks, months, and potentially years of "copied" documents.

CBS did an excellent story on copy machines that is quite alarming:
http://www.youtube.com/watch?v=iC38D5am7go

## Password Management and Two-Factor Authentication


In short, passwords need to be (1) unique; (2) strong; and (3) stored safely. With as many passwords that we maintain, personally and professionally, there are some very inexpensive, but fantastic solutions that can provide you with relief.

### ❶ Two-Factor Authentication is Critical

Putting in place two-factor (or multi-factor) authentication (also known as 2FA) is more important today than changing passwords or using unique passwords. I still think unique passwords is important, but changing passwords every 30 days has recently been regarded as a waste of time. 2FA is more important because without the second method of authentication (usually a text message notification requiring your intervention, like entering a code, providing a PIN, proving your fingerprint from your smartphone) a cybercriminal will not be able to login to an important account even if they have your password. See this regarding Microsoft finally acknowledging this year that 2FA is critical and changing passwords is not very important anymore: https://www.cnet.com/news/microsoft-admits-expiring-password-rules-are-useless/.

### ❷ Make Passwords Strong and Unique

Passwords should not be re-used. If your credentials are compromised, they could be sold on the dark web. If you used the same password at another site (i.e. Dropbox, a client portal, your bank, etc.) your information (potential confidential information or documents) is now compromised. Moreover, most cybersecurity experts now advise people to use long phrases that combine letters, numbers and characters. I generally aim for at least 12 characters.

### ❸ Safely Store your Passwords

If you don't have a password manager, I recommend saving your passwords in an encrypted Word or Excel file (see above how to encrypt Word & Excel files).

### ❹ Password Management Programs

I strongly recommend investing in a password manager. In fact, I believe in this technology so much, that our company now provides a password manager to every employee in our organization. The good news is that the above 3 objectives can be

achieved with some very inexpensive solutions. Here are some of the common features:

- Automatic password generators for unique passwords that never repeat
- Automatic password generators that create insanely strong & cryptic passwords
- Cloud encrypted storage of passwords
- Access to passwords from all mobile and desktop devices
- Integration with all major browsers
- Works on a Mac or PC
- Apps for iPhone, Android-based phones, iPads, Android tablets
- Safe storage of financial and estate information
- Ability to share with loved ones or individuals at work

**Highly Rated Password Managers**

1. **Dashlane** (www.Dashlane.com)
2. **LastPass** (www.LastPass.com)
3. **1Password** (www.1password.com)
4. **Roboform** (www.roboform.com)
5. **Keeper** (www.keepersecurity.com)

July 2020

# Third Party Comments or Tags on a Lawyer's Social Media

OPINION #1-20

## Question

Can a third party's addition to a lawyer's social media pages have ethical implications to the lawyer?

## Short Answer

It depends on the actions the lawyer has taken to prevent and/or rectify the situation.

### Recommended Rules for Review

Indiana Rules of Professional Conduct: **1.1; 3.6; 3.8; 5.1; 5.3; 7.1**

## Summary

An excellent rule of thumb for social media is if the attorney cannot do it in person, he/she cannot do it online. When it comes to third party comments, tags and endorsements, the same rule applies. If the rules prohibit the attorney from saying it, tagging it or endorsing it, then a third party, including the lawyer's staff, create ethical problems for the attorney by posting such content on the attorney's social media. Lawyers must prevent or remove content which would violate the professional rules.

## The Ethical Problems

Several rules guide lawyers on policing their social media accounts.

- A lawyer must be well-informed of the "benefits and risks associated with technology relevant to the lawyer's practice." **Indiana Professional Conduct Rule 1.1 [Comment 6].**
- It is professional misconduct to violate the Rules through the acts of others. **Indiana Professional Conduct Rule 8.4(a).**

These rules require the lawyer to be aware of the risks which use of this type of technology poses for rule violations, and to act proactively to ensure the use of social media accounts do not place the attorney in violation of the rules.

Several minefields in the area of social media create ethical problems for the attorney.

## Minefield #1: False or misleading claims.

Social media presents opportunities for third parties to comment on the attorney's page. Though glowing comments or testimonials from former clients may seem harmless, the rules prohibit statements, even truthful, made by third parties that the lawyer cannot make themselves.

Lawyers are constrained from making a "representation, testimonial, or endorsement of a lawyer or other statement that, in light of all of the circumstances, is intended or is likely to create an unjustified expectation about a lawyer or law firm or a person's legal rights". **Indiana Professional Conduct Rule 7.1 [Comment 2(3) and (8)].**

## Minefield #2: Claiming a non-authorized specialty.

Lawyers may not claim a specialty with limited exceptions enumerated in the Rule. **Indiana Rule of Professional Conduct 7.4.**

An endorsement on Linked In from a fellow lawyer claiming a non-authorized "specialty" or a comment by a client that the attorney is a specialist in a non-listed field could subject the lawyer who maintains that page to discipline. The lawyer must act proactively to cure violations through clarification or deletion.

## Minefield #3: Non-consensual disclosure of client confidences.

Tempting though it may be for legal staff to brag on social media about a court victory or the signing of a famous new client, a lawyer may not reveal attorney confidences without client consent. **Indiana Professional Conduct Rule 1.6.** Lawyers must supervise staff and subordinate attorneys to insure compliance with the rules. **Indiana Professional Conduct Rule 5.1; Indiana Professional Conduct Rule 5.3(c)(2).**

If a lawyer does post about an ongoing case within the parameters of **Indiana Professional Conduct Rule 3.6**, third-party comments to this post must not reference facts or opinions outside of those permitted by Rule 3.6.

## Minefield #4: Adoption of a third-party comment.

An attorney who responds to or "likes" a third party's comment that contains prohibited content could be deemed to have adopted the third-party comment. Such action could subject the attorney to a rule violation. The failure by the attorney to delete prohibited content could be considered acquiescence and expose the lawyer to discipline.

A lawyer should also be careful to adjust privacy settings to avoid being "tagged" to improper content which could show up on the lawyer's page and thereby be deemed adopted by the lawyer.

### Minefield #5: Prosecutors with social media accounts.

Criminal jury trials "will be most sensitive to extrajudicial speech." **Indiana Professional Conduct Rule 3.6 [Comment 5]**. Prosecutors have the dual responsibility of keeping the public informed but also to "refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused" which could affect the due process rights of criminal defendants. **Indiana Professional Conduct Rule 3.8.**

While a prosecutor can provide valuable information to their constituents via social media post, it must be recognized that these posts will likely have widespread and lasting influence on potential jurors due to the nature of social media. Real care must be taken therefore to limit posts to information permitted by Rules 3.6 and 3.8.

Allowing public comment to these posts adds an additional risk to the reputation and rights of the defendants. Given the risks to the integrity of the system, it is best practice to simply disable comments on posts regarding pending criminal matters all together. Alternatively, strict guidelines regarding commenting should be clearly enumerated and regular monitoring and removal of comments that contain information outside that allowed by Rules 3.6 and 3.8 should be employed. Again, failure to do so could be perceived as adoption of the offending comments and result in discipline.

## Conclusion

The above minefields do not form an exhaustive list. As technology evolves, attorneys should continue to review the rules to ensure social media accounts do not violate attorney ethical rules.

A lawyer must act to amend, remove, block or reject additions to their social media pages that violate the Rules, or risk inaction being perceived as an adoption of those comments or endorsements, which in turn may subject the lawyer to discipline.

Lawyers must be aware of the risks of technology and police social media for false or misleading content. Attorneys should consider use of settings disabling third party posting or setting sites to require approval.

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*This nonbinding advisory opinion is issued by the Indiana Supreme Court Disciplinary Commission in response to a prospective or hypothetical question regarding the application of the ethics rules applicable to Indiana judges and lawyers. The Indiana Supreme Court Disciplinary Commission is solely responsible for the content of this advisory opinion, and the advice contained in this opinion is not attributable to the Indiana Supreme Court.*

# Section Thirteen

# Indiana Law Update 2021: Business, Contracts, and Banking

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## Section Thirteen

## Indiana Law Update 2021:
## Business, Contracts, and Banking……. Kiamesha-Sylvia G. Colom

# Indiana Law Update 2021:
# Business, Contracts, and Banking

**September 15, 2021**

**Presented By:**

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Taft

# *New Nello Operating Co., LLC v. CompressAir*, 168 N.E.3d 238 (Ind. 2021)

**Issue**: Do the "de facto merger" and "mere continuation" exceptions to the general rule that in an asset purchase the buyer typically does not take on the seller's liabilities, require continuity of ownership between the companies?

**Facts**: Nello Corporation defaulted on various secured loans. A private-equity firm created two entities: New Nello Acquisition, to purchase Nello's largest secured creditor's interests; and New Nello Operating, to run the business as Acquisition's wholly owned subsidiary. Old Nello and New Nello finalized a strict-foreclosure agreement that identified which liabilities New Nello was assuming and which it was not. None of Old Nello's shareholders owned any equity in New Nello. CompressAir had previously installed piping in Old Nello's facility and was never fully paid. CompressAir attempted to recover from Old Nello and discovered Old Nello was defunct and had no assets. CompressAir then attempted to recover from New Nello alleging the strict foreclosure between the companies was fraudulent, it amounted to a de facto merger, and that New Nello was a mere continuation of Old Nello.

**Holding**: The Indiana Supreme Court held that continuity of ownership between the two companies is necessary for either, the "de facto merger" or "mere continuation," exceptions to apply. Since none of the shareholders in Old Nello were shareholders in New Nello, the exceptions did not apply.

Taft/

# *McLean v. Trisler*, 161 N.E.3d 1259 (Ind. Ct. App. 2020)

**Issue**: May a shareholder of a closely-held corporation bring a direct action against the corporation?

**Facts**: McLean joined Trisler and Koeppen as members of Greek's Mobile Response Team, LLC ("GMRT"). GMRT owned and operated a Greek's Pizzeria franchise. Later, Koeppen's interest in GMRT was divided pro rata between McLean and Trisler. At some point, Trisler sought to acquire another pizzeria using GMRT's assets. Trisler eventually entered into an agreement to purchase the other pizzeria, and the sale was approved by Trisler and Koeppen over McLean's objection. McLean subsequently filed suit in his individual capacity, and on behalf of GMRT, against Trisler and Koeppen seeking money damages and injunctive relief.

**Holding**: The Court of Appeals upheld the Indiana Supreme Court's rule that, under circumstances, a shareholder of a closely-held corporation may bring a direct action against the corporation if the court finds that doing so will not (i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested parties.

Taft/

# *Hartman v. BigInch Fabricators & Construction Holding Company, Inc.*, 161 N.E.3d 1218 (Ind. 2021)

**Issue**: Can "minority" and "marketability" discounts in share valuations apply in a closed-market sale?

**Facts**: Hartman was a shareholder in BigInch Fabricators & Construction Holding Company, Inc. ("BigInch"). The parties' shareholder agreement included a buyback provision that obligated BigInch to purchase Hartman's shares in BigInch in the event of involuntary termination. BigInch subsequently terminated Hartman, and in accordance with the buyback provision, hired a third-party appraiser who discounted Hartman's shares for their lack of marketability and lack of control. Hartman then sued BigInch alleging that the discounts were inapplicable in a closed-market sale.

**Holding**: The Indiana Supreme Court held that "minority" and "marketability" discounts in share valuations may also apply in a closed-market sale, provided that a contract provision permits such discounts. The Court acknowledged the public policy rational for not allowing such discounts in closed-market sales, but held that courts must "honor the parties' freedom to contract and look at the terms they [choose] to govern the buyback." *Id*. at 1222

Taft/

# *Symons v. Fish*, 158 N.E.3d 352 (Ind. Ct. App. 2020)

**Issue**: Is a contract clause providing for treble damages an unenforceable penalty?

**Facts**: Symons ("Buyer") purchased a company from Fish ("Seller"). The stock purchase agreement included a provision that required Buyer to release Sellers' personal guaranties with the company, and provided that Buyer was to indemnify Seller three times the amount of any loss or claim arising from any of Seller's personal guaranty. Buyer failed to release Seller's personal guaranty, and a vendor of the company subsequently sued Seller to recover on Seller's guaranty. In response, Seller sued Buyer to recover for the vendor's claim, and a jury found in favor Seller. The trial court tripled the award for Seller, in accordance with the agreement provision, and Buyer appealed contending the treble-damages clause was not a proper liquidated damages, but rather an unenforceable penalty.

**Holding**: The Court of Appeals held that damages clauses that contain multipliers of two and three times a stipulated sum are unenforceable penalties.

Taft/

# *Jetz Service Company, Inc. v. Ventures*, 165 N.E.3d 990 (Ind. Ct. App. 2021)

**Issue**: What terms are required to render a proposed settlement agreement an enforceable contract?

**Facts**: Jetz and Ventures had entered into a seven-year lease under which Jetz was authorized to install three pay-to-use washers and dryers in one of Ventures' apartment complexes. Ventures decided to get rid of the apartment complex and reached out to Jetz, via email, about terminating their lease. Jetz responded that there were approximately 81 months remaining in the 84-month contract and that Jetz was entitled to $9,720.00 from Ventures in light of the breach. The parties agreed to settle for $8,000 and Jetz subsequently drafted and sent a settlement agreement to Ventures. Ventures eventually replied and informed Jetz that it wanted additional terms in the settlement agreement, however, Ventures never updated the settlement agreement and later contacted Jetz to inform it that it would not be paying the previously determined settlement amount. Jetz later filed suit against Ventures for breach of contract and Ventures responded seeking enforcement of the settlement agreement.

**Holding**: The Court of Appeals held that to render a contract enforceable, an absolute certainty in all terms is not required, rather, all that is required to render the contract enforceable is reasonable certainty in the terms and conditions of the promises made, including by whom and to whom. It found the emails between the parties constituted a meeting of the minds and thus, the settlement agreement was enforceable.

Taft/

# *Clark County REMC v. Reis*, 167 N.E.3d 333 (Ind. Ct. App. 2021)

**Issue**: Does a policy requiring a person to serve on a board of directors for a certain number of years in exchange for health-care coverage constitute an enforceable contract?

**Facts**: Reis, and other plaintiffs, served as members of the board of directors of the Clark County's Rural Electric Membership Corporation ("REMC"). Prior to Reis joining the board, the REMC had a policy in place that required it to pay, and eventually reimburse directors, for directors health-care insurance for life, provided that the directors served on the board for a certain number of years. At some point, REMC's new board of directors voted to revoke the policy and REMC stopped reimbursing Reis and other former members of the board. Reis subsequently sued the REMC alleging breach of contract. REMC appealed contending that there was no "mutuality of obligation" under the policy and the trial court erred in concluding it was a contract.

**Holding**: The Court of Appeals held that there is no mutuality deficiency where one party to an agreement acts upon the promises of the other party and performs his part of the agreement—because the other party becomes bound by that performance. As such, the Court of Appeals concluded that once Reis served the number of years required under the policy, REMC was bound to performance.

Taft/

# *McGraw Property Solutions, LLC v. Jenkins*, 159 N.E.3d 991 (Ind. Ct. App. 2021)

**Issue**: Under the Home Improvements Contracts Act (HICA), may a contractor's replacement cure contract for deficiencies in the original contract relate back to the effective date of the original contract?

**Facts**: Jenkins and McGraw entered into an agreement under which McGraw was to perform storm remediation work to Jenkins' property. The agreement provided that if Jenkins' insurer did not approve the claim the agreement would be automatically terminated, and also included a liquidated damages provision in the event Jenkins refused to allow McGraw complete the work. Later, Jenkins decided not to repair his property and his insurer approved a claim for less than McGraw's estimate. McGraw subsequently sued Jenkins for breach of contract and Jenkins responded with a Notice of Violations under the Home Improvements Contracts Act alleging a variety of defects in the original contract including a failure to include a notice of cancellation. McGraw then issued a replacement cure contract, relating back to the date of the initial contract, that included the notice of cancellation. Upon receipt of the replacement cure contract, Jenkins cancelled the contract.

**Holding**: The Court of Appeals held that a contractor who fails to provide a consumer with the contract provisions required by the HICA, cannot provide the consumer with a replacement cure contract that relates back to the effective date of the original contract.

Taft/

# *Carroll v. Long Tail Corporation*, 167 N.E.3d 750 (Ind. Ct. App. 2021)

**Issue**: Is a non-solicitation covenant prohibiting a former employee from soliciting "Contractors of the Company" enforceable?

**Facts**: Carroll executed a Non-Solicitation and Confidentiality Agreement (NSA) with Long Tail Corporation. The NSA included provisions governing the non-solicitation of Long Tail's customers and contractors. After Carroll resigned from Long Tail, Long Tail discovered that Carroll had formed a company that competed with a Long Tail affiliate company. Long Tail subsequently filed suit against Carroll alleging that Carroll violated the NSA. The trial court granted Long Tail's request for a preliminary injunction enjoining Carroll from approaching, soliciting, or enticing Long Tail's contractors to leave Long Tail.

**Holding**: A non-solicitation agreement that extends to "any [c]ontractor of the [c]ompany and not just those who have access to or possess any knowledge that would give a competitor an unfair advantage" is overbroad and unenforceable.

Taft/

# *CW Farms, LLC v. Egg Innovations, LLC*, 2021 WL 1826993 (Ind. Ct. App. May 7, 2021)

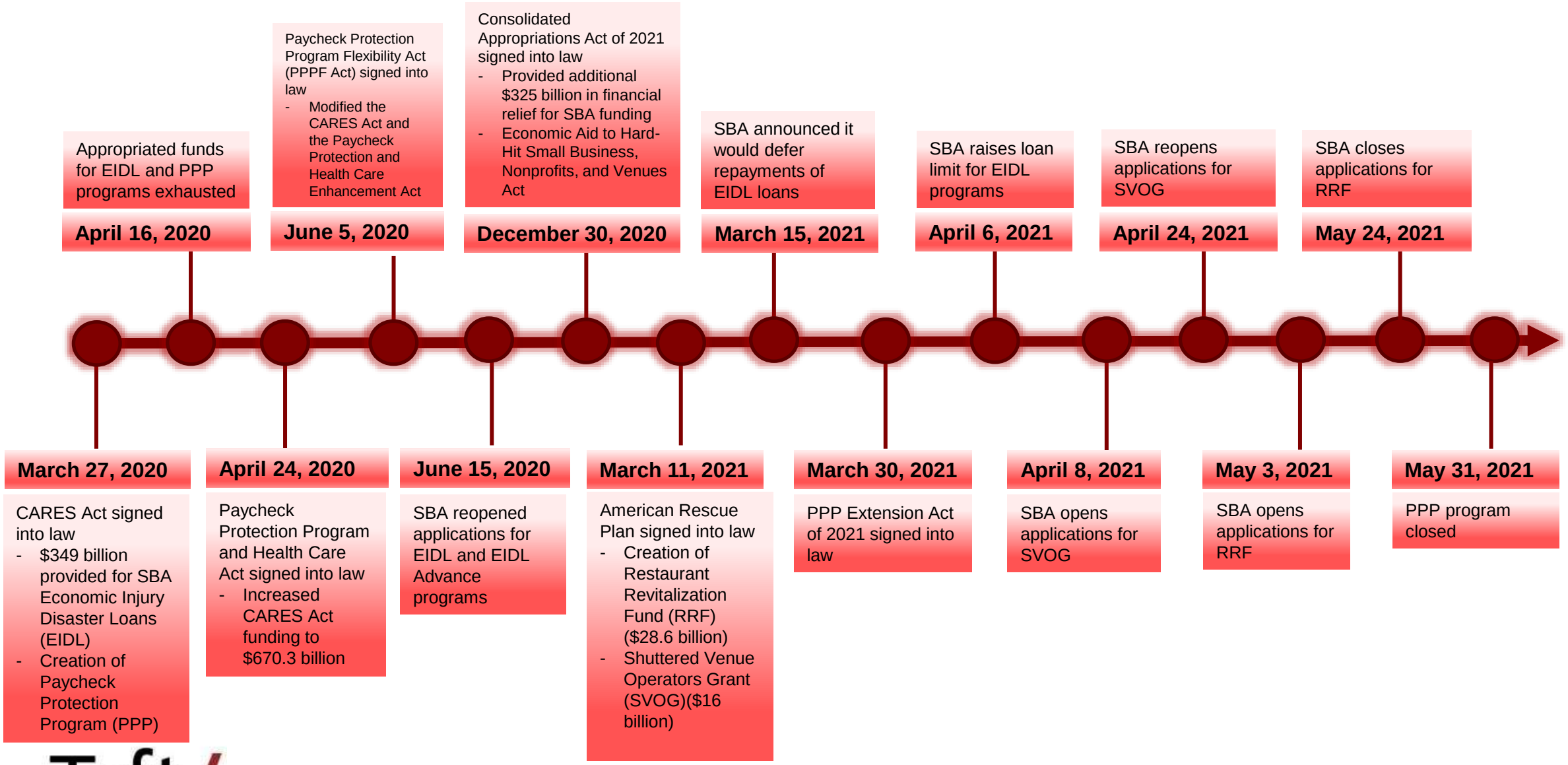
**Issue**: Can a contract that includes a provision explicitly rejecting the creation of a fiduciary relationship, also be found to establish a general duty of good faith and fair dealing?

**Facts**: Egg Innovations (EI) hired CW to raise chickens for egg production. The parties executed two agreements, each applicable to a different CW barn. The agreements provided that they would remain in effect for a period of 8 flocks. The parties later amended the agreements to stipulate that CW would only raise one more flock in each barn; neither barn reached the 8 flock mark. Prior to CW raising the final flocks, EI removed the chickens from CW's barns. CW subsequently filed suit against EI, including a claim of breach of good faith and fair dealing. CW claimed that EI breached the duty when it removed the final flocks prior to the end of the flocks' production cycle as retaliation for modifying the initial agreements. EI alleged that there was no duty of good faith or fair dealing because the contract included a provision that explicitly rejected the creation of a fiduciary relationship between the parties.

**Holding**: The Court of Appeals held that "the exclusion of a fiduciary relationship does not in itself preclude a duty of good faith and fair dealing" as "[t]he two concepts are not coextensive." It noted that language in another provision in the contract corresponded to the general definition of good faith and fair dealing.

Taft/

# SBA COVID-19 Relief Timeline




Taft/

# *Economic Injury Disaster Loan (EIDL)*

- **Purpose**
  - To meet financial obligations and operating expenses that could have been met had the disaster not occurred
- **Loan Amount**
  - For loans approved starting week of April 6, 2021: 24-months of economic injury with a maximum loan amount of $500,000
- **Terms**
  - 3.75% for businesses
  - 2.75% for nonprofits
  - 30 years
- **Use of Proceeds**
  - Working capital and normal operating expenses
- **Collateral Requirements**
  - Required for loans over $25,000
- **Forgivable**
  - No
- **Additional EIDL loans**
  - EIDL Advance; Targeted EIDL Advance; Supplemental EIDL Advance

Taft/

# *Paycheck Protection Program (PPP)*

- **Purpose**
  - Designed to provide a direct incentive for small businesses to keep their workers on payroll
- **Loan Amount**
  - For loans approved starting week of April 6, 2021: 24-months of economic injury with a maximum loan amount of $500,000
- **Terms**
  - 1% interest rate
  - Loans issued prior to June 5, 2020 – 2 year maturity
  - Loans issued after June 5, 2020 – 5 year maturity
- **Use of Proceeds**
  - Can be used to help fund payroll costs, pay mortgage, rent, utilities, worker protection costs related to COVID-19, uninsured property damage costs caused by looting or vandalism during 2020, and certain supplier costs and expenses for operations
- **Collateral Requirements**
  - None
- **Forgivable**
  - Yes

Taft/

# *Restaurant Revitalization Fund (RRF)*

- **Purpose**
  - To provide funding to help restaurants and other eligible businesses keep their doors open
- **Grant Amount**
  - $10 million per business; no more than $5 million per physical location
- **Repayment**
  - Funds need not be repaid if used for eligible uses no later than March 11, 2023
- **Eligibility**
  - Restaurants
  - Food stands, food trucks, food carts
  - Caterers
  - Bars, saloons, lounges, taverns
  - Snack and nonalcoholic beverage bars
  - Bakeries (onsite sales to the public comprise at least 33% of gross receipts)
  - Brewpubs, tasting rooms, taprooms (onsite sales to the public comprise at least 33% of gross receipts)
  - Breweries and/or microbreweries (onsite sales to the public comprise at least 33% of gross receipts)
  - Wineries and distilleries (onsite sales to the public comprise at least 33% of gross receipts)
  - Inns (onsite sales to the public comprise at least 33% of gross receipts)
  - Licensed facilities or premises of a beverage alcohol producer where the public may taste, sample, or purchase products

Taft/

# *Shuttered Venue Operators Grant (SVOG)*

- **Purpose**
  - To provide funding to help restaurants and other eligible businesses keep their doors open
- **Grant Amounts**
  - Entity in operation on January 1, 2019: 45% of their gross earned revenue OR $10 million, whichever is less
  - Entity that began operation after January 1, 2019: average monthly gross earned revenue for each full month in operation during 2019 multiplied by six OR $10 million, whichever is less
  - $2 billion reserved for eligible applicants with up to 50 full-time employees
- **Repayment**
  - None
- **Eligibility**
  - Live venue operators or promoters
  - Theatrical producers
  - Live performing arts organization operators
  - Museum operators
  - Motion picture theatre operators (including owners)
  - Talent representatives

Taft/

# *Impact of SBA Relief Programs*

- **Economic Injury Disaster Loan (EIDL)**
  - As of May 24, 2021:
    - 3.78 million loans approved
    - $205 billion in approved loans
- **Paycheck Protection Program (PPP)**
  - As of June 1, 2021:
    - PPP provided over 8.5 million small businesses and nonprofits loans
    - 96% of PPP loans went to small businesses with fewer than 20 employees
    - 32% of loans went to Low-and-Moderate Income Communities
- **Restaurant Revitalization Fund (RRF)**
  - As of May 18, 2021, SBA received applications from:
    - More than 122,000 women business owners
    - More than 14,000 veteran business owners
    - More than 71,000 economically and socially disadvantaged individuals
- **Shuttered Venue Operators Grant (SVOG)**
  - As of June 1, 2021:
    - 13,619 Applications submitted
    - 31 grants awarded
    - $34.2 million in total grants awarded

Taft/

# *Indiana Small Business Restart Grant*

- **Purpose**
  - To help accelerate economic recovery activity by supporting Hoosier entrepreneurs and small businesses.
- **Eligibility**
  - Been established prior to October 1, 2019
  - Be registered to operate in Indiana, except sole proprietors, and must be seeking reimbursement for expenses related only to their Indiana operations
  - Be in good standing with the Indiana Department of Revenue or have entered into a payment plan approved by the Indiana Department of Revenue
  - Have had fewer than 100 full time employees as of December 31, 2019
  - Have been profitable and have had less than $10 million in revenue (Gross Receipts or Sales) in 2019
  - Demonstrate a monthly gross revenue loss of at least 30% compared to pre-COVID 2019 average monthly revenue
- **Grant Amount**
  - Reimbursement for qualified business expenses incurred between March 1, 2020 and May 1, 2021
  - Reimbursements for expenses may be awarded up to $10,000 for each month during this period
  - Reimbursement may not exceed $50,000
- **Eligible Expenses**
  - Payroll – may be reimbursed up to 100%
  - Insurance premiums, rent or mortgage payments, lease payments for real or personal property, utilities, safety investments, food delivery software service payments – may be reimbursed up to 80%
- **Application Deadline**
  - December 31, 2021

Taft/

# *QUESTIONS?*

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Taft/

**New Nello Operating Co., LLC v. CompressAir, 168 N.E.3d 238 (Ind. 2021)**

The Supreme Court clarifies the requirements for two exceptions to the general rule that in a typical asset purchase, the buyer acquires seller's assets but not its liabilities. *Id*. at 239.

Nello Corporation ("Nello") was founded in 2002 and manufactured utility and cellphone towers. *Id*. Nello had seven shareholders, including four senior officers who owned 95% of its shares. *Id*. In 2016, Nello relocated its facilities to South Bend, Indiana, but the process took longer and was more expensive than anticipated. *Id*. Nello had significant debts including a $10-million-dollar obligation to Fifth Third Bank that had been personally guaranteed by Nello's four senior officers. *Id*. at 240. Upon default, Fifth Third was preparing to liquidate Nello's assets, but a private-equity firm offered Fifth Third a premium and acquired all of Fifth Third's interests in Nello. *Id*. The private-equity formed created New Nello Acquisition, to acquire Fifth Third's interests, and a wholly owned subsidiary, New Nello Operating Co. ("New Nello"), to run the business. *Id*. In 2017, New Nello and Nello finalized a strict-foreclosure agreement which identified the liabilities New Nello was assuming and which it was not. *Id*. New Nello operated from the same location without publicly announcing the transaction and retained about ninety percent of Nello's employees, including senior management. *Id*. None of Nello's shareholders owned any equity interest in New Nello. *Id*. CompressAir, who had installed piping in Nello's facility prior to the asset transfer and had never been paid, sued Nello and upon finding it had no assets subsequently sued New Nello to recover payment. *Id*. CompressAir contended that the strict foreclosure agreement between New Nello and Nello was fraudulent, it amounted to a de facto merger, and that New Nello was a mere continuation of Nello. *Id*. at 240-41. The trial court concluded that the transaction was a de facto merger and that New Nello was a mere

continuation of Nello and entered judgment in favor of Compress Air. *Id*. at 241. The court of appeals affirmed. *Id*.

The Supreme Court granted to transfer and held that "[f]or the purposes of the de-facto-merger exception… continuity of ownership is a required element." *Id*. In addition, the Supreme Court held that "because the mere-continuation exception applies only where there is exists [of] 'common identity' of equity holders, continuity of ownership is a necessary element." *Id*. at 243.

**McLean v. Trisler, 161 N.E.3d 1259 (Ind. Ct. App. 2020)**

This case upheld the rule that a shareholder of a closely-held corporation, under certain circumstances, may bring a direct action against the corporation "if [the court finds that doing so] will not (i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons." *Id*. at 1268-69 (citing *Barth v. Barth*, 659 N.E.2d 559 (Ind. 1995)).

In 2014, McLean joined Trisler and Koeppen as members of Greek's Mobile Response Team, LLC ("GMRT"). *Id*. at 1262. GMRT owned and operated a Greek's Pizzeria franchise. Later that year, Koeppen's interest in GMRT was divided pro rata between McLean and Trisler. *Id*. In November of 2014, Trisler sought to acquire another Pizzeria with GMRT assets. *Id*. In September of 2016, Trisler entered into an agreement to convey all of GMRT's assets to a buyer, and in October of 2016, Koeppen and Trisler approved the sale over McLean's objection. *Id*. McLean subsequently filed suit in his individual capacity and on behalf of GMRT, against Trisler, Koeppen, GMRT, and various other defendants, for money damages and injunctive relief. *Id*. at 1263. The trial court dismissed all of McLean's claims against the defendants "on the basis that McLean had failed to sufficiently prove his actual damages." *Id*. McLean appealed contending that "the trial court erred in concluding that he failed to establish his damages" and Trisler cross-appealed "claiming that McLean to establish that he was entitled to pursue claims in his individual capacity…" *Id*.

The Court agreed with McLean "that the trial erred in concluding that he failed to establish damages…." and rejected Trisler's argument that "McLean was unable to bring claims in his own name." *Id*. The Court found that "GRMT only ever had three members… all of whom

[were] parties to [the] lawsuit" and as such, "there [was] nobody else to sue them." *Id*. at 1269. The Court also found that there was "no evidence in the record that GRMT [had] any creditors who [would] be prejudiced by a judgement in McLean's favor." *Id*. Additionally, the Court found that "McLean being able to bring direct actions against the Defendants would not interfere with a fair distribution of recovery, because there [was] no indication that there is any party other than McLean that [was] entitled to any." *Id*.

**Hartman v. BigInch Fabricators & Construction Holding Company, Inc., 161 N.E.3d 1218 (Ind. 2021)**

The Supreme Court held that "minority" and "marketability" discounts in share valuations can also apply in a closed-market sale if a contract provision permits such discounts. *Id*. at 1219-20.

Hartman was an officer/director and minority shareholder of BigInch Fabricators & Construction Holding Company, Inc. ("BigInch"). *Id*. at 1220. All of BigInch's shareholders signed a contractor that included a buyback provision that required "BigInch to repurchase a shareholder's interest if the company involuntarily [terminated] the shareholder as an officer or director." *Id*. The provision also stated that "the company must pay the former officer or director the shares' 'appraised market value' as determined by a third-party valuation company in accordance with generally accepted accounting principles." *Id*. Hartman was subsequently terminated and in accordance with the buyback provision, BigInch hired a third-party appraiser who discounted Hartman's shares "for their lack of marketability" and "lack of control." *Id*. Hartman sued BigInch seeking a declaratory judgment "that the discounts [were] inapplicable because the shareholder agreement [didn't] contemplate a fair market value standard." *Id*. The trial court granted summary judgment in favor of BigInch finding that "'appraised' merely states how to determine 'market value' and that 'market value' and 'fair market value' [were] synonymous terms, both consistent with the appraiser's approach." *Id*. The Court of Appeals subsequently reversed the decision "concluding that the discounts could not apply to any closed-market sale." *Id*.

The Supreme Court acknowledged the public policy rational behind refusing "to apply marketability and minority discounts to a closed-market sale of a [non-controlling] business

interest," but noted that prior decisions "do not govern because they do not concern a sale under a contract that expressly contemplates the shares' 'market value.'" *Id*. at 1221. The Supreme Court reasoned that while "public policy discussions are valid," courts must "honor the parties' freedom to contract and look to the terms they chose to govern the buyback." *Id*. at 1222. Upon concluding that "the plain and unambiguous language of the shareholder agreement [called] for BigInch to pay Hartman the fair market value of his shares," the Court held that "Hartman's shares could be discounted for their lack of marketability and his lack of a controlling interest in the company." *Id*. at 1224.

**Symons v. Fish, 158 N.E.3d 352 (Ind. Ct. App. 2020)**

The court upheld the general rule that "damages clauses that contain multipliers of two and three times a stipulated sum are unenforceable penalties." *Id*. at 357.

In 2011, Symons and other buyers purchased a company from Fish. *Id*. at 355. The parties stock purchase agreement included a provision that required Symons "to obtain the release or replacement of the [seller's] personal guaranties [in association with the company]" and provided that Symons would "indemnify and hold harmless [Fish] and [would] reimburse [Fish] three (3) times the amount of any loss [or claim] … arising from or in connection with any personal guaranties of [Fish]." *Id*. at 356. Symons failed to obtain such release and a vendor of the company subsequently sued Fish to recover on his personal guaranty. *Id*. Fish then sued Symons for "breach of contract for failure to obtain the release or replacement of [Fish's] personal [guaranty]" and "sought a judgment for three times the amount of the alleged damages" Fish was required to pay the vendor. *Id*. The jury found in favor of Fish in the amount of $831,222 and the trial court "further awarded [Fish his] reasonable costs and attorneys' fees, and tripled the award" under the relevant stock purchase agreement provision. *Id*. at 356-57. Symons appealed contending that "the treble-damages clause in [the stock purchase agreement was] not a proper liquidated damages clause but, rather, [an unenforceable penalty]." *Id*. at 357.

On appeal, the court reiterated their previous ruling that "[l]iquidated damages provisions are generally enforceable where the nature of the agreement is such that when a breach occurs the resulting damages would be uncertain and difficult to ascertain." *Id*. (citing *Gershin v. Demming*, 685 N.E.2d 1125, 1127-28 (Ind. Ct. App. 1997)). "However, the stipulated sum will not be allowed as liquidated damages unless it may fairly be allowed as compensation for the breach" and "[w]here the sum stipulated in the agreement is not greatly disproportionate to the

loss likely to occur, the provision will be accepted as a liquidated damages clause and not as a penalty, but where the sum sought to be fixed as liquidated damages is grossly disproportionate to the lose which may result from the breach, the courts will treat the sum as a penalty." *Id*. The court upheld its rule that "damages clauses that contain multipliers of two and three times a stipulated sum are unenforceable penalties" and found that the provision in question was "a textbook example of an unenforceable penalty." *Id*. at 358. The court found that there was "no apparent or discernable relationship or correlation between the treble damages claimed and the loss actually suffered by [Fish]" and found that the clause did not "provide for liquidated damages in lieu of performance but for payment of a penalty to secure performance of the contract." *Id*.

**Jetz Service Company, Inc. v. Ventures, 165 N.E.3d 990 (Ind. Ct. App. 2021)**

The court held that to "render a contract enforceable, an absolute certainty in all terms is not required, rather, all that is required to render the contract enforceable is reasonable certainty in the terms and conditions of the promises made, including by whom and to whom." *Id*. at 995.

Jetz entered into a seven-year lease with Ventures under which Jetz was authorized "to install three pay-to-use washers and dryers" in an apartment complex owned by Ventures. *Id*. at 992. Through their respective agents, Ventures emailed Jetz stating that Ventures was considering "eliminating" the apartment complex and that Ventures "would be terminating [the parties'] lease." *Id*. Jetz responded that there "were approximately 81 months remaining" on the lease and that Jetz "was entitled to about $9,720.00 from [Ventures] in light of the breach." *Id*. On March 17, 2016, Jetz sent a subsequent email in which it agreed to settle the issue for $8,000 and Ventures accepted the offer by stating "I will reluctantly agree [,] [p]lease forward a termination agreement effective 6/2516 [and] remove the machines between the 25th & 30th of June." *Id*. The next day Jetz sent Ventures a copy of the settlement agreement. *Id*. Ventures responded stating that it wanted to include additional terms and Jetz authorized Ventures to make the modifications it sought. Id. Jetz did not hear from Ventures for over two months, at which point Ventures emailed Jetz rescinding "all previous offers" because "Jetz was not being reasonable" in their negotiations. *Id*. at 993. Jetz subsequently filed suit against Ventures for breach of contract and after about two years of litigation, "[Ventures] filed motions for leave to amend its answers to Jetz's Complaint, and to enforce the settlement agreement." *Id*. The trial court issued an Order of Judgment in favor of Jetz that stated that there was "a meeting of the minds" and "[a] contract was formed" on March 17, 2016. *Id*. Jetz appealed contending "that the

trial court erred in concluding that the parties entered into an enforceable settlement agreement on March 17, 2016, because the facts do not support a meeting of the minds." *Id*. at 994.

On appeal, the court held that "there is evidence in the record to support the trial court's judgment that there was a meeting of the minds on" March 17th. *Id*. at 995. The court noted that "[a]ll that is required to render a contract enforceable is reasonable certainty in the terms and conditions of the promises made, including by whom and to whom; absolute certainty in all terms is not required [and] [o]nly essential terms are necessary for a contract to be enforceable." *Id*. at 994-95. Relying on the trial court's findings that on March 17, 2016, "there was an offer, acceptance, and consideration," the Court held that the email exchanges between the parties "created a contract, and the execution of a more elaborate agreement to memorialize the contract was not required." *Id*. at 995.

**Clark County REMC v. Reis, 167 N.E.3d 333 (Ind. Ct. App. 2021)**

The court held that a policy requiring "mutuality of obligation" constitutes a contract. *Id*. at 339.

Reis, and other plaintiffs, served as directors on the defendant's, Clark County Rural Electric Membership Corporation (the "REMC"), board. *Id*. at 335. In 1972, the REMC's board of directors adopted a policy that provided, in relevant part, "that all directors having not less than twelve years [of] service at the end of the term when they must retire from the board shall continue to participate in the [health care] plan with full cost paid by the R.E.M.C. for the director and spouse as long as the retired director shall live." *Id*. In addition, the policy provided that "[a]ny director having accumulated service of twenty years shall participate in the [health care] plan with full cost paid by the R.E.M.C. for the director and spouse as long as the director shall live." *Id*. at 335-36. In 2000, Reis and the other plaintiffs, had elected to participate in the health care plan and subsequently amended the policy "to provide that directors elected after July 5, 2000, would not be eligible for paid post-service coverage." *Id*. at 336. In 2015, retirees age sixty-five and older were no longer allowed to participate in the health care plan, and the board amended the policy "to allow eligible past directors to obtain their own insurance and be reimbursed by the RMC, up to a certain amount." *Id*. In 2018, the new board of directors voted to revoke the policy and REMC stopped reimbursing Reis and the other plaintiffs. *Id*. The plaintiffs subsequently sued the REMC claiming breach of contract and the trial court granted the plaintiffs "partial summary judgment on their breach-of-contract claim." *Id*. The REMC appealed contending that "there was no 'mutuality of obligation' under the policy" and as such, the trial court erred by concluding it was a contract." *Id*. at 337.

On appeal, the court held that "[b]ecause there was mutuality of obligation under the policy, the trial court did not err by finding the policy to be a contract." *Id*. at 339. The court found that "there was mutuality of obligation under the policy because [the directors] were bound to serve [on the board] for a certain number of years in order to qualify for lifetime health-insurance benefits, and the REMC was bound to provide [such benefits if the directors] served the requisite number of years." *Id*. at 337. The court noted that although the policy "may have been revocable at any time… [it was not revoked until] after [the plaintiffs] had served the requisite number of years." *Id*. The court reiterated their prior rule that "[w]here one party to an agreement 'acts upon the promise of the other party and performs his part of the agreement, the contract is not unenforceable for lack of mutuality.'" *Id*. at 337-38 (citing *Rogier v. Am. Testing and Eng'g Corp.*, 734 N.E.2d 606, 618 (Ind. Ct. App. 2000)). As such, the court found that once the directors served the required number of years, "the REMC became bound to provide the promised benefits." *Id*. at 338.

**McGraw Property Solutions, LLC v. Jenkins, 159 N.E.3d 991 (Ind. Ct. App. 2020)**

The court held that a contractor who fails to provide a consumer with the required contract provisions as required by the Home Improvements Contracts Act ("HICA"), cannot provide the consumer a replacement cure that relates back to the effective date of the original contract. *Id*. at 997-98.

In 2017, Jenkins' property was damaged during a severe storm. *Id*. at 993. On June 11, 2017, Jenkins and McGraw entered into an agreement under which "McGraw promised to complete all storm remediation work to the property for the price approved by Jenkins' insurer." *Id*. The contract stated that "[i]f the insurance company [did] not approve [Jenkins'] claim, [the] agreement" would be automatically terminated. *Id*. The contract also required Jenkins to pay McGraw 20% of the replacement cost value as liquidated damages if Jenkins refused to allow McGraw to finish the work. *Id*. Jenkins subsequently decided not to repair his property and his insurer approved a claim for less than McGraw's estimate. *Id*. McGraw then filed suit against Jenkins alleging "breach of contract, unjust enrichment, and promissory estoppel." *Id*. Jenkins responded with a "Notice of Violations under the [HICA]" alleging that the contract lacked "several minimum statutory requirements" such as the date he could accept, the date the improvements would begin, and a statement of any contingencies that would materially change the approximate completion date. *Id*. Jenkins demanded that McGraw submit a replacement cure contract in accordance with the HICA's provision to cure the deficiencies. *Id*. at 994. On August 24, 2017, McGraw "issued a replacement cure contract which, according to its terms, related back to June 11, 2017, i.e., the date of the original contract." *Id*. The replacement cure contract provided Jenkins with the right to cancel within three days of the "[t]he date of [the] agreement" or upon receiving written confirmation from his insurance company that "all or any part of the

claim or contract is not a covered loss under the insurance policy." *Id*. Jenkins' accepted the replacement cure contract on August 27, 2017, and also submitted a notice to McGraw that he was cancelling the contract that same day. *Id*. The trial court issued judgment against McGraw on its breach of contract claim and McGraw appealed. *Id*. at 994-95.

The court of appeals found that "as soon as one of the statutorily enumerated requirements is not included in the contract, a deceptive act has occurred and the contract is in violation of HICA" regardless of any deceptive intent on behalf of McGraw. *Id*. at 996-97. The court held that the purpose of the HICA "is to protect consumers by placing specific minimum requirements on the contents of home improvement contracts" and that "[b]y relating the replacement cure contract back to the effective date of the original contract, McGraw attempted to circumvent granting Jenkins an effective remedy." *Id*. at 997. The court noted that the HICA can only protect consumers if the consumers are aware of their rights, and in this case, Jenkins' became aware of his rights when he was offered the replacement cure contract on October 27, 2017. *Id*. Accordingly, the court held "the replacement cure contract [was] effective from the date of its execution on October 27, 2017, and Jenkins timely exercised his right to cancel [it]." *Id*. at 997-98.

**Carroll v. Long Tail Corporation, 167 N.E.3d 750 (Ind. Ct. App. 2021)**

The court held that a non-solicitation agreement that extends to "any [c]ontractor of the [c]ompany and not just those who have access to or possess any knowledge that would give a competitor an unfair advantage" is overbroad and unenforceable. *Id*. at 761.

In 2017, Carroll executed a Non-Solicitation and Confidentiality Agreement ("NSA") with Long Tail Corporation. *Id*. at 754. The NSA identified Carroll as "the 'Contractor'" and included provisions "governing the [non-solicitation] of [Long Tail Corporation's] Customers and Contractors." *Id*. In 2019, Carroll resigned from his position with Long Tail. Id. Long Tail then discovered that "certain documents were missing including service agreements, notes that Carroll may have taken on phone calls, and any type of records of his conversations." Id. Additionally, when Carroll returned his company computer, it had been factory reset and there was nothing on it. Id. Upon discovering that Carroll had formed a company that competed with Long Tail's affiliate company, CodeClouds, Long Tail filed suit against Carroll seeking various forms of injunctive relief and damages asserting that "Carroll violated the NSA by soliciting [Long Tail's] clients." *Id*. The trial court granted Long Tail's preliminary injunction and enjoined Carroll from "approaching, soliciting, or enticing contractors of Long Tail to leave Long Tail's employment." *Id*. at 755. Carroll subsequently appealed. *Id*. at 753.

The court of appeals held that the NSA's provision that relates to the non-solicitation of all of Long Tail's contractors was "overbroad and unenforceable" because it extended "to any [c]ontractor of the [c]ompany and not just to those who have access to or possess any knowledge that would give a competitor an unfair advantage." *Id*. at 761. The court held that the provision could not be "blue-penciled because there is no language that [the court] could excise to rend its

scope reasonable" since the term "[c]ontractor" was not defined in the NSA. *Id*. (citing *Heraeus Medical, LLC v. Zimmer, Inc.*, 135 N.E.3d 150 (Ind. 2019)).

**CW Farms, LLC v. Egg Innovations, LLC, 2021 WL 1826993 (Ind. Ct. App. May 7, 2021)**

The court held that "the exclusion of a fiduciary relationship does not in itself preclude a duty of good faith and fair dealing" as "[t]he two concepts are not coextensive." *Id*. at 4.

In 2010, Egg Innovations ("EI") hired CW to raise chickens for egg production. *Id*. at 1. EI and CW executed two agreements, each applicable to a different CW barn, that provided EI "would provide the chickens and the feed, and CW would provide the facilities, care for the chickens, and oversee egg production." *Id*. The agreements stated that they would remain in effect "for a period of 8 flocks," although the duration of a flock was not defined, and that EI would pay CW "per each dozen eggs produced." *Id*. In 2018, the parties amended the agreements to stipulate that "CW would raise only one more flock in each barn, for a total of six and seven flocks, respectively." *Id*. EI provided CW with the final flock in September 2018 and "[a]pproximately forty-eight weeks later, [EI] suddenly and without explanation removed the chickens" from CW's barns prior to the end of the production cycle. *Id*. CW subsequently filed suit against EI including a claim of "breach of good faith and fair dealing." *Id*. EI moved to dismiss the suit pursuant to T.R. 12(B)(6) and the trial rule granted EI's motion. *Id*. CW appealed contending that "its claim that [EI] breached the duty of good faith and fair dealing" stated a valid claim because "[EI] breached this duty when it removed the flocks at forty-eight weeks of the production cycle as 'retaliation' for CW's role in seeking to modify the parties' original agreement." *Id*. at 3.

The court of appeals reiterated its previous holding that "the duty of good faith is implied in contract law 'only under limited circumstances… [h]owever, a duty of good faith may apply to a contract where the terms of the contract expressly include such a duty." *Id*. (citing *Lake Cty. Trust Co. v. Wine*, 704 N.E.2d 1035, 1039 (Ind. Ct. App. 1998)). The court found that Black's

Law Dictionary definition of "good faith" and "fair dealing" corresponded to the language in the parties' agreement that stated "[t]his [a]greement will be interpreted assuming all parties conduct themselves in a professional and honest manner, and uphold their respective obligations." *Id*. at 4. The court also rejected EI's assertion that another provision in the agreement that provided that "[n]othing in this [a]greement shall be deemed to… establish a fiduciary relationship of any kind between the parties" made it clear no "general duty of good faith and fair dealing existed." *Id*. The court held that "the exclusion of a fiduciary relationship does not in itself preclude a duty of good faith and fair dealing" as "[t]he two concepts are not coextensive." *Id*.

# Section Fourteen

# Judge Robert H. Staton
# Indiana Law Update
# 2021 Insurance Law Update

**Anna Mallon**
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## Section Fourteen

## 2021 Insurance Law Update……Anna Mallon

# 2021 INSURANCE LAW UPDATE

## I. CASE LAW UPDATE

### A. HOMEOWNER'S AND CONDOMINIUM POLICIES

#### 1. Appraisal

A sample appraisal provision in a homeowner's policy states:

**APPRAISAL**

If "**you**" and "**we**" fail to agree on the amount of loss, on the written demand of either, each party will choose a competent, disinterested and impartial appraiser and notify the other of the appraiser's identity within 20 days after the demand is received. The appraisers will select a competent, disinterested and impartial umpire. If the appraisers are unable to agree upon an umpire within 15 days after both appraisers have been identified, "**you**" or "**we**" can ask a judge of a court of record in the state where "**your**" "**residence premises**" is located to select an umpire.

The appraisers will then set the amount of loss. If the appraisers submit a written report of an agreement to "**us**," the amount agreed upon will be the amount of loss. If they cannot agree, they will submit their differences to the umpire. A written award by two will determine the amount of loss.

Each party will pay the appraiser it chooses, and equally bear expenses for the umpire and all other expenses of the appraisal. However, if the written demand for appraisal is made by "**us**," "**we**" will pay for the reasonable cost of "**your**" appraiser and "**your**" share of the cost of the umpire.

"**We**" will not be held to have waived any rights by any act relating to the appraisal.

This is not an agreement to arbitrate. The appraisers and umpire are only authorized to determine actual cash value or the cost to repair or replace damaged property. The appraisers and umpire are not authorized to determine if a loss is covered or excluded under the policy.

Either party can invoke appraisal under the policy. Appraisal is appropriate when there is a dispute about the amount of the loss.

Recently, the Southern District assessed whether there is a time limit for demanding appraisal as most appraisal provisions do not speak to timing. In *North Shore Co-Owners' Assoc. v. Nationwide Mut. Ins. Co.*, 2021 WL 2711640 (S.D. Ind. July 1, 2021), Nationwide partially denied coverage for a hail and wind claim submitted by North Shore condominiums. Apparently, Nationwide paid for the damage to soft metals, but not the roof shingles because Nationwide did not find that the shingles were damaged from a covered cause of loss. North Shore filed suit seeking insurance coverage. During the course of the coverage lawsuit, North Shore demanded appraisal. Nationwide objected to the demand for appraisal as untimely and argued that North Shore waived the right to seek appraisal.

The District Court explained that appraisal is a contractual right, and like any other contractual right, it can be waived. 2021 WL 2711640 at * 2. The Court looked to Indiana law and held that "[a] contractual option, such as this appraisal provision, which lacks any specific time reference, must be invoked within a reasonable time in light of the circumstances of the instant case." *Id.* The District Court denied North Shore's Motion to Order Parties to Appraisal because it found the appraisal was demanded too late into the litigation process and was waived. *Id.* While this case discusses examples of instances where appraisal has been waived as untimely, there is no hard and fast rule that demanding appraisal after litigation is commenced is automatically grounds for waiver.

**2. Suit Limitation Provisions**

Most homeowner's policies contain a suit limitation provision that states something similar to the following:

> No one may bring legal action against us under this Coverage Form unless there has been full compliance with all of the terms of this Coverage Form and the Action

> is brought within 2 years after the date on which direct physical loss or damage occurred.

In *Legend's Creek Homeowners Assoc. Inc. v. Travelers Indem. Co. of America*, 493 F.Supp.3d 681 (S.D. October 6, 2020), the District Court examined a suit limitation provision in a condominium policy. While the facts of this case are quite convoluted, the basic facts relevant to the suit limit issue are that Travelers denied a hail and wind claim under a condominium policy issued to Legend's Creek. Legend's Creek filed a lawsuit alleging breach of contract and bad faith. Travelers defended against the allegations, in part, by alleging that Legend's Creek failed to file the lawsuit within the two year suit limit. The District Court noted that it was undisputed that the date of loss was May 1, 2016 and the lawsuit was not filed until July 23, 2018, more than two years after the date of loss.

Legend's Creek argued that Travelers had a duty to notify it of Traveler's intent to enforce the suit limitation provision in the policy. The District Court reviewed Indiana law on suit limitation provisions and held:

> The Court determines that Indiana law does not impose an affirmative duty on an insurer to notify its insured of its intent to enforce the suit limitation provision. Instead, the question is whether a reasonable insured would have the impression that the insurer *does not* intend to enforce the provision.

493 F.Supp.3d 681 at 689.

Legend's Creek also argued that Travelers waived the suit limitation provision in this case. The District Court acknowledged that suit limitation provisions can be waived either explicitly or implicitly. *Id.* Whether a suit limitation provision is waived turns on the conduct of the insurance company and whether the conduct caused the insured to believe that the limitation would not be enforced. *Id.* Legend's Creek claimed that waiver occurred because (1) after suit was brought there were discussions about settling the claim; (2) there was a request to extend the suit limitation

that was not responded to by Travelers; and (3) Travelers continued to act on the claim past the two-year suit limit.

In rejecting all of these arguments, the District Court determined that Legend's Creek did not specifically reference the suit limitation provision when it asked for an extension so there was no evidence that Travelers ignored a request for extension. *Id.* at 690. The District Court also found no evidence that Travelers gave Legend's Creek the impression that it would not enforce the suit limitation provision or that Legend's Creek could delay filing suit. *Id.* at 691. In finding no waiver, the District Court found dispositive the fact that the discussions post the two-year suit limit involved a different claim. *Id.* Apparently, Legend's Creek essentially made a new claim two weeks before the two-year limit by requesting replacement of all siding instead of just the north facing siding. Thus, communications post the two-year limit on this new claim did not waive the suit limitation provision. *Id*.

Legend's Creek also advanced an argument that it "substantially complied" with the suit limitation provision. The District Court rejected this argument and held that Legend's Creek "was the party attempting to game the claims adjustment process and that it was Legend's Creek that dragged its feet in asking for replacement of all siding." *Id.* at 692. Finally, the District Court in this case found the suit limitation provision to be unambiguous. *Id.* The District Court granted summary judgment to Travelers on all claims due to the failure of Legend's Creek to comply with the two-year suit limitation provision in the policy. *Id.*

### B. AUTOMOBILE POLICIES

Indiana has financial responsibility requirements set forth in Ind. Code § 27-7-5-2 et seq. The purpose of the Financial Responsibility Act is to ensure that every insured is entitled to recover

uninsured motorist benefits for the damage they would have recovered from the offending motorist if that person would have maintained a policy of liability insurance or maintained adequate liability insurance. Every year, there are cases interpreting underinsured motor vehicle ("UIM") and uninsured motor vehicle ("UM") coverage. This year is no exception.

### 1. Meaning of "Resident Relative" for UM/UIM Coverage

Who is entitled to UM/UIM coverage is a question that often arises in the UIM context. In *Glover v. Allstate Property and Cas. Ins. Co.*, 153 N.E.3d 1114 (Ind. 2020), Sheila Glover died in a car accident and her Estate settled its claims against the responsible drivers for the policy limits totaling $75,000.00. The Estate also recovered separate settlements of $25,000.00 each for UIM coverage from Glover's carrier and from the carrier for Glover's husband who was driving. Thus, the Estate recovered a total of $75,000.00 in liability payments and $50,000.00 in UIM payments totaling $125,0000.00. The Estate then requested an additional $25,000.00 in UIM coverage under Glover's parents' policy with Allstate.

In order for the Estate to recover under the parents' policy as an insured, Glover must qualify as a "resident relative." Apparently, Glover had moved in with her parents six weeks before the accident. The trial court granted summary judgment for Allstate on this issue and found that Glover was not a "resident relative" entitled to coverage. The Court of Appeals affirmed the trial court (although on the issue related to anti-stacking discussed below) and transfer was sought to the Indiana Supreme Court. The Indiana Supreme Court granted transfer and vacated the trial court's judgment and remanded the case to the trial court with instructions to grant the Estate's motion for summary judgment.

In finding that Glover qualified as a "resident relative" under the parents' policy and entitled to UIM coverage, the Indiana Supreme Court explained that there is no dispute that Glover was a relative of her parents. 153 N.E.3d at 1117. The dispositive issue is whether Glover qualified as a "resident" which was defined as "a person who physically resides in [the policyholder's] household with the intention to continue residence there." *Id.* In finding that Glover was a resident of her parents' home, the Court relied on the fact that Glover moved everything she and her children owned into the home, changed her address, her parents described their home as Glover's new home, and Glover intended to remain in her parents' home. *Id.* Because Glover qualified as a "resident relative", she was entitled to UIM coverage. *Id.* The Supreme Court also held that the parents did not have to notify Allstate that Glover was residing with them because the notice requirement applies when an operator becomes a resident of your household and Glover was not an operator. *Id.* at 1118.

**2. Anti-Stacking and Offset Provisions For UM/UIM Coverage**

The *Glover* case also addressed the anti-stacking and offset provisions in the parents' policy related to UIM coverage. The parents' policy set forth that UIM limits "shall be reduced by [ ] all amounts paid" to the Estate. The Supreme Court held that the offset provision reduces only the payments made on behalf of those persons responsible for the accident and not from other sources. *Id.* Thus, the $100,000.00 UIM limit under the parents' policy is reduced by the $75,000.00 paid by the liability carriers but not by the UIM payments made by Glover's carrier and her husband's carrier. *Id.* This leaves an additional $25,000.00 in UIM coverage under the parents' policy. *Id.* The Supreme Court held that the Estate is entitled to summary judgment that it is entitled to $25,000.000 in UIM coverage under the parents' policy. *Id.* at 1120-1121.

### 3. Evidence of Medical Expenses in UIM Trial

In *Gladstone v. West Bend Mut. Ins. Co.,* 166 N.E.3d 362 (Ind. Ct. App. March 24, 2021), the Indiana Court of Appeals addressed the issue of whether medical bills can be introduced as evidence of pain and suffering at trial. In this case, Gladstone was injured in an automobile accident and filed suit against the responsible party and his UIM carrier, West Bend. Once the responsible party tendered her liability limits, she was dismissed from the lawsuit leaving the UIM claim. Gladstone dropped his claim for medical expenses and only sought damages for pain and suffering under the UIM coverage. The UIM claim proceeded to trial and West Bend sought to introduce evidence of medical bills totaling $14,000.00 reduced to $2,000.00. The medical bills were admitted over objection and Gladstone recovered nothing at the UIM trial. Gladstone appealed.

The Indiana Court of Appeals acknowledged that whether evidence of medical bills is admissible in a proceeding in which recovery of medical bills is not sought has not been specifically addressed in Indiana. 166 N.E.3d at 367. The Court of Appeals rejected Gladstone's argument that evidence of medical bills is never relevant to pain and suffering. *Id.* at 368. The Court noted:

> Common sense and experience dictate that a more serious injury generally brings with it greater medical expenses as well as greater pain and suffering…
>
> Because we conclude that evidence of medical bills will generally have some relevance to the amount of pain and suffering experienced by the patient, we decline Gladstone's invitation to adopt a bright-line rule that evidence of medical bills is always inadmissible on relevance grounds when their recovery is not sought.
>
> Having declined Gladstone's invitation to adopt a bright-line rule, we conclude that West Bend has cleared the low bar for establishing the relevance of Gladstone's medical bills in this case. If the bills are low, as Gladstone apparently considers them to be, then they tend to establish that he has not experienced extensive pain and suffering from his injuries, and that is all that Evidence Rule 401 requires. We acknowledge that there are cases in which low medical bills may not accurately

> reflect the amount of pain and suffering experienced, but that does not mean that evidence of medical bills is irrelevant. If, in the estimation of one of the parties, the amount of the medical bills does not accurately reflect the amount of pain and suffering, that party is free to counter it with other evidence and argument, as Gladstone did in this case.

*Id.* (citations omitted). The Court of Appeals also held that Gladstone did not establish that "the danger of unfair prejudice or juror confusion substantially outweighed the relevance of his medical bills in this case." *Id.* at 369. In affirming the decision of the trial court to admit medical expenses, the Court of Appeals emphasized its confidence in the jurors' ability to weigh evidence. *Id.*

## C. COMMERCIAL POLICIES

### 1. Business Interruption Claims from COVID-19

The business closures and restrictions due to COVID-19 triggered claims for business interruption and business loss. The District Courts interpreted two cases involving business interruption claims due to COVID-19. In *Georgetown Dental, LLC v. Cincinnati Ins. Co*., 2021 WL 1967180 (S.D. Ind. May 17, 2021), Georgetown Dental filed a lawsuit for declaratory judgment seeking coverage for economic losses due to closures and partial closures necessitated from COVID-19. Cincinnati moved to dismiss the claims under Federal Rule of Civil Procedure 12(b)(6).

The Cincinnati Policy contains a Building and Personal Property coverage form and also a Business Income and Extra Expense coverage under which Georgetown Dental seeks coverage. The Building and Personal Property coverage form states:

> We will pay for the direct "loss" to Covered Property at the "premises" caused by or resulting from any Covered Cause of Loss.

2021 WL 1967180 at * 1. "Loss" is defined in the Policy as "accidental physical loss or accidental physical damage." *Id.* The Business Income and Extra Expense coverage form states:

> [Defendants] will pay for the actual loss of "Business Income" and "Rental Value" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct "loss" to property at a "premises" caused by or resulting from any Covered Cause of Loss.

*Id.* The Policy defined "period of restoration" as "the period of time that a. [b]egins at the time of direct loss [and] b. [e]nds on the earlier of (1) [t]he date when the property at the premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or (2) [t]he date when business is resumed at a new permanent location." *Id.*

Cincinnati argued that courts have dismissed similar claims because insurance policies require that there be tangible alteration to property in order to meet the requirement that there be direct physical loss or damage to property. The argument advanced in these cases is that COVID-19 does not physically alter the appearance, shape, color or any other material dimension of the property. Cincinnati also argues that "Civil Authority" coverage does not apply.

Georgetown Dental responded that the definition of loss includes more than physical damage and includes the inability to use the dental office for its intended purpose—loss of use. Georgetown Dental argues that orders shutting down businesses because of actual or threatened contamination either in the air or on the surface constitutes physical loss of the property. Georgetown Dental also points out that this policy did not contain a virus exclusion.

The District Court agreed with Cincinnati that the Policy does not cover Georgetown Dental's alleged losses due to COVID-19. *Id.* The Court held that for "Business Income" and "Extra Expenses" coverage to apply Georgetown Dental must demonstrate that it has suffered some property "loss," defined as "accidental physical loss or accidental physical damage." *Id.* The Court held that this "physical loss" or "physical damage" must be actual and demonstratable physical harm. *Id.* The District Court relied on two recent cases in Indiana to support its decision.

*See MHG Hotels, LLC v. Emcassco Ins. Co. Inc.*, No. 1:20-cv-01620-RLY-TAB (S.D. Ind. March 8, 2021); *Indiana Repertory Theatre v. Cincinnati Ins. Co.*, No. 49D01-2004-PL-013137 (Marion Sup. Ct. March 12, 2021). The District Court agreed with the prior decisions that the term "period of restoration" and how it is defined strongly suggests that for coverage to exist the damage must be physical in nature. *Id.*

The District Court ultimately held that "because Georgetown Dental has not alleged any physical alteration or structural degradation to the premises, nor the need to repair, replace, or restore any physical element of the property in order to reopen for business, it has not sufficiently alleged 'loss' as required by the Policy." 2021 WL 1967180 at *8 (citations omitted). The District Court granted Cincinnati's Motion to Dismiss with prejudice finding no claim for business interruption for Georgetown Dental. *Id.*

In *Circle Block Partners, LLC v. Fireman's Fund Ins. Co.*, 2021 WL 3187521 (S.D. Ind. July 7, 2021), the Conrad Hotel in Indianapolis filed a claim for loss incurred during the pandemic. Fireman's Fund denied the claim and the owners of the Conrad Hotel filed suit for breach of contract/declaratory judgment seeking a determination that coverage exists. Fireman's Fund moved to dismiss under Federal Rule of Procedure 12(b)(6).

Circle Block alleges that there is coverage under several policy provisions, including but not limited to (1) Business Income and Extra Expense Coverage; (2) Business Access Coverage; (3) Communicable Disease Coverage; (4) Civil Authority Coverage; and (5) Dependent Property Coverage. All of the provisions require "direct physical loss or damage" to either the property or to "a dependent property." 2021 WL 3187521 at *2. The issue in this case again centered on what constitutes "direct physical loss or damage to property." Fireman's Fund argued that it requires

direct destruction or physical alteration to property and Circle Block argued that it can mean loss of use or function, or at least is ambiguous.

The District Court explained that the Policy does not define "direct physical loss" but that does not make it ambiguous. In looking to the ordinary meaning of the words, the Court held that a "direct physical loss" to property requires a "harmful alteration in the appearance, shape, color, composition, or other material dimension of the property, excluding situations in which an intervening force plays some role." *Id.* at 4. The Court held that "[t]he ordinary meaning of the phrase 'direct physical loss or damage to property' does not provide coverage for economic losses caused by the COVID-19 pandemic in the absence of any physical harm to the Conrad's building or the items located within it." *Id.* at * 6. Circle Block tried to argue that COVID-19 required additional cleaning and disinfecting so that constitutes direct physical loss or damage to the building. However, the Court did not accept this argument and held that a physical substance on property is not enough. The District Court dismissed the claims of Circle Block with prejudice. *Id.*

### 2. Ransomware Attacks

In *G&G Oil Co. of Indiana v. Continental Western Ins. Co.*, 165 N.E.3d 82 (Ind. March 18, 2021), the employees of G&G discovered that the company was the victim of a ransomware attack and were unable to access the company's servers and workstations. The hijacker demanded a ransom in exchange for the passwords to restore control over the servers which G&G paid.

G&G submitted a claim to Continental Western Insurance Company under its Commercial Policy. The Policy included a Commercial Crime and Fidelity Coverage Part providing coverage for computer fraud. The computer fraud provision stated:

> Computer Fraud
>
> We will pay for loss or of damages to "money", "securities" and "other property" resulting directly from the use of any computer to fraudulently cause a transfer of that property from inside the "premises" or "banking premises":
>
> a. To a person (other than a "messenger") outside those "premises"; or
> b. To a place outside those "premises".

Continental denied coverage because G&G had not purchased the optional Computer Virus and Hacking Coverage. G&G filed a Complaint for Declaratory Judgment seeking a declaration of coverage. The trial court granted summary judgment for Continental and found that G&G's losses did not result from computer fraud. The Court of Appeals affirmed. The Indiana Supreme Court accepted transfer and examined the issue of whether the ransomware attack (1) "fraudulently caused a transfer of money" and (2) whether the loss "resulted directly from the use of a computer."

The Indiana Supreme Court assessed whether the phrase "fraudulently cause a transfer" is ambiguous. The Court found the phrase unambiguous and determined that its straightforward definition was construed too narrowly by the trial court and the Court of Appeals. 165 N.E.3d at 88. The Supreme Court determined that reasonably intelligent policyholders would not disagree over this term's definition- to obtain by a trick. *Id.* In applying this definition, the Indiana Supreme Court determined that neither party was entitled to summary judgment because there was a question as to whether G&G's computer systems were obtained by a trick. *Id.*

Next, the Indiana Supreme Court examined whether G&G's loss "resulted directly from the use of a computer." *Id.* at 89. The Court looked at the meaning of the word "directly" and found that in order to obtain coverage per this provision, G&G must show that its losses resulted "immediately or proximately without significant deviation from the use of a computer." *Id.* The Court found that G&G satisfied that definition because the transfer of Bitcoin was nearly the immediate result- without significant deviation- from the use of a computer. *Id.*

The Indiana Supreme Court held that although G&G's losses resulted directly from the use of a computer, neither party is entitled to summary judgment and reversed the finding of no coverage and remanded the case to the trial court. *Id.*

## D. BAD FAITH AND EXTRACONTRACTUAL CLAIMS

The tort of breach of an insurer's duty of good faith and fair dealing was first recognized in Indiana in *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515 (Ind. 1993). Although the *Erie* court did not establish the exact parameters of the duty owed by an insurer to an insured, it did state that the obligation of good faith and fair dealing with respect to the discharge of an insurer's contractual obligation includes the obligation to refrain from: (1) making an unfounded refusal to pay policy proceeds; (2) causing an unfounded delay in making payment; (3) deceiving the insured; and (4) exercising any unfair advantage to pressure an insured into a settlement of the claim. *Erie*, 622 N.E.2d at 519.

### 1. Bifurcation of Breach of Contract and Bad Faith Claims

Bifurcation of discovery and/or trial is often sought in cases involving breach of contract and bad faith claims. The case of *State Farm Mut. Ins. Co. v. Gutierrez*, 866 N.E.2d 747 (Ind. 2007) is cited in support of bifurcation for these claims. Recently, the Northern District denied a request for bifurcation.

In *Donahue v. American Family Ins. Co.*, 2021 WL 2221411 (N.D. Ind. June 2, 2021), the District Court was presented with a Motion to Bifurcate a breach of contract claim from a bad faith claim. In this case, the Donahues submitted a claim to American Family for a ceiling collapse in their lake home due to a burst pipe. The Donahues claim that American Family refused to pay the balance of the repair agreement because the repairs were not completed within one year from the date of the loss as required by the Policy. The Donahues filed suit alleging breach of contract and

bad faith against American Family. American Family filed a Motion to Bifurcate the breach of contract claim from the bad faith claim.

American Family argued that it would be prejudicial to try the claims together. The District Court explained that "[w]ile it is true that the plaintiffs must establish that the defendant breached the contract in order to prove bad faith, it is not necessary that it be accomplished through two separate trials." 2021 WL 2221411 at *2. The Court then explained that it could provide "warnings, limiting instructions, or special verdict forms" to address the prejudice issue. *Id.* The Court also explained that the Donahues will not be able to put on evidence of American Family's net worth unless there is sufficient evidence of bad faith. *Id.*

American Family also argued that bifurcation is necessary because the discovery sought is not relevant to both claims. The Court explained that because American Family raised the affirmative defense related to making repairs within one year and the Donahues countered that American Family stalled the second ACV payment and refused an extension of the one-year limit, the discovery is relevant to both claims. The District Court denied the Motion to Bifurcate.

**2. Bad Faith and Negligent Failure to Settle**

When an excess judgment is rendered against an insured it is not uncommon that the insured assigns any cause of action it may have against the insurer to the tortfeasor in exchange for the tortfeasor not executing any judgment against the insured. The tortfeasor then steps into the shoes of the insured and brings a cause of action against the insurer for its failure to settle the claim within policy limits. In making this claim for failure to settle, the tortfeasor is seeking extra-contractual damages or more than the policy limits The insurer will argue that the proper claim is a claim for bad faith failure to settle with its heightened burden of proof. The tortfeasor, on the other hand, often argues that the claim is negligent failure to settle with a lower burden of proof.

The case law in Indiana has been mixed on whether the cause of action is negligent failure to settle or bad faith failure to settle. Recently, the Southern District was faced with an interesting set of facts related to failure to settle claims.

In *Cincinnati Ins. Co. v. Selective Ins. Co.*, 2020 WL 7027876 (S.D. Ind. November 30, 2020), the District Court examined several issues related to failing to settle an insurance claim within policy limits. This case stems from a vehicular accident wherein Smiley accidentally flipped his truck owned by his auto repair shop severely injuring passenger Callahan. Callahan filed a lawsuit against Smiley and the auto shop and that case settled. Selective Insurance insured Smiley and his business under a commercial policy with limits of $3 million. Cincinnati Insurance provided a personal policy as umbrella coverage to Smiley in the amount of $1 million. Selective filed a declaratory lawsuit seeking a coverage determination as to whether the Selective policy covered the claims against Smiley and the auto shop and Cincinnati intervened in that action and also sought a determination that its policy did not cover the claims. In this present action, Cincinnati filed suit against Selective alleging bad faith failure to settle and negligent failure to settle the underlying lawsuit. Selective and Cincinnati filed cross motions for summary judgment.

The District Court first reviewed the bad faith failure to settle claim. Selective argued that Cincinnati does not have standing to bring a bad faith claim because Indiana does not allow a third party to assert an insured's bad faith claim against its insurer through the doctrine of equitable subrogation. The Court did not address whether Cincinnati could bring a bad faith claim against Selective via the doctrine of equitable subrogation because the Court granted summary judgment to Selective on the bad faith claim for other reasons. Thus, the issue of whether an insurance company can file suit against another insurance company for bad faith via equitable subrogation remains undecided.

Also on the bad faith claim, Selective argued that it had a rational basis for not settling the underlying claims sooner because it had a rational basis for its coverage defenses. The coverage defenses related essentially to whether Callahan was an employee of Smiley. If he was an employee, there was no coverage. The declaratory action was pending at the same time as the underlying action, and ultimately the coverage issue proceeded to trial wherein it was determined that Callahan was not an employee. Cincinnati argued that Selective acted in bad faith when it (1) refused to settle the underlying claims within policy limits when it knew Smiley had no liability defenses and (2) offered much lower in settlement than its reserves.

In granting summary judgment to Selective on the bad faith claim, the District Court explained that Selective knew Smiley faced liability but it decided not to settle until the coverage issues were worked out. The fact that Selective's coverage argument was rejected by the jury did not make it bad faith as the issue of who is an employee under a policy is a difficult coverage issue. The District Court held that "[b]ecause Cincinnati has designated no evidence showing that Selective pursued [the coverage] litigation without a rational principled basis, Selective did not act in bad faith in disputing coverage." 2020 WL 7027876 at * 5. The District Court also held that there is no authority that an insurer's duty to act in good faith requires it to settle a case before an excess insurer does "especially given the context of an ongoing, good faith coverage dispute." *Id.* at * 6.

Turning next to the negligent failure to settle claim, Selective argued that Indiana does not recognize a claim for negligent failure to settle. Cincinnati claimed that Indiana does. The District Court reviewed the case law in Indiana and ultimately concluded that "it's unclear whether the Indiana Supreme Court, in recognizing a cause of action against an insurer for bad faith refusal to settle in *Hickman,* excluded a cause of action for negligent refusal to settle." *Id.* The District

Court also explained that while the Seventh Circuit allows an excess carrier to file suit against a primary carrier through equitable subrogation, it is unclear how the Indiana Supreme Court would decide that issue. The District Court explained:

> Here, the remaining issues on summary judgment present questions that appear to meet the standard- is there a cause of action for negligent refusal to settle a case, and if so, can a third party assert such a claim against an insurer through the doctrine of equitable subrogation? The Court has not identified "clear controlling Indiana precedent" on either question and each may be determinative to the outcome of the case.

*Id.* at * 7. The District Court ordered the parties to file briefs addressing whether the Court should certify these questions to the Indiana Supreme Court. On February 25, 2021, the District Court issued its Order of Certification, 2021 WL 766651 (S.D. Ind. February 25, 2021).

This case gives credence to the consideration of coverage issues when approaching underlying settlement negotiations. This case also leaves open whether there is a claim for negligent failure to settle. Interestingly, we discussed last year the case of *Travelers Indemnity Co. v. Johnson*, 440 F. Supp.3d 980 (N.D. Ind. 2020), wherein the Northern District held that there is no cause of action in tort for negligently failing to settle a claim within the policy limits.

# 2021 Indiana Law Update

Insurance Law Update

Anna Mallon

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# Insurance Case Law Update

- Homeowner’s Policies
- Automobile Policies
- Commercial Policies
- Bad Faith/Extra-Contractual


Homeowner’s
Policies

# Appraisal:

- *North Shore Co-Owners' Assoc. v. Nationwide Mut. Ins. Co.*, 2021 WL 2711640 (S.D. Ind. July 1, 2021).

# **Background:**

- Appraisal to set the amount of loss.
- Coverage issues not appropriate.
- Appraisal provision does not set time limit.

# Facts:

- Hail and wind damage claim.
- Nationwide covered soft metals, but not shingles.
- North Shore filed suit and then demanded appraisal.

# Holding:

- Appraisal was untimely.
- Appraisal provision can be waived.
- Appraisal must be demanded within a reasonable time.

# Practice Pointer:

- No hard and fast rule on what is too late, but after litigation is commenced be weary of appraisal demands.


# Suit Limitation Provision

- *Legend's Creek Homeowners Assoc. Inc. v. Travelers Indem. Co. of Am., 493 F.Supp.3d 681 (S.D. Ind. October 6, 2020)*

# Background:

- Most HO policies contain suit limit provision barring actions brought after 2 years from the date of the loss.

# Facts:

- Travelers denied a hail and wind damage claim to condos.
- Legend's Creek filed suit for breach of contract and bad faith.
- Travelers raised suit limit.

# Holding:

- No duty for insurer to inform insured of intent to rely on suit limit.
- Suit limit can be waived.
- Waiver depends on the conduct of the insurer.

# Holding:

- Travelers did not ignore a request for extension of suit limit.
- Travelers did not give the impression it would not enforce the suit limit.

# Holding:

- Discussions post 2-year suit limit involved another claim.
- District Court found no waiver of suit limit and the provision unambiguous.
- Suit limit barred all claims.

# Practice Pointer:

- Waiver arguments are common when the insurer raises the suit limit defense. It is not a bad idea for the insurer to continually remind of the suit limit in communications during the claim.


# Automobile Policies


# Uninsured and Underinsured Motorist Coverage (UM/UIM)

# Background:

- Insurer required to offer UM/UIM coverage in auto policy (Ind. Code §27-7-5-2).
- Protect insured from paying for damage caused by uninsured/ underinsured motorist driver.

# Meaning of "Resident Relative"

- *Glover v. Allstate Property and Cas. Ins. Co.,* 153 N.E.3d 1114 (Ind. 2020).

# Facts:

- Glover died in a car accident. Her husband was driving.
- Estate settled the claims against the responsible drivers for limits of $75,000.

# Facts:

- Estate also recovered settlements of $25,000 each for UIM coverage from Glover's carrier and the carrier for Glover's husband.
- Estate requested an additional $25,000 in UIM coverage under Glover's parents' policy with Allstate.

# Facts:

- To be an insured under parents' policy, Glover must qualify as "resident relative."
- Trial court found Glover was not "resident relative." Court of Appeals affirmed (on other grounds).
- Indiana Supreme Court granted transfer.

# Holding:

- Indiana Supreme Court found Glover was a “resident relative” and entitled to UIM coverage.
- “Resident” defined as a person who physically resides in the policyholder’s household with the intention to continue residence there.

# Holding:

- Facts support finding of resident relative- moved into parents' home with all belongings and children, changed address etc.
- No duty on the part of the parents to notify Allstate that their daughter was living there.

## Practice Pointer:

- If assessing whether someone qualifies as a resident under a policy, gather all facts. Very fact specific.

# Offset Provisions for UIM Coverage

- *Glover v. Allstate Property and Cas. Ins. Co.,* 153 N.E.3d 1114 (Ind. 2020).

**Facts:**

- Parents' policy set forth that UIM limits "shall be reduced by all amounts paid" to the Estate.
- Allstate wanted to reduce the $100,000 UIM limits by all amounts received by the Estate.

# Holding:

- Indiana Supreme Court held that the offset provision reduces only the payments made on behalf of those persons responsible for the accident.
- The $100,000 UIM limit was reduced only by the $75,000 paid by the liability carriers.

**Holding:**

- Indiana Supreme Court remanded the case to the trial court with instructions to grant the Estate's motion for summary judgment.

# Practice Pointer:

- *Glover* addresses an issue with set offs in UIM coverage that has been talked about a long time. It remains to be seen how far this will stretch- medpay, workers compensation etc.

# Evidence of Medical Expenses UIM Trial

- *Gladstone v. West Bend Mut. Ins. Co.*, 166 N.E.3d 362 (Ind. Ct. App. March 24, 2021) .

# Facts:

- Gladstone was injured in an automobile accident and filed suit against his carrier for UIM coverage and the responsible party.
- Responsible party paid limits and was dismissed.

# Facts:

- Gladstone dropped his claim for medical expenses and only sought damages for pain and suffering under UIM.
- At trial, West Bend sought to introduce evidence of medical expenses.

# Facts:

- Trial court admitted medical bills over Gladstone's objection.
- Gladstone recovered nothing at the UIM trial
- Gladstone appealed.

# Holding:

- Indiana Court of Appeals held that evidence of medical bills can be relevant to pain and suffering.
- No bright line rule against evidence of medical bills.

# Holding:

- Indiana Court of Appeals affirmed the decision of the trial court admitting the medical bills.
- Confidence in jurors' ability to weigh evidence.

# Practice Pointer:

- The practice of dropping a claim for medical expenses in an attempt to limit the introduction of medical bills has lost its steam with this case. There will still be debate over relevancy based on the facts of a given case.

# Commercial Policies

# Business Interruption Claims- COVID-19

# Background:

- Closures and restrictions due to COVID-19 have led to claims for business losses under commercial polices.
- Some policies have virus exclusions.

- *Georgetown Dental, LLC v. Cincinnati Ins. Co.* , 2021 WL 1967180 (S.D. Ind. May 17, 2021).

# Facts:

- Dental office filed a declaratory lawsuit seeking coverage for business losses.

# Facts:

- Policy contained Building and Personal Property coverage form.
- Pay for the direct “loss” to Covered Property at the “premises” caused by or resulting from a Covered Cause of Loss.

# Facts:

- “Loss” is defined as “accidental physical loss or accidental physical damage.”

# Facts:

- Policy contains a Business Income and Extra Expense coverage form.
- Pay for the actual loss of "Business Income" due to the necessary "suspension" of your "operations" during the "period of restoration."

# Facts:

- The “suspension” must be caused by direct “loss” to property at a “premises” caused by or resulting from any Covered Cause of Loss.

# Facts:

- Cincinnati moved to dismiss the declaratory lawsuit pursuant to Fed. R. Civ. Proc. 12(B)(6).

# Holding:

- Commercial Policy does not cover losses due to COVID-19.
- Under Business Income and Extra Expense coverage, Georgetown Dental must show it suffered property “loss.”

# Holding:

- Must show “accidental physical loss or accidental physical damage.”
- Damage must be physical in nature.
- Granted Cincinnati’s Motion to Dismiss.

- *Circle Block Partners, LLC v. Fireman's Fund Ins. Co.*, 2021 WL 3187521 (S.D. Ind. July 7, 2021).

# Facts:

- Conrad Hotel filed a claim for business losses.
- Fireman's Fund denied the claim.
- Conrad filed a declaratory lawsuit.

# Facts:

- Business Income and Extra Expense Coverage.
- Business Access Coverage.
- Communicable Disease Coverage.
- Civil Authority Coverage.
- Dependent Property Coverage.

# Facts:

- All provisions required “direct physical loss or damage” to the property or a dependent property.

**Holding:**

- Policy does not define “direct physical loss.”
- Not ambiguous.
- Requires a harmful alteration to the property.

# Holding:

- No coverage for economic losses caused by COVID-19- need physical harm to hotel's building or items in it.
- Physical substance on property is not enough.
- Dismissed claims by Conrad.

# Practice Pointer:

- Hard to find coverage for business losses from COVID-19 under Commercial Policies even in the absence of virus exclusion.

# Coverage For Ransomware Attacks

- *G&C Oil Co. of Indiana v. Continental Western Ins. Co.*, 165 N.E.3d 82 (Ind. March 18, 2021).

# Background:

- Ransomware is one of the largest cybercrimes in the world.
- Cyber insurance market has grown rapidly.

# Facts:

- Employees of a company discovered the company was the victim of a ransomware attack.
- The hijacker demanded a ransom in exchange for the passwords to restore the system.

# Facts:

- Company submitted a claim under its commercial policy- Commercial Crime and Fidelity Coverage Part providing coverage for computer fraud.

# Facts:

- The claim was denied and the company filed a declaratory lawsuit.
- Trial court granted summary judgment for the insurer.  Court of Appeals affirmed.
- Supreme Court granted transfer.

# Holding:

- “Fraudulently cause a transfer” is unambiguous.
- Straightforward meaning- to obtain by trick.
- Fact dispute as to whether computer systems were obtained by trick.

**Holding:**

- Examined whether losses "resulted directly from the use of a computer."
- Company satisfied this definition- the transfer of Bitcoin was nearly the immediate result of the use of a computer.

# Holding:

- Neither party entitled to summary judgment.
- Reversed finding of no coverage.

# Practice Pointer:

- Computer fraud provision is not necessarily the same as a cyber policy.

# Bad Faith/Extra-Contractual Claims

# Background:

- Duty for Insurer to act in good faith to Insured.

- Duty arises by virtue of contract between Insurer and Insured.

# Bifurcation

- *Donahue v. Am. Fam. Ins. Co.*, 2021 WL 2221411 (N.D. Ind. June 2, 2021).

# Background:

- Request for bifurcation of breach of contract claim and bad faith claim.
- Bifurcation can be for trial or discovery.

# Facts:

- Donahues submitted claim for ceiling collapse in lake home.
- Suit filed for breach of contract and bad faith.
- American Family filed a Motion to Bifurcate.

# Holding:

- Must establish that American Family breached the contract in order to prove bad faith.
- Not necessary that it be done in separate trials.
- Limiting instructions will handle prejudice.

**Holding:**

- Discovery may be relevant to both claims related to delay.
- Denied Motion to Bifurcate.

# Practice Pointer:

- Courts rule different ways when presented with bifurcation motions.  Facts of particular case important.
- Prejudice and Relevancy are most common reasons advanced for bifurcation.

# Bad Faith Failure to Settle

- *Cincinnati Ins. Co. v. Selective Ins. Co.*, 2020 WL 7027876 (S.D. Ind. November 30, 2020).

# Background:

- Arises when an excess judgment is rendered against the insured.
- Failure to settle within policy limits.

**Facts:**

- Smiley flipped truck owned by his auto shop.
- Passenger Callahan was injured.
- Callahan filed suit against Smiley and auto shop.  Settled.

# Facts:

- Selective insured Smiley and auto shop under CGL.
- Cincinnati insured Smiley under personal umbrella.

# Facts:

- Selective filed a declaratory lawsuit. Cincinnati intervened. Both argued no coverage.
- Cincinnati filed suit against Selective alleging bad faith and negligent failure to settle.

# Holding:

- Court granted summary judgment to Selective on bad faith claim.
- Selective had a rational basis for pursuing its coverage position.
- Not bad faith to refuse to settle.

# Holding:

- Unclear whether Indiana recognizes a claim for negligent failure to settle.
- Unclear whether Indiana would allow an excess carrier to file suit against primary carrier- equitable subrogation.

# Holding:

- District Court issued Order of Certification to Indiana Supreme Court.

# Practice Pointer:

- Unclear on whether negligent failure to settle is a recognized claim.
- Supports considering coverage issues when assessing settlement of underlying case.

# Section Fifteen

# Appellate Practice

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## Section Fifteen

## Appellate Practice..... Maggie L. Smith

## A. Should I—and more important, can I—appeal?

### 1. What are my chances of success on appeal?

Next to, "How much is this going to cost me?", the first thing your client wants to know as the appellant is, "What are my chances of success on appeal?" and, conversely, as appellee, "What are my chances of holding onto my victory"? Although there is no surefire way to know how the appellate courts will decide your particular appeal, some basic information exists that may help you make informed decisions and alert your client to the possibilities on appeal.

As a general matter, historically the Indiana Court of Appeals has reversed the trial court in civil cases approximately 35% of the time.

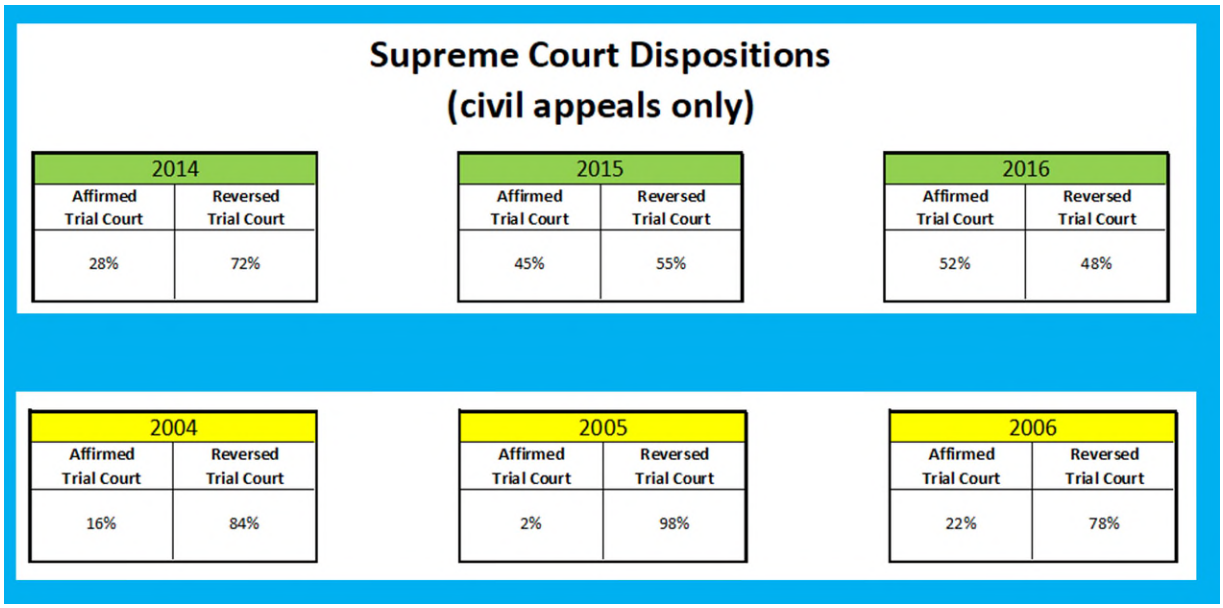
**Court of Appeals Dispositions**
**(civil appeals only)**

| 2014 | |
|---|---|
| Affirmed Trial Court | Reversed Trial Court |
| 69% | 31% |

| 2015 | |
|---|---|
| Affirmed Trial Court | Reversed Trial Court |
| 61% | 39% |

| 2016 | |
|---|---|
| Affirmed Trial Court | Reversed Trial Court |
| 68% | 32% |

In contrast, the Indiana Supreme Court's civil reversal rates are much higher, historically ranging from 48% to 98% reversal in 2005:




Of course, application of this averages will differ depending on the nature of the issue and the standard of review. For example, in a case where the issue on appeal is a fact-based error and the standard of review is abuse of discretion, there will be a much smaller chance of reversal. On the other hand, the chance of reversal should be higher for de novo review of a pure question of law or de novo review of summary judgment. Nonetheless, the fact that the reversal rate has remained relatively constant over the years is a good indication of the overall chances of success in the appellate court.

**2. Do you have a final judgment?**

With the exception of a few interlocutory appeals discussed below, appeals may be taken as a matter of right only from "final" orders/judgments of the trial court. The existence of a final order is jurisdictional, and the appellate court will dismiss the appeal if it finds there is no final order.

A final order/judgment is defined as one that "disposes of all issues as to all parties, to the full extent of the court to dispose of the same, and puts an end to the particular case as to all of such parties and all of such

issues. A final judgment reserves no further question or direction for future determination." *Young v. Estate of Sweeney,* 808 N.E.2d 1217, 1120 n.4 (Ind. Ct. App. 2004).

Trial Rules 54(D) and 56(C) allow a trial court to certify an otherwise interlocutory order as final. This authority, however, is constrained by the fact that "[t]o be properly certifiable . . . a trial court order must possess the requisite degree of finality, and must dispose of at least a single substantive claim." *Id.* "[A] claim consists of two elements: 1) a showing of entitlement to relief, and 2) the relief. . . ." *Id.* Thus, "a judgment that fails to determine damages is not final" and may not be certified under 54(D) or 56(C).

If there are still remaining parties or claims, merely labeling something as "final" is not sufficient. *See, e.g.*, *Cincinnati Ins. Co. v. Davis*, 860 N.E.2d 915, 920 (Ind. Ct. App. 2007) (trial court's statement that "[a]s there remain no pending issues, this shall be considered a final, appealable order" was insufficient where there were pending issues and where the orders "[did] not contain the 'magic language' of either Trial Rule 54(B) or Trial Rule 56(C)").

### 3. Interlocutory Appeals

An order which is not final is termed "interlocutory." The appellate rules provide for an appeal of an interlocutory order in three basic circumstances: by statute; "as of right"; and discretionary. IND. APPELLATE RULE 14.

The statutory and "of right" grounds for appeal are limited and either apply or not. IND. APPELLATE RULE 14(A)(1) through (A)(9); 14(D).

When a trial court grants or denies class certification, Appellate Rule 14(C) will allow a party to bypass the trial court certification requirement and file a Motion to Accept Jurisdiction over that interlocutory order in the

Court of Appeals within thirty days after the trial court's entry of the order granting or denying class certification. IND. APPELLATE RULE 14(C). The Court of Appeals still retains discretion to decide whether to accept the appeal. *Id.*

All other interlocutory orders are discretionary appeals, which involves a three-step process. First, the trial court must certify the order. IND. APPELLATE RULE 14(B)(1). If the trial court chooses not to do so, there can be no interlocutory appeal.

Second, if the trial court does certify the order, you must then convince the Court of Appeals to accept jurisdiction over the appeal. Discretionary interlocutory appeals are disfavored and strictly limited, representing "narrow exceptions to the final judgment rule," the purpose of which is "to prevent delay in the trial of lawsuits which would result from limitless intermediate appeals." 24 GEORGE T. PATTON, JR., INDIANA PRACTICE, Appellate Procedure § 5.7 (3d ed. 2021); Paulson v. Centier Bank, 704 N.E.2d 482, 488 (Ind.Ct.App.1998). For this reason, neither the trial courts nor the appellate courts are inclined to grant discretionary interlocutory appeals because of the concern of piecemeal litigation." *Id.*

"The reasons for that approach are both sound and longstanding. The general rule has long favored postponing appeal until a final judgment has been rendered because it promotes judicial economy by avoiding the time and expense attendant to piecemeal litigation. Indeed, many potential errors may be mooted by the final result of judgment because the result is acceptable to the party who might otherwise complain." *INB Nat. Bank v. 1st Source Bank*, 567 N.E.2d 1200, 1202 (Ind.Ct.App. 1991).

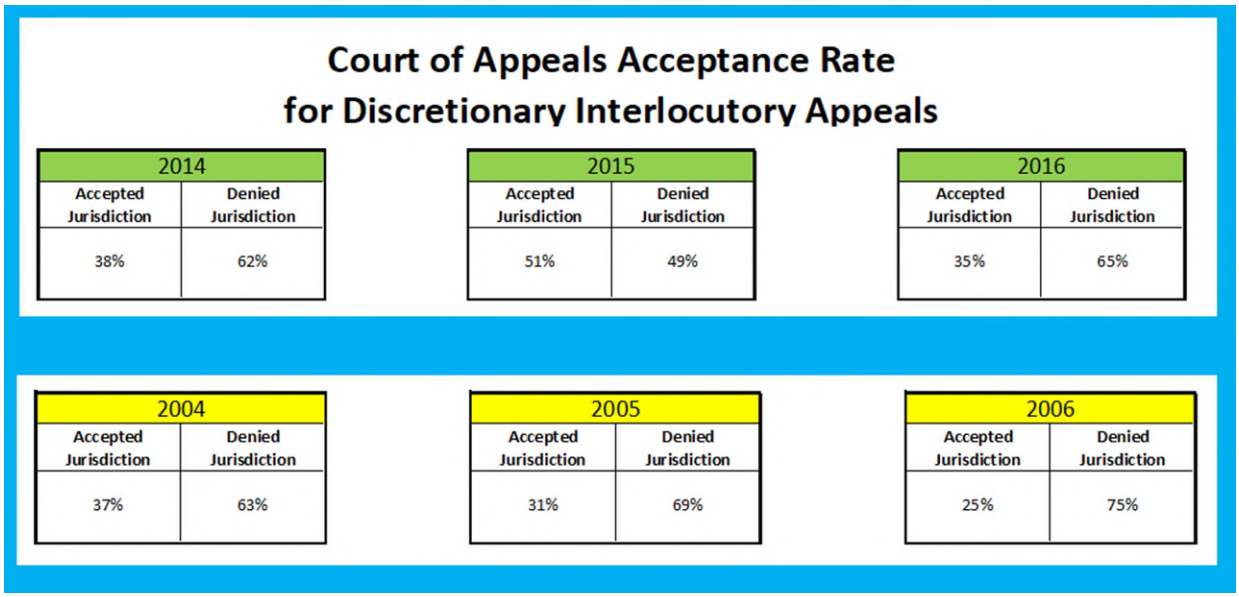
Because of the concern for piecemeal litigation, "The discretionary grant of jurisdiction is typically reserved for extraordinary cases raising important and novel legal issues, not for garden variety challenges to a trial court's factual findings that are appealable after final judgment."

HONORABLE EDWARD W. NAJAM, JR., *Interlocutory Appeals Under the Revised Rules*, APPELLATE PRACTICE, p. 10 (Indiana Continuing Legal Education Forum, May 4, 2000). Thus the potential interlocutory appeal "must be a way to resolve all or most of a pending litigation." 24 IND. PRAC., APPELLATE PROCEDURE § 5.7 (3d ed. 2005).

Although there are always exceptions to the rule, generally speaking, the Court of Appeals is more likely to accept jurisdiction over an appeal where (1) the facts are not in dispute; (2) resolution of the interlocutory issue has the potential to be case dispositive, or at least dispose of most of the issues remaining at trial; (3) the trial court's interlocutory ruling is wrong.

Some "protypical" examples of discretionary interlocutory appeals that may be accepted by the Court of Appeals include matters going to liability; subject-matter jurisdiction; personal jurisdiction; certification of a class action; statute of limitations; dispositive evidence (most often in the criminal context); and discovery orders (particularly matters involving privilege). See APPELLATE SKILLS INSTITUTE, Discretionary Interlocutory Appeals p. 16-18 (Indiana Continuing Legal Education Forum, November 2, 2006).

With this in mind, the rates for the Court of Appeals accepting jurisdiction when requested vary between 35-50% over the past ten years:




Finally, if the court accepts jurisdiction over the appeal, the parties then brief the case as if it were an appeal from a final judgment.

**4. Motions to Reconsider & Motions to Correct Error**

A timely Motion to Correct Error under Trial Rule 59 tolls the appeal deadline. A Motion to Reconsider under Trial Rule 53.4 *does no*t.

Trial Rule 53.3(A) sets out the time limitations for ruling on a Motion to Correct Error and provides that the Notice of Appeal must be filed with thirty days of the date of the ruling on or deemed denial of a Motion to Correct Error, regardless of whether the Motion is mandatory or permissive under Trial Rule 59. IND. TRIAL RULE 53.3(A).

A Motion to Correct Error will be "deemed denied" if any of the following occur: (1) The trial court fails to set[1] the Motion to Correct Error for a

[1] The trial court only need set the date for a hearing within the forty-five-day period, it need not actually hold the hearing within the forty-five-day period. *See Kovacik v. Kovacik*, 631 N.E.2d 509, 511 (Ind. Ct. App. 1994) ("Although the hearing did not take place until well after the forty-five (45) day period, it was set within the period. The rule specifically requires a hearing to be set within forty-five (45) days, not that a hearing actually take place within that timeframe."). In the context of rescheduling a hearing on a Motion to Correct Error after a continuance, there is a question as to whether *Kovacik* "allow[s] for a seemingly indefinite

hearing within forty-five days after its filing; (2) The trial court fails to rule on the Motion to Correct Error within thirty days after a hearing on the motion; or (3) The trial court fails to rule on the Motion to Correct Error within forty-five days if there is no hearing. IND. TRIAL RULE 53.3(A).

If the motion has been "deemed denied" the trial court cannot resurrect the appeal clock by belatedly ruling on the Motion to Correct Error. *See, e.g.*, *Garrison v. Metcalf*, 849 N.E.2d 1114, 1115-16 (Ind. 2006) (although trial court ruled on the motion to correct error thirty-six days after filing, it was deemed denied six days earlier, and appeal clock started to run from the "deemed denied" date).

A Motion to Correct Error can only be used when there is a final judgment. It cannot be used to correct interlocutory rulings (such as a partial summary judgment that was not declared final under Trial Rule 56(C). *See Cardiology Assocs. of Northwest Ind., P.C. v. Collins*, 804 N.E.2d 151, 153 (Ind. Ct. App. 2004).

**5. When is my Notice of Appeal due?**

The time to file a Notice of Appeal from a final judgment under Appellate Rule 9(A) is 30 days from entry of the judgment into the Chronological Case Summary ("CCS"), not from the date the judge renders judgment. IND. APPELLATE RULE 9(A).

Also, if you are appealing an Administrative Agency decision, the Notice of Appeal must be filed within 30 days after the Administrative Agency's entry of its order, ruling or decision. IND. APPELLATE RULE 9.

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period of time to elapse before a hearing on a motion to correct error need be rescheduled, so long as the original hearing was set within forty five days after the motion was filed," *Ostertag v. Ostertag*, 755 N.E.2d 686, 689 (Ind. Ct. App.2001) (Sullivan, J., dissenting), versus whether the trial court must reset the date for a new hearing within forty-five days of the continuance being granted. *See Williamson v. Williamson*, 825 N.E.2d 33 (Ind. Ct. App. 2005); *Ostertag*, 755 N.E.2d at 687; *Copenhaver v. Lister*, 852 N.E.2d 50, 57 (Ind. Ct. App. 2006).

**Contrary provisions in controlling statutes or agency regulations will *not* impact or alter the filing deadlines.** *See, e.g.*, *Owen County v. Indiana Dep't of Workforce Dev.*, 861 N.E.2d 1282, 1288-89 (Ind. Ct. App. 2007) (provision in statute that a Review Board decision is not final for fifteen days does not impact application of Appellate Rule 9(A)(3) that requires the Notice of Appeal to be filed within thirty days of the decision); *Citizens Industrial Group v. Heartland Gas Pipeline*, 856 N.E.2d 734, 738 (Ind. Ct. App. 2006) (provision in statute that appeal shall not be submitted prior to determination of a petition for rehearing does not toll time to file Notice of Appeal since rule required appeal within thirty days).

The 30-day deadline used to be considered jurisdictional, but that is no longer good law after *In re Adoption of O.R.*, 16 N.E.3d 965 (Ind. 2014). Now, even formerly jurisdictional requirements are not met, an appeal can proceed if there exist "extraordinarily compelling reasons." *Id.* at 971. The case law is still developing as to what constitutes "extraordinarily compelling reasons."

## B. Notice of Appeal to Briefing

### 1. Staying execution of the judgment

Once a judgment has been handed down, the Indiana Trial Rules allow for immediate execution on that judgment. IND. TRIAL RULE 62(A); see also IND. APPELLATE RULE 39 ("An appeal does not stay the effect or enforceability of a judgment or order of a trial court or Administrative Agency unless the trial court, Administrative Agency or Court on Appeal otherwise orders.").

A party wishing to appeal is not required to post any type of bond or security to take an appeal, unless the party wants execution on that judgment stayed during the pendency of an appeal. See IND. TRIAL RULE 62(D); IND. APPELLATE RULE 18 ("No appeal bond shall be necessary to

prosecute an appeal from any Final Judgment or appealable interlocutory order.").

Trial Rule 62 provides, "The bond or letter of credit may be given at or after the time of filing the Notice of Appeal. The stay is effective when the appeal bond or letter of credit is approved by the appropriate court." IND. TRIAL RULE 62(D). The Trial and Appellate Rules grant the trial court continuing jurisdiction to enter a stay, even if the trial court is otherwise divested of jurisdiction under Appellate Rule 8. See id. ("The trial court or judge shall have jurisdiction to fix and approve the bond or letter of credit and order a stay pending an appeal[.]"); IND. APPELLATE RULE 18 ("The trial court or Administrative Agency shall have jurisdiction to fix and approve the bond, or irrevocable letter of credit, and order a stay prior to or pending an appeal.").

Governmental and court-appointed entities are entitled to a stay without posting any type of bond or security. IND. TRIAL RULE 62(E). As to all other parties, you can always ask the trial court to enter a stay without requiring any type of appeal bond or security.

The only time a stay is mandatory, however, is when the Appellant posts "an adequate appeal bond with approved sureties or an irrevocable letter of credit from a financial institution approved in all respects by the court." IND. TRIAL RULE 62(D); see also IND. APPELLATE RULE 18 ("Enforcement of a Final Judgment or appealable interlocutory order from a money judgment shall be stayed during appeal upon the giving of a bond or an irrevocable letter of credit approved by a trial court or Administrative Agency.") Thus, the question becomes, what is an "adequate" appeal bond or irrevocable letter of credit?

When the judgment is a monetary judgment, setting the bond amount can be relatively straightforward, although the trial court always has authority to exercise its discretion in setting the amount curtailed only by Appellate

Rule 18, which provides, "[t]he Court on Appeal may . . . modify the bond or letter of credit." IND. APPELLATE RULE 18.

In general, an appeal bond or letter of credit must be in an amount that will satisfy "the judgment in full together with costs, interest, and damages for delay . . . and such costs, interest, and damages as the appellate court may adjudge and award." IND. TRIAL RULE 62(D); see also id. ("When the judgment is for the recovery of money not otherwise secured, the amount of the bond or letter of credit shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than a bond or letter of credit.").

Costs and interest in this instance typically include any costs allowed under Trial Rule 54 and Appellate Rule 67, and statutory pre- and post-judgment interest. See IND. CODE § 24-4.6-1-103 ("Interest at the rate of eight percent (8%) per annum shall be allowed . . . from the date an itemized bill shall have been rendered and payment demanded on an account stated[.]"); IND. CODE § 24-4.6-1-101 ("[I]nterest on judgments for money whenever rendered shall be from the date of the return of the verdict or finding of the court until satisfaction at . . . an annual rate of eight percent (8%) if there was no contract by the parties.").

A creative appellee may try to get the court to award various additional costs as "damages for delay." With a few exceptions, however, trial courts have not included these "damages for delay" amounts in an appeal bond. The overall feeling is that the lost opportunity to use the money awarded in the judgment is compensated by the award of post-judgment interest.

The maximum amount of an appeal bond is constrained by the Indiana Code, which provides, "An appeal bond that an appellant must post to

stay execution on a judgment while an appeal is pending may not exceed twenty-five million dollars ($25,000,000) regardless of the total amount of the judgment." IND.CODE § 34-49-5-3. The only exception is "if an appellee proves by a preponderance of the evidence that an appellant is dissipating assets outside the ordinary course of business to avoid payment of a judgment, a court may enter orders that: (1) are necessary to protect the appellee; and (2) require the appellant to post a bond that is equal to the total amount of the judgment." Id.

When the judgment does not involve a monetary judgment, the trial court has the discretion to set an appeal bond at whatever amount it decides, including requiring no appeal bond at all, again curtailed only by Appellate Rule 18.

Trial Rule 62 only specifically discusses the proper amount of an appeal bond in only one type of non-monetary judgment:

> When the judgment determines the disposition of the property in controversy as in real action, replevin, and actions to foreclose liens or when such property is in the custody of the sheriff or when the proceeds of such property or a bond or letter of credit for its value is in the custody or control of the court, the amount of the appeal bond or letter of credit shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay.

IND. TRIAL RULE 62(D).

In all other cases, it is up to the parties to make arguments as to whether the appeal of the judgment involved should require an appeal bond at all or, conversely, how much bond should be required. It is not uncommon for the appellee to agree that no appeal bond should be required in some cases, but you cannot count on this.

Finally, as a practical matter, it is generally quickest and most cost-effective to have the client approach his or her own insurance company to

determine whether it provides appeal bonds. Likewise, the client's own financial institution will generally work hard for its existing clients to provide an irrevocable letter of credit. Many law firms also have established relationships with insurance companies providing such bonds.

Your client must understand that if you lose on appeal, the appellee will immediately seek tender of the proceeds of any appeal bond or letter of credit and will not be required to initiate any proceedings supplemental to get full satisfaction of the judgment. See IND. TRIAL RULE 65.1.

For this reason, insurance companies and financial institutions generally require: (1) the client have enough accessible assets and collateral to secure the full amount of any bond or letter of credit (which, as noted above can include the amount of the judgment in entirety, plus interest and costs): (2) the client execute a separate collateral agreement or personal guaranty; and (3) the assets/collateral be held in some type of escrow or trust pending the appeal so that, if the bond proceeds are in fact tendered, the bank can immediately secure payment from your client.

Because of this, many appellants have been unsuccessful in obtaining an appeal bond and have been unable to stay execution of the judgment pending appeal. Of course, appellees who proceed with enforcing their judgments do so at their own peril.

The premiums and fees for an appeal bond or a letter of credit can be very, very high. While an argument can be made that these premiums and fees should be costs recoverable in the court's discretion under Appellate Rule 67 if the judgment is ultimately reversed on appeal, some clients prefer to deposit cash with the trial court clerk and avoid paying these additional costs altogether. The Trial Rules specifically authorize this: "In any case where a surety bond, letter of credit, or security is

furnished under this rule, the right to furnish money or a check in lieu of a bond shall remain unimpaired." IND. TRIAL RULE 62(F).

**2. Ordering the transcript.**

You are required to order a Transcript or portions of the Transcript if it is necessary to fairly present the issues on review must be requested. IND. APPELLATE RULE 9(F)(4).

In particular, Appellate Rule 9(F)(4) provides, "If the appellant intends to urge on appeal that a finding of fact or conclusion thereon is unsupported by the evidence or is contrary to the evidence, the Notice of Appeal shall request a Transcript of all the evidence." *Id.*

Normally, the failure to include portions of a Transcript "works a waiver of any specifications of error which depend upon the evidence." *Fields v. Conforti*, 868 N.E.2d 507, 511 (Ind. Ct. App. 2007); *see also Kocher v. Getz*, 824 N.E.2d 671, 675 (Ind. 2005) (holding that, where the appellant failed to provide a Transcript of the trial court's hearing on his motion to stay execution and request for bond less than the full amount of the judgment, appellant failed to demonstrate that the trial court abused its discretion).

On the other hand, if an appellant intends to adopt the trial court's findings of fact and not contend they were unsupported by the evidence or that a conclusion is unsupported by the evidence or contrary to the evidence, a Transcript is not required.

In *Pabey v. Pastick*, 816 N.E.2d 1138 (Ind. 2004), the appellee asked the Court of Appeals to dismiss the appeal, claiming that by not requesting preparation of the Transcript of the evidentiary hearing and the exhibits introduced by the other parties, the appellant failed in his duty to present a complete record as required by Appellate Rule 4(F)(4). After the Court of Appeals dismissed the appeal, the Supreme Court granted transfer and

reversed the dismissal. In doing so, the Supreme Court noted that the appellant stated that no Transcript was necessary because he was not contending that the trial court's findings were unsupported by the evidence or that a conclusion is unsupported by the evidence or contrary to the evidence. Rather, the appellant adopted the trial court's findings of fact, and cited to them throughout the brief.

Referencing its previous decision in which it had "encourage[d] litigants and reviewing courts to employ efficient appeal procedures," the Supreme Court noted that it had "addressed the merits of the appeal, even though no Transcript had been filed as part of the record, where the appellants accepted the trial court's findings of fact and argued that those findings did not support the trial court's judgment." *Id.*

A question often arises as to whether counsel should request a Transcript of oral arguments in which no evidence is presented, such as a summary judgment hearing. Of course, if an issue on appeal relates to waiver or judicial estoppel based on conduct at that hearing, then the Transcript is needed. But if these issues are not going to be presented on appeal, Appellate Rule 9(F)(4) would appear to indicate that a Transcript of an oral argument should not be required. Nonetheless, several decisions reference the fact that the Transcript of a summary judgment hearing was not provided as if there were something incorrect about the omission. *See Progressive Ins. Co., Inc. v. Bullock*, 841 N.E.2d 238, 241 n.2 (Ind. Ct. App. 2006) (noting the parties failed to provide the court with a Transcript of the summary judgment hearing).

In light of these decisions, many appellate practitioners have adopted the practice of requesting a Transcript even if it would appear the rule would not actually require one.

### 3. Dealing with the Court Reporter and Clerk

The first duties of the Appellant with regard to the Transcript are: (1) to determine whether a Transcript must be ordered and, if yes, whether the entire Transcript must be ordered or just parts thereof; and (2) to make the appropriate request for the Transcript in the Notice of Appeal (or note that no Transcript is being requested). (See section III(B), (C), above)

Within 10 days after the Notice of Appeal is filed, "a party must enter into an agreement with the court reporter for payment of the balance of the cost of the Transcript. Unless a court order requires otherwise, each party shall be responsible to pay for all transcription costs associated with the Transcript that party requests." IND. APPELLATE RULE 9(H). "The Court Reporter may require from the appellant a fifty percent (50%) deposit based on the estimated cost of the Transcript, except no deposit may be charged for state or county paid Transcript." *Id.*

Make sure you do this immediately, as you subject yourself to admonition or sanctions by the Court of Appeals if the court reporter seeks an extension of time because you have failed to pay the deposit required.

The Appellate Rules require that, within forty-five days after the Appellant files the Notice of Appeal, "[t]he court reporter shall prepare, certify and file the Transcript designated in the Notice of Appeal with the trial court clerk or Administrative Agency in accordance with Rules 28 and 29. Preparation of the exhibits as required by Rule 29 is considered part of the Transcript preparation process." IND. APPELLATE RULE 11(A), (B).

> NOTE: "With the exception of the preparation of documentary exhibits pursuant to Rule 29(A), the Court Reporter may engage the services of outside transcribers or transcription services to assist in all or part of the transcription." *Id.*

"The Court Reporter shall provide notice to all parties to the appeal that the Transcript has been filed with the clerk of the trial court or Administrative Agency in accordance with Rules 28 and 29. (See Form # App.R. 11-1)." *Id.*

If the court reporter fails to file the Transcript with the trial court clerk or request an extension within the time allowed, the appellant is required to seek an order from the Court of Appeals compelling the court reporter to do so. IND. APPELLATE RULE 11(D). "Failure of appellant to seek such an order not later than seven (7) days after the Transcript was due to have been filed with the trial court clerk shall subject the appeal to dismissal." *Id.*

The trial court clerk then has five days to issue and file with the Court of Appeals a Notice of Completion of Transcript. IND. APPELLATE RULE 10(D). If the trial court clerk fails to issue and file the Notice of Completion of Transcript, the appellant is required to seek an order from the Court of Appeals compelling the trial court clerk to do so. IND. APPELLATE RULE 10(G). "Failure of appellant to seek such an order not later than seven (7) days after the Notice of Completion of Transcript was due to have been issued, filed, and served with shall subject the appeal to dismissal." *Id.*

Keep in mind . . . the preparation of the Transcript is for the benefit of the appellate court, not the parties. The Appellate Rules require only that the Transcript be filed with the trial court—nothing in the Appellate Rules requires the court reporter to provide copies of the Transcript to the parties, not even to the party who paid for the transcription in the first place.

Some court reporters nonetheless will give you a copy of the Transcript even if they don't have to. Some even voluntarily give you a disk containing an electronic version of the Transcript as well. But others

charge you $1 per page (or more) for a copy of the Transcript and also charge an additional fee for the disk (sometimes equal to what the copying charge would be, but often half of the total copying charge).

If you have an appeal from a county in which a copy of the Transcript is not provided automatically, you have two options: (1) pay the court reporter the copy fees and get a copy directly from the court reporter; or (2) utilize Appellate Rule 12 and check out the Transcript and copy it yourself back at your office:

> (B) . . . Any party may withdraw the Transcript or, at the trial court clerk's option, a copy, at no extra cost, from the trial court clerk for a period not to exceed the period in which the party's brief is to be filed. . . .
>
> (C) Unless limited by the trial court, any party may copy any document from the Clerk's Record and any portion of the Transcript. After a Transcript or Appendix has been transmitted to or filed with the Clerk, a party to the appeal may arrange to have access to that Transcript or Appendix during the time period that party is working on a brief, subject to any internal rules the Clerk may adopt to provide an accounting for the location of those materials and for ensuring fair access to the Transcript and Appendices by all parties.

IND. APPELLATE RULE 12(B, C).

Finally, if the Court Reporter is unable to provide a needed Transcript for whatever reason or if parts of a Transcript are inaudible, "a verified statement of the evidence" is to be prepared "from the best available sources, which may include the party's or the attorney's recollection." IND. APPELLATE RULE 31(A). "The party shall then file a motion to certify the statement of evidence with the trial court or Administrative Agency" with the verified statement of the evidence attached to the motion. *Id.*

Any response to the proposed statement of evidence must be verified and filed with the trial court within fifteen days. IND. APPELLATE RULE 31(B). The trial court can then hold a hearing or decide the matter based on the

statements. The trial court ultimately must certify "a statement of the evidence, making any necessary modifications to statements proposed by the parties. The certified statement of the evidence shall become part of the Clerk's Record." *Id.*

If the judge refuses to certify the moving party's statement of evidence and the statements or conduct of the trial court judge are themselves in controversy, "the trial court judge . . . shall file an affidavit setting forth his or her recollection of the disputed statements or conduct." IND. APPELLATE RULE 31(D). All of the verified statements of the evidence and affidavits then become part of the Clerk's Record. *Id.*

**4. When does the trial court lose jurisdiction over the case?**

The trial court loses (and the appellate court acquires) jurisdiction when the trial court clerk issues its Notice of Completion of Clerk's Record. IND. APPELLATE RULE 8. It is immaterial whether the Transcript is complete or not. It is also immaterial whether the Notice is received by either the appellate court or the parties, since the only prerequisite for jurisdiction to pass to the appellate court is that the Notice of Completion be issued.

A trial court "does not have jurisdiction to continue with a case concerning matters from which an appeal is taken as long as that appeal is pending." *Schumacher v. Radiomaha, Inc.*, 619 N.E.2d 271, 273 (Ind. 1993). "The purpose of viewing jurisdiction in this formalistic manner is to facilitate 'the orderly presentation and disposition of appeals and [prevent] the confusing and awkward situation of having the trial and appellate courts simultaneously reviewing the correctness of the judgment.'" *Id.*

A trial court does, however, retain jurisdiction to perform such ministerial tasks as reassessing costs, correcting the record, or enforcing a judgment." *City of New Haven v. Allen County Bd. of Zoning Appeals*, 694 N.E.2d 306, 310 (Ind. Ct. App. 1998) (citation omitted) (trial court had

jurisdiction to perform the ministerial task of entering an agreed judgment).

Likewise, a trial court retains jurisdiction to rule on matters unrelated to the judgment being appealed. *See, e.g.*, *In the Matter of the Guardianship of Hickman*, 811 N.E.2d 843 (Ind. Ct. App. 2004) ("[W]here the subject of the appeal is entirely independent of the issues to be tried, subsequent trial court action does not interfere with the jurisdiction of the appellate court. . . . We hardly think the trial court thereby loses jurisdiction to adjudicate those claims which remain unresolved. Therefore, we hold the trial court retained limited jurisdiction over the case to those claims left unresolved by the first judgment."); *Inlow v. Henderson, Daily, Withrow & Devoe*, 804 N.E.2d 833, 838 (Ind. Ct. App. 2004) (trial court retained jurisdiction to award attorney fees); *Smoot v. Smoot*, 604 N.E.2d 618, 621 (Ind. Ct. App. 1992) (petition for modification of custody filed while appeal from original dissolution was still pending is separate action which resulted in separate final, appealable order).

There may be instances where returning jurisdiction to the trial court is desirable. For instance, if both a Motion to Correct Error and a Notice of Appeal are filed by different parties, a trial court will often lose jurisdiction prior to ruling on the Motion to Correct Error.

Depending on what is needed, any party may file a motion requesting that the appeal be temporarily stayed or dismissed without prejudice and the case remanded to the trial court or administrative agency for further proceedings. IND. APPELLATE RULE 37(A). As set out in that Rule, the motion must be verified and demonstrate that remand will promote judicial economy or is otherwise necessary for the administration of justice. To the extent appropriate, remember to attach a certified copy of the CCS and any documents you are relying on to speed the trial court's consideration of the motion.

## 5. Motions Practice

Motions Practice became more rule driven by virtue of Title VI (Appellate Rules 34 through 42), but this aspect of appellate practice is still an area that is not used effectively by many practitioners. A non-exhaustive list of motions available on appeal include:

- Motions to Dismiss (Voluntary and Involuntary)
- Motions for Expedited Review
- Motions for Remand
- Motions to Compel
- Motions to Publish
- Motions to Appear as Amicus Curiae
- Motions for Oral Argument
- Motions to Strike
- Motions to Amend
- Motions for Extension of Time
- Motions for Writ in Aid of Appellate Jurisdiction
- Motions for Extension of Time to File Notice of Appeal (TR 72(E))
- Motions to Submit Additional Authority
- Motions to Stay Pending Appeal
- Motions for Emergency Transfer to Supreme Court
- Motions to Correct Record

- Motions to Submit Certified Statement of Evidence in Lieu of Evidence

Three full-time staff attorneys are employed to assist the court with motions practice, and their duties include: screening appeals for jurisdictional defects (revealed by reviewing the Appellant's Case Summary); issuing "show cause" orders if it appears that an appeal is not properly before the Court; reviewing daily motions and drafting the orders to be signed by the Chief Judge; preparing weekly memos for any motions that are to go to the Motions Panel; attending the Motions Panel and presenting the cases; drafting the orders reflecting the Motions Panel rulings; drafting other specific orders requested by judges; and providing guidance by way of telephone calls and written correspondence to trial judges, attorneys, court reporters, and case managers in the Clerk's Office regarding the Rules of Appellate Procedure and motions practice.

All Motions are decided by either (1) the Chief Judge; (2) the Motions Panel; or (3) the Writing Panel.

The Chief Judge decides the "daily" motions, which include Motions for Extension of Time; Motions to Compel the filing of the Notice of Completion of Clerk's Record and the Notice of Completion of Transcript; Motions for Temporary Admission (f/k/a Pro Hac Vice); Motions for the Transfer of the Record of Proceedings from a prior appeal; Motions requesting the setting of a briefing schedule; Motions to Consolidate Appeals; Motions to File an Oversized Brief; Motions to Amend Brief; and Motions to Withdraw Appearance.

The Motions Panel consists of three judges—two active judges and one senior judge. The two active judges serve staggered, two-month terms, while a different senior judge may sit on the panel each week. The types of motions that go before the Motions Panel include Motions to Stay; Appellees' Involuntary Motion to Dismiss; Petitions to Accept Jurisdiction

over an Interlocutory Appeal; Successive Petitions for Post-Conviction Relief; and Petitions for Rehearing of Appeals that have been dismissed.

Finally, two types of motions end up going to the writing panel (the actual three-judge panel which decides the case): (1) motions held in abeyance until the writing judge is assigned; and (2) motions received after the case is fully briefed.

The types of motions generally held "in abeyance" for the writing panel are motions for oral argument, motions to appear amicus curiae, motions to strike all or portions of a brief and/or appendix, and motions for non-involvement.

Likewise, any motion received or filed after the case is fully briefed is sent directly to the writing panel—it is not reviewed by staff attorneys unless forwarded by the writing panel.

## C. Briefing

**1.** Your judge is a generalist, so have someone "Play Judge" with your Brief in **every** appeal.

Even if you were not trial counsel, by the time you have finished drafting the Brief, you have an incredible amount of "inherent" knowledge of both the facts and legal authorities.

What is perfectly clear to you based on this inherent knowledge (and probably perfectly clear to opposing counsel as well) may not be so perfectly clear to the “generalist” judge who not only lacks your extensive knowledge of the facts and specific legal precedent applicable to your case, but has thousands of other pages to read in the time they have set aside before having to vote on the cases.

Do not assume the judges or their law clerks know anything about the area of the law at issue in your case. Take the time to set up the relevant

"big picture" or overview of the law in general before delving into the particular subset of the law at issue in your case.

Then find an attorney in your office who has had absolutely no involvement in the case and—just as important—does not practice in this area of law, and ask her to read your Brief. The attorney will be reading it with the same inherent knowledge of the case and the law that an appellate judge has (none) and will be able to tell you where things get confusing and need factual and legal clarification or supplementation before you ever file your brief.

Given their workload, the judges cannot spend time trying to figure out what you are trying to argue. If you give them a Brief that is confusing or assumes facts that may be in the Record but are not actually put before the judge in the Brief, you may lose your chance to advocate your position prior to the vote.

**2. Statement of Facts**

After being involved in appellate practice for almost twenty years, I now believe most cases are won or lost in the Statement of Facts. A persuasive Statement of Facts tells a story, is balanced, and makes the judges want to rule in your favor using your legal arguments in the rest of the Brief.

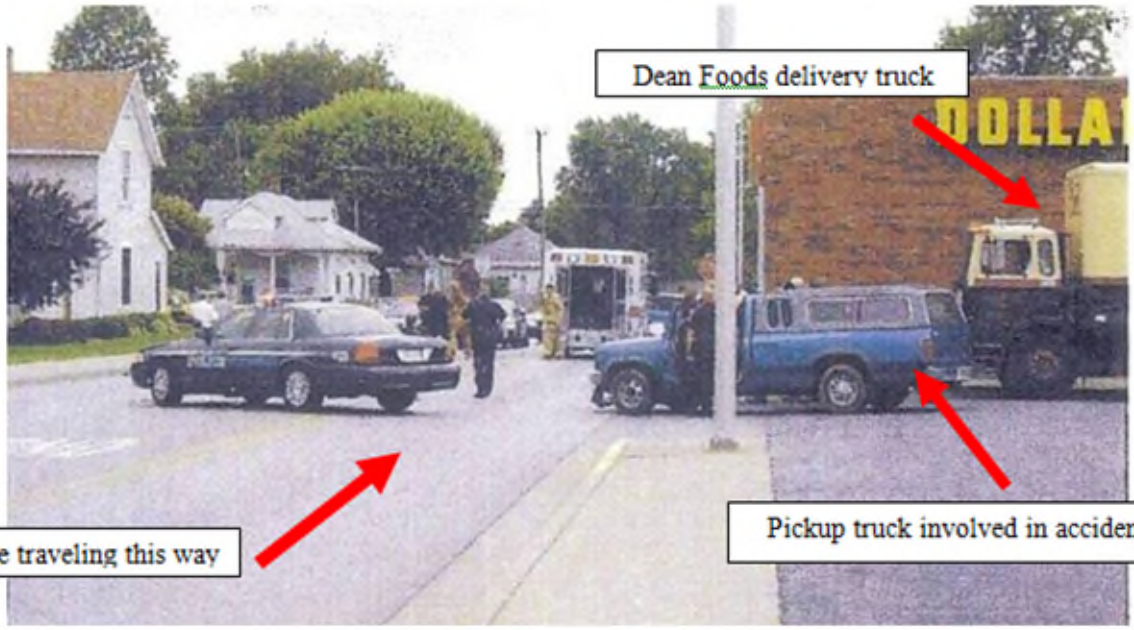
A key part of a good Statement of Facts is balance. Use this section to put your spin on the bad facts you know your opposing counsel will bring out . . . especially if you are the Appellant.

Don’t be argumentative, though, as it is prohibited. A good advocate can make an argumentative point seem merely factual.

Also make sure you give enough background for the reader to understand, but not so much that the reader gets lost in the details. If you have a long Statement of Facts, break it up with headings.

Don’t be afraid to embed pictures, charts, and graphics in your Statement of Facts. The following picture with annotations presents the “facts” in ways that words never could:

As seen in this photo taken immediately after the accident, however, the delivery truck is parked a significant distance back from the intersection and Driver has repeatedly testified that the parked delivery truck did not in any way impair or affect her ability to see the traffic on Christian Avenue and that she could see a safe distance in both directions:




(App. 143, 146-47, 153-54,159, 174, 232.)

Driver testified that the only effect the delivery truck had on her exit from the parking lot was that she briefly had to maneuver around the delivery truck as she got into position to exit onto Christian Avenue, but after she did that and then came to a complete stop before turning onto Christian Avenue, she was "able to look with an unimpeded view all the way to [the] left . . . and all the way to [the right]." (App. 154-59.)

Finally, keep in mind that the Appellate Rules provide, "The facts shall be stated in accordance with the standard of review appropriate to the judgment or order being appealed." IND. APPELLATE RULE 46(A)(6)(b). As Judge Najam has noted, this "differs from the long-standing common law

rule that the appellant shall state the facts in the light most favorable to the judgment." JUDGE EDWARD W. NAJAM JR., PRESENTATION OF FACTS ON APPEAL, November 2002, Indiana Continuing Legal Education Foundation Seminar, reproduced in 47 Res Gestae 24.

In this regard, when the issue is the grant or denial of a summary judgment, "as everyone knows, there is de novo review. The court on appeal looks at all the facts disclosed in the Trial Rule 56(C) designations, not just the facts most favorable to the summary judgment or the denial of summary judgment. The facts most favorable to the judgment rule would not apply here." *Id.*

Likewise, when the question presented on appeal involves "how the law should be applied to the facts ... all the facts are in play." *Id.* Thus, in a case where the "abuse of discretion" standard of review on appeal turns on claims that "the trial court has misinterpreted or misapplied the law" or whether "the trial court's ruling is clearly against the logic and effect of the facts and circumstances before the court," the Statement of Facts "can include virtually all the relevant facts, not just those facts most favorable to the judgment." *Id.*

"[T]he same can be said ... [where] the 'clearly erroneous' standard of review applies. Before we can reach a firm conviction that a mistake has been made, we have to look at the totality of the evidence." *Id.*

**Bottom line. Be colorful, strong, and engaging . . . but balanced and non-argumentative.**

**3. Focus on the legal issues.**

Hyperbole, purely emotional arguments, whining, and name-calling do not persuade appellate judges, and in fact so annoy most of them that it becomes a huge distraction to your arguments on the merits. It also could get you sanctioned. *See In re Wilkins*, 777 N.E.2d 714 (Ind. 2002).

In *Cochran v. Cochran*, 717 N.E.2d 892 (Ind. Ct. App. 1999), the court reminded counsel that "[o]verheated rhetoric is unpersuasive and ill-advised. Righteous indignation is no substitute for a well-reasoned argument." *Id.* at 893 n.3. A brief cannot "be used as a vehicle for the conveyance of hatred, contempt, insult, disrespect, or profession[al] discourtesy of any nature for the court of review, trial judge, or opposing counsel." *Id.*

And in *County Line Towing, Inc. v. Cincinnati Ins. Co.*, 714 N.E.2d 285 (Ind. Ct. App. 1999), the court noted, "At the outset, we point to the obvious: the judiciary, in fact and of necessity, has absolutely no interest in internecine battles over social etiquette or the unprofessional personality clashes which frequently occur among opposing counsel these days." *Id.* at 290. "Irrelevant commentary thereon during the course of judicial proceedings does nothing but waste valuable judicial time. On appeal, it generates a voluminous number of useless briefing pages which have nothing to do with the issues presented, as in this appeal." *Id.* at 290-91. "Further, appellate counsel should realize, such petulant grousing has a deleterious effect on the appropriate commentary in such a brief. Material of this nature is akin to static in a radio broadcast. It tends to blot out legitimate argument." *Id.* "On a darker note, if such commentary in appellate briefs is actually directed to opposing counsel for the purpose of sticking hyperbolic barbs into his or her opposing numbers' psyche, the offending practitioner is clearly violating the intent and purpose of the appellate rules." *Id.*

"In sum, we condemn the practice, and firmly request the elimination of such surplusage from future appellate briefs." *Id.* "A brief should not only present the issues to be decided on appeal, but it should be of material assistance to the court in deciding those issues. A brief is far more helpful to this court, and it advocates far more effectively for the client,

when its focus is on the case before the court and not on counsel's opponent." *Id.*

Finally, disorganized, poorly written, and improperly cited briefs are distracting. Given the constraints on the judges, it is not their job to try to figure out what your arguments really are. Worse, you most likely have lost your chance to advocate. *See Wright v. Elston*, 701 N.E.2d 1227, 1231 (Ind. Ct. App. 1998) ("[T]he arguments presented in the Wrights' brief were extremely difficult to follow. A brief should not only present the issues to be decided on appeal, but it should be of material assistance to the court in deciding those issues. When no cogent argument is presented, our consideration of the issue is waived.").

In addition, the Bluebook was not just a law school exercise to confound you. Appellate Rule 22 requires Appellate Briefs to conform to the Bluebook. *See Howell v. Hawk*, 750 N.E.2d 452, 457 n.3 (Ind. Ct. App. 2001) ("We ask Appellants' counsel to renew his acquaintance with the Bluebook and our Rules governing citation to cases.").

Give pinpoint citations for everything (the rules require them). Failure to do so can result in waived arguments. *Id.* ("Appellants' brief almost completely lacks pinpoint citations within the relevant cases cited, and includes numerous blank (wholly superfluous) citations to the Indiana Appellate Court Reports (Ind.App.), which ceased to exist after 1979. We prefer to resolve cases on the merits; nevertheless, we remind counsel that improper citation could amount to failure to make a cogent argument and result in waiver of our consideration of an issue, and such citation does not facilitate our review of the merits."); *Wright*, 701 N.E.2d at 1230 ("[W]e will not, on review . . . search through the authorities cited by a party in order to try to find legal support for its position.").

### 4. Appendix & Addendum

There are several things to remember about this aspect of appellate practice as it relates to civil cases (criminal appeals are handled differently). First, after briefing is completed, the trial court clerk will send the Transcript to the Court of Appeals, but will not send any of the documents filed in the trial court unless the appellate court specifically requests that they be transmitted (rare in civil cases).

Appellate Rule 50 therefore requires the parties to include certain specific documents and any additional documents "necessary" to resolution on appeal (but only the truly necessary documents) in an Appendix filed with the briefs. These documents need not be certified by the trial court and can instead come from your own files because Rule 50 requires that you must "verify under penalties of perjury that the documents in this Appendix are accurate copies of parts of the Record on Appeal."

Keep in mind, however that you only file one Appendix. If there are documents critical to the appeal (such as a contract) that you believe each member of the court should see to make his/her decision, or if there are instances where you want to actually provide the court with copies of relevant legal materials not easily obtainable online (old statutes, ordinances, etc.), the Rules allow you to file a separately bound "Addendum to Brief" containing those documents. See IND. APPELLATE RULE 46(H).

Unlike the Appendix, *each judge* gets his or her own copy of the Addendum. If you choose to file an Addendum, read Rule 46(H) carefully, as the requirements for this document differ from the requirements of an Appendix.

Finally, many appellate practitioners put the entire Transcript in the Appendix. DON'T. The Rules prohibit it. The Court of Appeals will *already* have the entire Transcript before it when it considers the appeal.

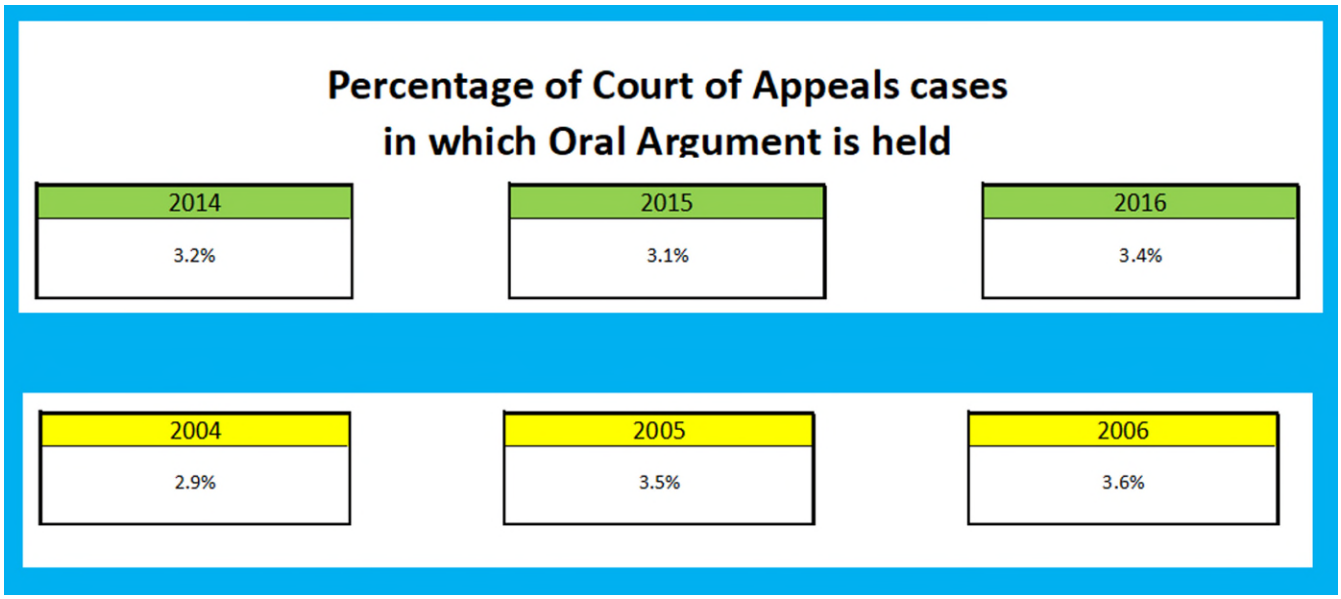
## 5. Oral Argument

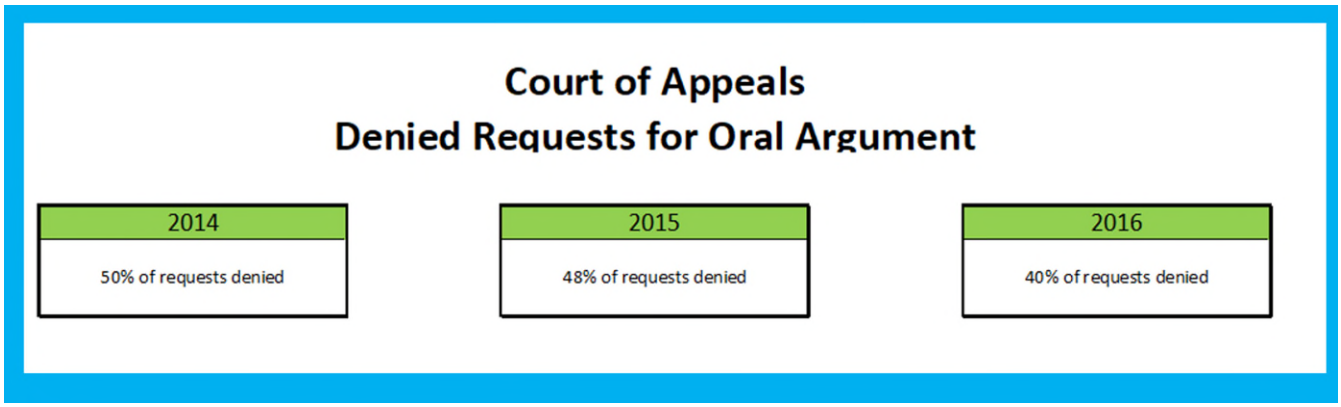
After an appeal is fully briefed, it is assigned to a Court of Appeals writing judge who sits on a three-judge panel. The exact mechanism used by each Court of Appeals panel to reach a decision differs from panel to panel and depends on the preferences of the three judges assigned to a panel.

Some panels elect to have the writing judge review the briefs and draft a proposed opinion first, and then circulate the proposed decision and briefs for review by the other judges. Other panels communicate via e-mail about the cases and reach a collective decision prior to the writing judge drafting the opinion. Some panels meet for conferences and discuss the various cases assigned to the judges in that panel and reach a collective decision prior to the writing judge drafting the opinion.

However, if oral argument is held, no decision regarding the outcome of the appeal is made until the judges have heard the oral argument. Because of this, many appellate advocates ask for oral argument in every case.

As a whole, however, oral argument in civil cases remains rare because most appellate parties do not request argument. The Court of Appeals grants around 50% of the requests it receives for oral argument, but the Court of Appeals actually held oral argument in only 3% of all cases.




## D. After the Court of Appeals Rules

### 1. Rehearing

The appellate rules allow you to seek rehearing after a decision is handed down. Practically, however, this is a waste of time.

Although the Court of Appeals last year granted rehearing in 8% of its cases, in almost all of those instances, it granted rehearing to affirm its original decision. It is widely believed that the outcome changes on rehearing in only about 1% of cases.

The cases in which rehearing is most likely to result in a different outcome are limited to those instances where the Court of Appeals relied on a fact that ended up being incorrect or where the court applied a statute or rule that was not in existence until after the acts giving rise to the appeal occurred and thus should not have been applied.

If all you are doing is rearguing what you argued in your principal briefs, then your chances of success on rehearing are zero.

**2. Certification of the decision**

When an opinion is handed down by the Court of Appeals, the opinion is immediately sent to the parties and trial court. It is not a "certified" opinion of the Court of Appeals, however, until after the time for filing a Petition for Rehearing or Transfer has expired without the filing of such a petition. If such a petition is filed, then the opinion will not be certified until the disposition of the petition is determined. If a petition for transfer is granted, then the Court of Appeals' opinion is vacated unless the Supreme Court directs otherwise under Appellate Rule 58(A).

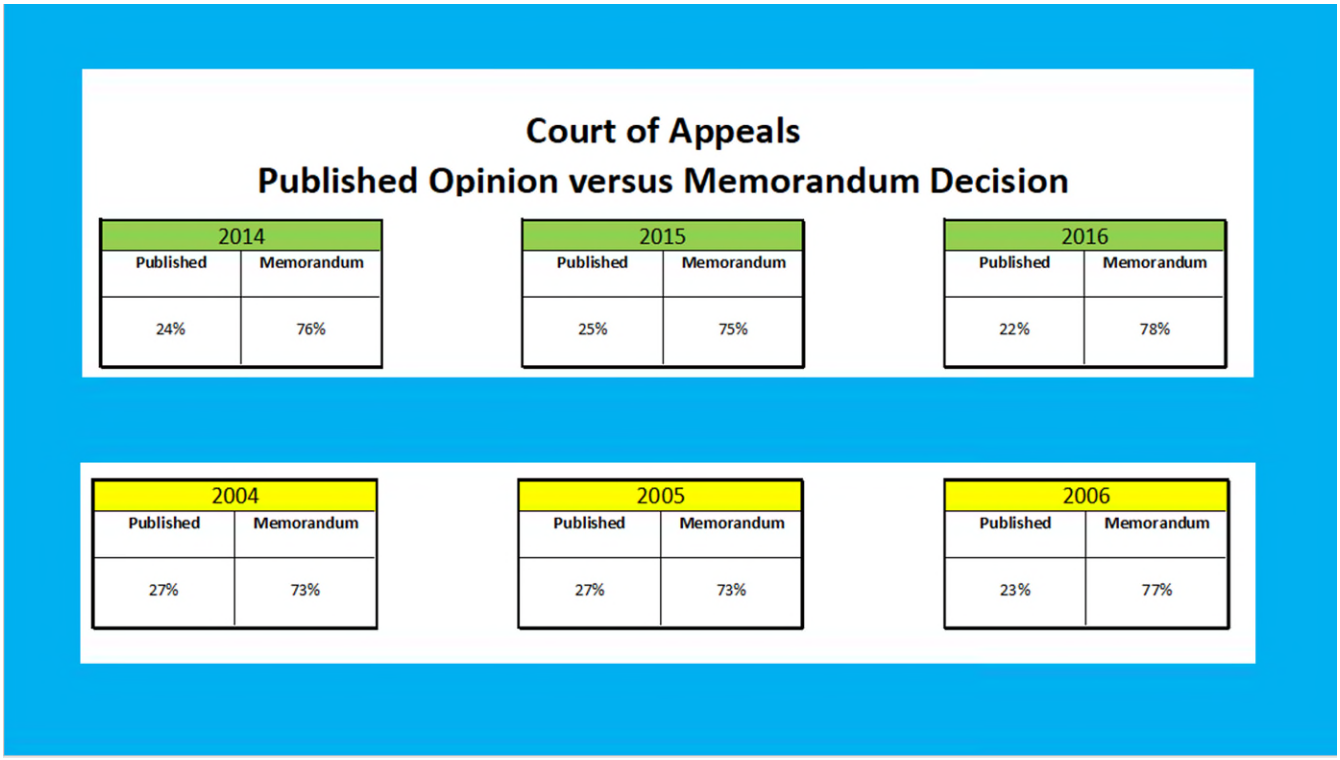
The same rule applies for Supreme Court decisions. They are not certified until the expiration of the petition for rehearing deadline. If such a petition is filed, then the opinion is not certified until final resolution of the rehearing petition.

This is relevant because the Appellate Rule 65(E) specifically provides that neither the parties, nor the trial court or Administrative Agency, may act in reliance on the opinion until it is certified. Although not specifically stated in the rules, it would seem implicit that parties in other cases also cannot rely on opinions as binding precedent until such time as the opinion is certified.

### 3. Published versus non-published.

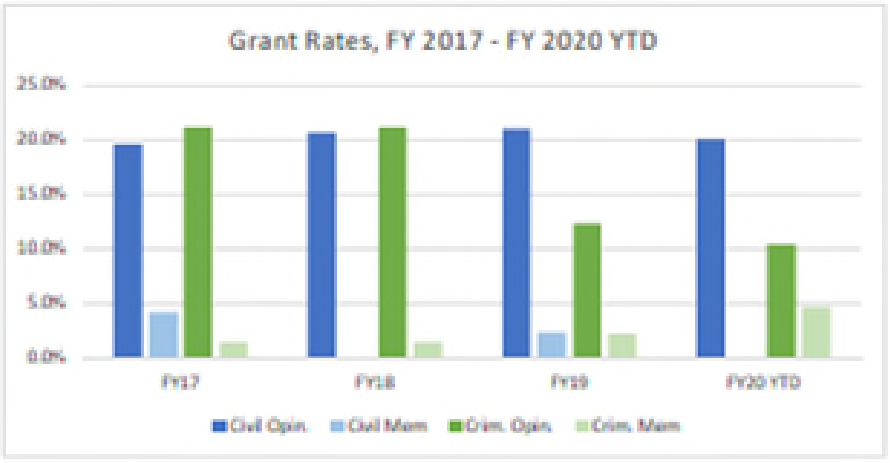
Indiana Appellate Rule 65 provides, "A Court of Appeals opinion shall be published if the case: (1) establishes, modifies, or clarifies a rule of law; (2) criticizes existing law; or (3) involves a legal or factual issue of unique interest or substantial public importance. Other Court of Appeals cases shall be decided by not for publication memorandum decision." IND. APPELLATE RULE 65(A).

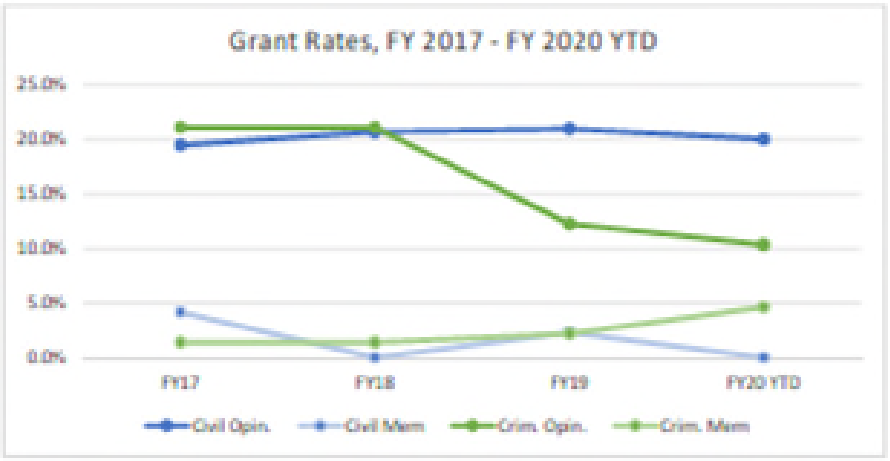
Almost 80% of the decisions from the Indiana Court of Appeals are designated as "not-for-publication memorandum."




Whether a decision is for publication has significant consequences on your chances in getting the Supreme Court to accept transfer. The Indiana Supreme Court accepts transfer of the not-for-publication decisions from 0%-4.5% (depending on the year).

| | 2017 | 2018 | 2019 | 2020 |
|---|---|---|---|---|
| Civil Opinion | 29.5% | 20.7% | 21% | 20% |
| Civil Memorandum | 4.13% | 0% | 2.3% | 0% |
| Criminal Opinion | 21.1% | 21.1% | 12.2% | 10.3% |
| Criminal Memorandum | 1.4% | 1.4% | 2.2% | 4.6% |




Given these statistics, parties who intend to seek transfer will often immediately move to publish the decision, whereas the party who has won at the Court of Appeals will want to have the decision remain unpublished.

The Appellate Rules provide, "Within fifteen (15) days of the entry of the decision, a party may move the Court to publish any not-for-publication memorandum decision which meets the criteria for publication." IND. APPELLATE RULE 65(D).

The Rule provides, "Unless later designated for publication, a not-for-publication memorandum decision shall not be regarded as precedent and shall not be cited to any court except by the parties to the case to establish res judicata, collateral estoppel, or law of the case." *Id.* This Rule unquestionably prohibits citation to the Indiana Court of Appeals "not-for-publication memorandum decisions." But conflicting authority exists concerning whether this Rule also prohibits citation to unpublished decisions from other jurisdictions.

There are appellate decisions where the Court of Appeals declines to consider unreported cases from other jurisdictions. *See Querrey & Harrow, Ltd. v. Transcontinental Ins. Co.*, 861 N.E.2d 719 (Ind.Ct.App. 2007) (citing Rule 65(D) and declining to rely on an "improperly" cited unreported federal case); *In the Matter of Dunn*, 848 N.E.2d 310 (Ind.Ct.App. 2006) (citing Rule 65(D) and declining to consider an unreported decision from another state); *Hartman v. Keri*, 858 N.E.2d 1017 (Ind.Ct.App. 2006) (citing Rule 65(D) and declining to consider an unreported federal decision and an unreported decision from another state).

On the other hand, other opinions from the Supreme Court and Court of Appeals not only considered unreported decisions from other jurisdictions, but oftentimes expressly adopted and applied the reasoning found in those unpublished decisions. *See Smith v. Toney*, 862 N.E.2d 656 (Ind. 2007) (relying on unpublished decision from another state); *LinkAmerica Corp. v. Albert*, 857 N.E.2d 961 (Ind. 2006) (relying on unpublished federal decision); *Schultz v. Ford Motor Co.*, 857 N.E.2d 977

(Ind. 2006) (same); *Glotzbach v. Froman*, 854 N.E.2d 337 (Ind. 2006) (same); Montgomery v. Board of Trustees of Purdue Univ., 849 N.E.2d 1120 (Ind. 2006) (relying on unpublished state and federal decisions); *Lee v. State*, 849 N.E.2d 602 (Ind. 2006) (relying on unpublished decision from another state); *Doe v. Town of Plainfield*, 860 N.E.2d 1204 (Ind.Ct.App. 2007) (relying on unpublished federal decision); *Roob v. Fisher*, 856 N.E.2d 723 (Ind.Ct.App. 2006) (same); *Rainey v. National Check Bureau, Inc.*, 849 N.E.2d 776 (Ind.Ct.App. 2006) (same); *Dewbrew v. Dewbrew*, 849 N.E.2d 636 (Ind.Ct.App. 2006) (same); *Heaton & Eadie Prof'l Svcs. Corp. v. Corneal Consultants of Indiana, PC*, 841 N.E.2d 1181 (Ind.Ct.App. 2006) (same).

One of the panels declining to consider unreported decisions from other jurisdictions noted that the appellate rules of the other state's court provided that its own unpublished opinions are "not precedential and may not be cited[.]" *In the Matter of Dunn*, 848 N.E.2d at 312 n.2 (citing Illinois's appellate rule). Thus, as to members of this particular panel, the question of whether an unpublished decision can be cited may depend on whether the rules of the state from which the unpublished decision comes allow citation to such decisions. If so, it is worth noting the recent amendment to the Federal Rules of Appellate Procedure providing that federal courts "may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as "unpublished," "not for publication," "non precedential," "not precedent," or the like; and (ii) issued on or after January 1, 2007." FED.R.APP.P. 32.1(A). As to unpublished opinions issued before 2007, the Federal Circuit Local Rules differ as to the circumstances in which citation to unpublished opinions is permissible.

Bottom line: You will have to determine whether a particular unpublished decision from another jurisdiction is so favorable that the practitioner is willing to cite it in hopes that the case will come before a judge who will

consider and apply it, but understanding that the case may instead be assigned to a judge who not only declines to consider the unpublished decision, but drops a footnote reprimanding you for citing it in the first place.

## E. Transfer to the Indiana Supreme Court

### 1. Deadlines

If you seek rehearing first in the Court of Appeals, you have 30 days to seek transfer to the Supreme Court by filing a Petition to Transfer. IND. APPELLATE RULE 57(C). If you do not seek rehearing first, you have 45 days to seek transfer. *Id.*

The briefing schedule at the Supreme Court uses different time increments than the Court of Appeals, so docket carefully. Any Response to the Petition to Transfer is due in 20 days and any Reply is due 10 days after that.

> Extensions of time are not allowed according to Appellate Rule 35(C). However, the supreme court has allowed extensions or late filings in rare circumstances (weather, severe illness—or an acknowledgement that counsel blew a deadline). An especially unusual belated request was in *Lee v. State*, 43 N.E.3d 1271, 1275 (Ind. 2015) (petition filed 8 months late)

Practice Tip: Supreme Court Advocacy begins long before transfer is ever sought. You do **not** get a chance to write another merits brief should the Supreme Court grant transfer after the Court of Appeals decides the case. The briefs you wrote in the Court of Appeals are the briefs the Supreme Court will use. Thus, make sure your arguments to the Court of Appeals are complete and appropriate for both courts.

### 2. Decisions Reviewable on Transfer

Rule 57(B) is explicit about the types of decisions from which transfer may be sought. Transfer may be sought from published or unpublished decisions, including amendments or modifications of those decisions (i.e., opinions on rehearing), as well as orders dismissing an appeal. IND. APPELLATE RULE 57(B). Transfer may not be sought from orders denying interlocutory appeals or orders denying permission to file a successive post-conviction relief petition.

Transfer may not be sought from any other decision from the Court of Appeals, such as a ruling on a stay or appeal bond.

### 3. Form and Content

A petition for transfer must include the following sections: questions presented on transfer, table of contents, background, and prior treatment of issues on transfer, argument, conclusion, and certificate of service. IND. APPELLATE RULE 57(G). If the petition exceeds ten pages, it must also include a word count certificate that it contains no more than 4,200 words. IND. APPELLATE RULE 44(D) & (E).

After the cover page, the next/second page should include the "Question(s) Presented on Transfer" and nothing else. The following/third page will be the table of contents. No table of authorities is required, although the court may find one helpful if the petition cites a significant number of cases or other authorities.

### 4. How do I increase my chances of getting transfer?

Every civil litigant has a constitutional right to an appeal to the Indiana Court of Appeals. IND. CONST. art. 7, § 6. After that, you must convince at least three supreme court justices that your case should be decided by Indiana's highest court. Statistically, you have a difficult road ahead of you.

First, although the supreme court's docket now contains far more civil matters than it once did—thanks to an Indiana Constitutional amendment effective in 2001—civil matters still comprise less than 50% of the supreme court's docket.

**Supreme Court**
**Criminal versus Civil Appellate Docket**

| 2014 | |
|---|---|
| Civil | Criminal |
| 41% | 59% |

| 2015 | |
|---|---|
| Civil | Criminal |
| 34% | 66% |

| 2016 | |
|---|---|
| Civil | Criminal |
| 33% | 67% |

| 2004 | |
|---|---|
| Civil | Criminal |
| 44% | 56% |

| 2005 | |
|---|---|
| Civil | Criminal |
| 43% | 57% |

| 2006 | |
|---|---|
| Civil | Criminal |
| 56% | 44% |

Combine that with the fact that, historically, the Indiana Supreme Court has granted transfer in an average of only 15% of the civil cases where transfer is sought, and you can see getting your case transferred is going to be tough.

**Supreme Court Transfer Rates**
**(civil appeals only)**

| 2014 | |
|---|---|
| Granted Transfer | Denied Transfer |
| 10% | 90% |

| 2015 | |
|---|---|
| Granted Transfer | Denied Transfer |
| 15% | 85% |

| 2016 | |
|---|---|
| Granted Transfer | Denied Transfer |
| 14% | 86% |

| 2004 | |
|---|---|
| Granted Transfer | Denied Transfer |
| 16% | 84% |

| 2005 | |
|---|---|
| Granted Transfer | Denied Transfer |
| 16% | 84% |

| 2006 | |
|---|---|
| Granted Transfer | Denied Transfer |
| 11% | 89% |

You have to convince the supreme court that your case falls into the highly selective 15% of cases they take. The supreme court cannot (and does not) engage in "error correcting." Thus, the fact that the Court of Appeals got it wrong is generally not enough to get the supreme court to take the case on transfer. *See Ellis v. Catholic Charities*, 685 N.E.2d 476 (Ind. 1997) (Dickson and Sullivan, J.J. dissenting from transfer decision and noting that judicial resources prevent the court from correcting every error made by the Court of Appeals).

Instead, you must convince the supreme court both that the Court of Appeals got it wrong and that your case will have broad policy or practice implications for large segments of this State or that the Court of Appeals opinion will have a deleterious effect on Indiana law. Of course, simply making this statement isn't enough; explain and support why it is true.

But the bottom line is, the reality of the supreme court's limited docket means the court is hesitant to get involved in cases where the outcome is fact-dependent and will probably apply only to your very specific facts. This is specifically reflected in the appellate rule dealing with transfer, which provides:

The following provisions articulate the principal considerations governing the Supreme Court's decision whether to grant transfer.

> (1) Conflict in Court of Appeals' Decisions. The Court of Appeals has entered a decision in conflict with another decision of the Court of Appeals on the same important issue.
>
> (2) Conflict with Supreme Court Decision. The Court of Appeals has entered a decision in conflict with a decision of the Supreme Court on an important issue.
>
> (3) Conflict with Federal Appellate Decision. The Court of Appeals has decided an important federal question in a way that conflicts with a decision of the Supreme Court of the United States or a United States Court of Appeals.

(4) Undecided Question of Law. The Court of Appeals has decided an important question of law or a case of great public importance that has not been, but should be, decided by the Supreme Court.

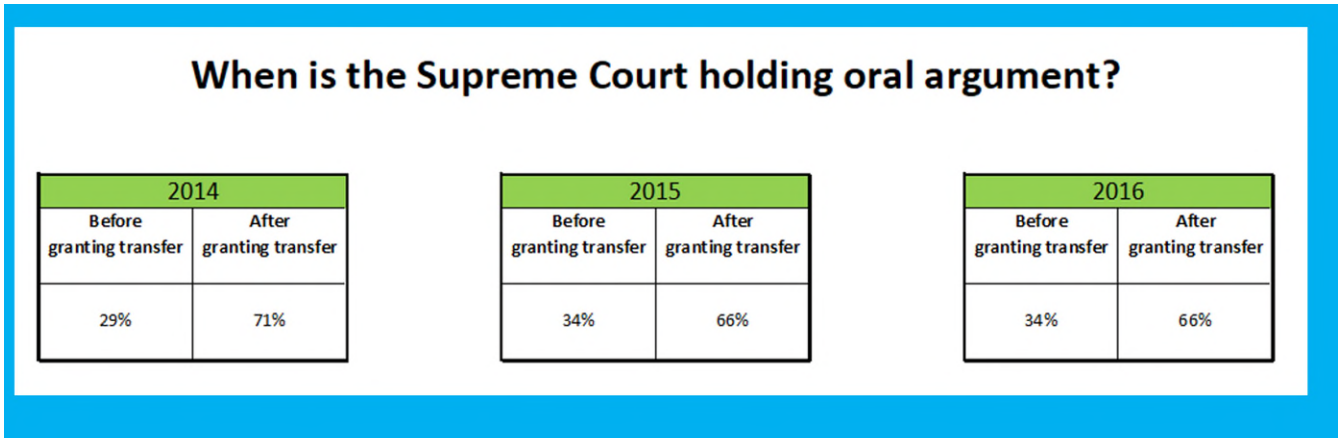
(5) Precedent in Need of Reconsideration. The Court of Appeals has correctly followed ruling precedent of the Supreme Court but such precedent is erroneous or in need of clarification or modification in some specific respect.

(6) Significant Departure From Law or Practice. The Court of Appeals has so significantly departed from accepted law or practice or has sanctioned such a departure by a trial court or Administrative Agency as to warrant the exercise of Supreme Court jurisdiction.

IND. APPELLATE RULE 57(H).

## 5. Oral Argument.

Unlike the Court of Appeals, the Supreme Court holds oral argument in almost every case where it has granted transfer or is seriously considering granting transfer but has more questions (it the Court issues per curiam opinions, more often than not, no oral argument is held).




## 6. Costs of the Appeal

After a decision is certified, the Appellate Rules provide that, "When a judgment or order is affirmed in whole, the appellee shall recover costs. When a judgment has been reversed in whole, the appellant shall recover

costs[.]" IND. APPELLATE RULE 67(C). When costs are to be taxed, Rule 67(B) provides for both mandatory costs and discretionary costs. The Deputy Appellate Clerk receives and reviews all Motions to Tax Costs filed in the Clerk's Office. If the motion is unopposed, the Deputy Clerk examines the expenses requested to be paid and prepares an order for the Clerk's signature setting forth the amount the moving party is entitled to under Rule 67(B). If the motion is opposed, the Deputy Clerk sends the motion and any responses and replies to the appropriate court which entered the final decision.

The mandatory costs allowed under the Rule are: "(1) the filing fee, including any fee paid to seek transfer or review; (2) the cost of preparing the Record on Appeal, including the Transcript, and appendices; and (3) postage expenses for service of all documents filed with the Clerk." IND. APPELLATE RULE 67(B). The discretionary costs a court may award include any "additional items as permitted by law," except "[e]ach party shall bear the cost of preparing its own briefs." *Id.* Attorney fees are not recoverable as costs under this Rule, unless the appeal is "permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay." *Commercial Coin Laundry Sys. v. Enneking*, 766 N.E.2d 433, 442 (Ind.Ct.App. 2002). As a practical matter, Indiana's appellate courts rarely find this standard is met.

As a practical note, because of the very limited nature of costs that can actually be recovered, keep in mind that if the Appellee was the prevailing party or if there was no transcript requested, the attorney time required to draft a Motion for Costs can end up being more than what the client could ever actually end up recovering as costs.

# Section Sixteen

# Immigration Law Update

**Jason A. Flora**
Flora Legal Group
Indianapolis, Indiana

## Section Sixteen

**Immigration Law Update……..…Jason A. Flora**

PowerPoint Presentation

# IMMIGRATION LAW UPDATE

*JASON FLORA*

Flora Legal Group

# PRIORITY FOR REMOVAL UNDER BIDEN ADMINISTRATION

- REMOVABLE VS. BEING REMOVED
- MARIJUANA CONVICTION
- TRUMP V. BIDEN

# CANCELLATION OF REMOVAL

REQUIREMENTS:

-10 Years of Physical Presence

-Good Moral Character

-Exceptional and Extremely Unusual Hardship

# CANCELLATION OF REMOVAL, INTERPRETING THE 10-YEAR CLOCK

- RECENT U.S. SUPREME COURT DECISIONS
  - PEREIRA V. SESSIONS
  - NIZ-CHAVEZ V. GARLAND

# ADMINISTRATIVE CLOSURE

- MATTER OF CASTRO TUM
- MATTER OF CRUZ VALDEZ

# ASYLUM

- RACE
- RELIGION
- NATIONALITY
- MEMBERSHIP IN A PARTICULAR SOCIAL GROUP
- POLITICAL OPINION

# ASYLUM

- MENDEZ ROJAS V. WOLF
- PARTICULAR SOCIAL GROUP

# ATTORNEY GENERAL DECISIONS INTERPRETING "PARTICULAR SOCIAL GROUP"

- MATTER OF AB VACATED
- MATTER OF LEA VACATED

# TEMPORARY PROTECTED STATUS

- VENEZUELA & HAITI
- EXTENSION FOR OTHER COUNTRIES

# DEFERRED ACTION FOR CHILDHOOD ARRIVALS, "DACA"

- **Implemented in 2012 under Obama administration**
- **Status of DACA under the Trump administration – SCOTUS ruled that attempt to end program was arbitrary and capricious"**
- **Biden executive order on "preserving and fortifying" DACA – initial applications allowed again**
- **But… DACA Decision in State of Texas, et al., v. United States of America, et al., 1:18-CV-00068 – initial applications can be filed but not adjudicated**
- **Legislative fix?**
- **Benefits of Advance Parole**

# USCIS FILING FEES

# Section Seventeen

# ANNUAL UPDATE ON BANKRUPTCY AND COMMERCIAL LAW (2021)

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## Section Seventeen

## Annual Update on Bankruptcy and Commercial Law (2021)……..Thomas P. Yoder
## Robert C. Allega

## UNITED STATES SUPREME COURT

**City of Chicago v. Fulton, et al., 19-357 (Jan. 14, 2021)**

This decision concerned a consolidated case from the Seventh Circuit. Chapter 13 debtors owed between $4,000 and $20,000 in unpaid parking tickets, and the City of Chicago impounded their vehicles. After filing bankruptcy, the debtors sought return of their vehicles, but the City refused to return them unless the debtors paid their fines. The debtors then filed contempt proceedings in the bankruptcy court arguing that the City was violating the automatic stays. The bankruptcy court held the City in contempt. The City appealed to the Seventh Circuit, and the Seventh Circuit affirmed. This resulted in a circuit split, and the United States Supreme Court granted certiorari. The Second, Seventh, Eighth, Ninth, and Eleventh Circuits imposed a duty on creditors to turn over repossessed property after a bankruptcy filing. The Third, Tenth, and District of Columbia Circuits held that retention was not an affirmative act and therefore a stay violation did not occur.

Justice Samuel Alito wrote for an 8-0 court (Justice Barrett did not participate in the decision). He held that the mere retention of property did not violate the automatic stay. Section 362(a)(3) stays "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." Justice Alito explained that "the most natural reading" of the words "stay," "act," and "exercise control" in Section 362(a)(3) prohibited "affirmative acts that would disturb the status quo of estate property as of the time when the bankruptcy petition was filed." Further, Justice Alito determined that any ambiguity in Section 362(a)(3) was resolved by looking at Section 542(a). Section 542(a) provides: "an entity . . . in possession . . . of property that the trustee may use, sell, or lease under section 363 of this title . . ., shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate." If mere retention of property constituted a violation of the automatic stay, Section 362(a)(3) would have then largely rendered Section 542 meaningless. The Supreme Court vacated the Seventh Circuit's judgment and remanded for further proceedings.

Justice Sonia Sotomayor filed a concurring opinion. She noted that the Court did not decide whether Section 362(a)'s other provisions might require return of a debtor's property, and whether the City's conduct violated the other provisions was an open question. Justice Sotomayor also noted that while the City's conduct satisfied the letter of the law, it did not comport with its spirit. Return of debtor's vehicle may be essential to the debtor's ability to commute to work. This will allow the debtor to earn an income and pay off creditors.

**TransUnion LLC v. Ramirez, 20-297 (Jun. 25, 2021)**

A credit reporting agency compiled a list of terrorists, drug traffickers, and other serious criminals based on a list the government maintained. However, the credit reporting agency's list was flawed and the names of thousands of innocent people were included on the list. The named

plaintiff negotiated to buy a car, but the dealer refused to sell the car to the plaintiff once the dealer learned that the plaintiff was on the list of terrorists and criminals. Plaintiff filed a class action in California under the Fair Credit Reporting Act. The class was composed of about 8,000 individuals and reports for 1,900 of those individuals had been given to third parties. The case went to trial. The jury found in favor of the plaintiffs and awarded the class $60 million in damages. The Ninth Circuit held in a 2-1 decision that all the plaintiffs in the class had standing, but the Ninth Circuit reduced the damage award to $40 million. The Supreme Court granted certiorari.

In a 5-4 decision, the Supreme Court held that only the 1,900 individuals whose false reports had been given to third parties had standing to sue for damages. Justice Kavanaugh wrote the majority opinion (joined by Chief Justice Roberts and Justices Alito, Gorsuch, and Barrett). Justice Kavanaugh noted that Article III standing requires the plaintiff to have a "personal stake" in the litigation. This requires the plaintiff to show: (1) she or he suffered an injury that was concrete, particularized, and actual or imminent; (2) the injury was likely caused by the defendant; and (3) the injury would likely be redressed by judicial relief. Justice Kavanaugh focused on whether the plaintiffs had suffered a concrete injury. He explained: "an injury in law is not an injury in fact. Only those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court." (emphasis in original). Justice Kavanaugh held that only those plaintiffs whose false reports had been given to third parties suffered concrete injuries, and therefore, they were the only plaintiffs in the class with standing to sue for damages. However, injunctive relief was still available to those plaintiffs.

Justice Thomas wrote a dissent (joined by Justices Breyer, Sotomayor, and Kagan). Justice Thomas noted that the notion of injury in fact emerged in the 1970s, 180 years after the ratification of Article III. He argued that courts have historically "held that injury in law to a private right was enough to create a case or controversy." He believed that all 8,000 members of the class had sufficient injury for damages in federal court because the credit agency violated each member's individual rights. Justice Thomas also contended that the majority's opinion infringed on the separation of powers. He explained, "this Court has relieved the legislature of its power to create and define rights." Nonetheless, he noted that the excluded plaintiffs might still be able to seek remedy in state courts.

Justice Kagan also wrote a separate dissent (joined by Justices Breyer and Sotomayor). She emphasized what she saw as the majority's intrusion on the separation of powers. She explained that the majority "here transforms standing law from a doctrine of judicial modesty into a tool of judicial aggrandizement. It holds, for the first time, that a specific class of plaintiffs whom Congress allowed to bring a lawsuit cannot do so under Article III."

Journalist and former bankruptcy practitioner Bill Rochelle explains:

> The opinion is important in bankruptcy because the decision questions whether a debtor or trustee has standing to seek damages for violation of the automatic stay if the debtor can identify no concrete damages apart from violation of the statute. Arguably,

the June 25 opinion means that a debtor or trustee is only entitled to an injunction barring further violations of the automatic stay, if the estate suffered no concrete damages from the original stay violation.

## SEVENTH CIRCUIT COURT OF APPEALS

**Algozine Masonry Restoration Inc. v. Local 52 Chicago Area Joint Welfare Committee (In re Algozine Masonry Restoration Inc.), 20-3384 (7th Cir. Jul. 26, 2021)**

Debtor employed members of a local union. Pursuant to a collective bargaining agreement, the debtor was required to submit contributions to three different employee benefit funds (welfare fund, pension fund, and annuity fund). The debtor falls behind in its contributions and files Chapter 11 bankruptcy. Each of the three funds files a separate proof of claim demanding priority treatment for the contributions due to it. Debtor argues that the priority cap in section 507(a)(5) should apply to the aggregate claims rather than to each individual fund's claims. The bankruptcy court agreed with the funds and held that the priority cap applied per plan. The district court agreed with the bankruptcy court, and the Seventh Circuit affirmed. Judge Wood held that the statutory language of "section 507(a)(5) is straightforward. It allows 'each such' employee benefit plan to file priority claims for services rendered within the applicable period. The priority cap is determined by multiplying the number of employees covered by 'each such plan' by $12,850."

**Consumer First Legal Group LLC v. Consumer Financial Protection Bureau, 19-3396 (7th Cir. July 23, 2021)**

Three bankruptcy attorneys set up an entity which billed itself as a national law firm and provided "for-profit mortgage-assistance services." Most of the work was done by 30-40 "intake specialists" who would read from a script. Inhouse lawyers would listen into brief portions of the call, but the intake specialists would guide clients through a retainer agreement and mortgage modification documents. The mortgage modification agreements were then forwarded to local attorneys in the same jurisdictions as the clients, and the local attorneys conducted "perfunctory" reviews of the documents.

The Consumer Financial Protection Bureau has the authority to regulate and sanction businesses, but the CFPB does not have supervisory or enforcement authority over an attorney's practice of law. The CFPB initiated an enforcement action against the company, and the company argued that it was engaged in the practice of law and thus beyond the CFPB's authority. The district court disagreed. It ordered the company to pay $21.7 million dollars in restitution, and it barred the three bankruptcy attorneys from providing "debt relief services."

While not a bankruptcy case, Judge Diane Wood put forward a definition of the "practice of law" which is applicable to the bankruptcy arena. She explained that attorneys "licensed in and operating out of one state . . . are entitled to advise clients in other states in which they are not licensed, so long as they affiliate themselves with local counsel." She adopted the district court's definition of "practicing law" which was that a lawyer is practicing law if the lawyer's work entails "[t]he application of legal principles and judgment to a particular set of facts." The Court then held that the attorneys were not "practicing law" because their work was perfunctory by design, rather than substantive. Therefore, the company was subject to the CFPB's authority, but the Court remanded for a recalculation of sanctions.

## SEVENTH CIRCUIT DISTRICT COURTS

**USA Gymnastics v. Ace American Insurance Co. (In re USA Gymnastics), 19-50012 (Bankr. S.D. Ind. Jan. 19, 2021)**

USA Gymnastics filed Chapter 11 bankruptcy following a series of suits by sexual abuse survivors. Before bankruptcy, insurers had been covering defense costs under a reservation of rights in lawsuits brought against USA Gymnastics by the abuse survivors. USA Gymnastics filed an adversary proceeding against the insurers arguing that the insurers were obligated to cover the costs of USA Gymnastics' bankruptcy. After discovery, USA Gymnastics filed for summary judgment.

Bankruptcy Judge Robyn L. Moberly of Indianapolis reviewed the policies pursuant to Indiana contract law. She found that bankruptcy was neither a "suit" nor a "claim" under the policy. The bankruptcy plan allowed for claimants to recover from a trust or litigate their claims. She explained that for bankruptcy costs to qualify as defense costs that insurers must cover, the bankruptcy must be "a civil proceeding in which damages for bodily injury are alleged." Here, she noted the bankruptcy "is a procedural vehicle by which [the debtor] can gather, maximize and then divvy up insurance proceeds in resolution of sexual abuse lawsuits. This object is far different than the duty to defend objective of minimizing an insured's liability." The court also noted that the bankruptcy suit was not a claim for a wrongful act. Judge Moberly held that the insurers were not obligated to pay the debtor's bankruptcy costs as part of the duty to defend. Judge Moberly recommended that the district court deny the debtor's motion for summary judgment.

**City of Chicago v. Howard, 20-00372 (N.D. Ill. Jan. 29, 2021)**

Two debtors filed Chapter 7 bankruptcy after the City of Chicago had impounded each of the debtor's vehicles. One debtor's car was worth $575, and the debtor owed $8,000 in unpaid parking fines. The other debtor's car was worth $3,000, and that debtor owed $12,000 in unpaid parking fines. The debtors claimed exemptions covering all or part of their cars, and they filed motions to avoid judicial liens. The City argued that the liens were statutory and could not be

avoided. The bankruptcy court ruled in favor of the debtors, and the City appealed to the district court.

Judge Andrea Wood held that the liens were judicial liens, and therefore the debtors could set them aside pursuant to Section 522(f)(1). Section 522(f)(1) allows a debtor to avoid the fixing of a judicial lien that impairs an exemption. Section 101(36) defines a judicial lien as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." Section 101(53) defines a statutory lien as a "lien arising solely by force of a statute on specified circumstances or conditions . . . whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute." Judge Wood looked to the administrative process which led to impoundment of the vehicles. The City was required to give a parking violator notice and the opportunity to contest a parking ticket before the debt became due and owing to the City in the form of a money judgment, and the City only impounded a vehicle after an individual had accumulated three or more judgments. Therefore, Judge Wood determined that each lien was a judicial lien. She explained that "because the lien is based on the combined effect of a certain number of judgments, it is obtained by those judgments."

## INDIANA STATE COURT CASES

**Ocwen Loan Servicing, LLC, v. Chambliss, 166 N.E.3d 926 (Ind. Ct. App. 2021)**

Debtor executed promissory note to refinance her mortgage in 2002. In 2004, the debtor filed a Chapter 13 bankruptcy petition, and lender filed a proof of claim for approximately $73,000. Bankruptcy court then issued a discharge in 2009. Following the discharge, debtor continued to make payments on the mortgage, and she and the lender subsequently entered into a Loan Modification Agreement. In 2017, debtor filed a complaint in state court to quiet title on the property. The parties filed cross-motions for summary judgment with the debtor alleging that the Chapter 13 discharge had discharged the mortgage. The lender alleged the mortgage was still valid because the debtor continued making payments on it after the discharge and negotiated to modify the loan. The trial court granted the debtor's motion for summary judgment and denied the lender's motion for summary judgment. The lender then appealed to the Indiana Court of Appeals. Judge Rudolph Pyle held that the bankruptcy court, not the state trial court, was the proper forum to decide whether the mortgage was discharged. Judge Pyle explained that it is not the purpose or function of a state court to construe bankruptcy laws. Bankruptcy law is exclusively federal, and therefore, must be left for the bankruptcy courts to decide. Therefore, the panel reversed the trial court's grant of summary judgment and directed the trial court to dismiss the quiet title action.

**CW Farms, LLC v. Egg Innovations, LLC, 169 N.E.3d 874 (Ind. Ct. App. 2021), reh'g denied.**

EI contracted with CW to provide chickens and feed and CW in return would care for the chickens and oversee egg production. EI would then pay CW based on the number of eggs produced. The agreements where to remain in place for 8 "flocks," with a "flock" lasting ninety-five to one hundred weeks. The agreement was subsequently modified in 2018 to state that the last "flock" covered by the agreement would be the "flock" delivered in September of that year. EI then removed the last "flock" from CW's barns about halfway through the production cycle. This cut off the flock's egg production and decreased the total amount CW could charge EI. CW sued EI alleging breach of contract, breach of good faith and fair dealing, and other claims. EI filed a motion to dismiss under Trial Rule 12(b)(6), and the trial court granted the motion.

Judge Edward Najam, writing for the panel, reversed. EI contended that the contract did not include a duty of good faith. However, the agreement did include language which stated: "This Agreement will be interpreted assuming all parties conduct themselves in a professional and honest manner, and uphold their respective obligations." Judge Najam noted that this language is similar to how the Black's Law Dictionary defined good faith. Even though the agreement included a provision that the contract did not create a fiduciary relationship, the exclusion of a fiduciary relationship does not in itself preclude a duty of good faith.

## STUDENT LOANS AND TUITION PAYMENTS

**Homaidan v. Sallie Mae Inc., 20-1981 (2nd Cir. July 15, 2021)**

Student took out $12,000 in private student loans to complete his undergraduate degree. Student alleged the loans were not made solely to cover the cost of attendance. The student then filed for Chapter 7 bankruptcy and received a general discharge. The lender nonetheless hired a collection agency "to pester" the student, and the student paid off the loans. Student then reopened his bankruptcy petition and filed a purported class action in bankruptcy court. Lender filed a motion to dismiss, and the bankruptcy court denied the motion. The district court certified a direct appeal to the Second Circuit.

Lender argued all private student loans were barred from discharge. However, the Second Circuit disagreed. Judge Dennis Jacobs of the Second Circuit held that private student loans are excepted from discharge under Section 523(a)(8)(A)(ii) only if the loans were "made to individuals attending eligible schools for certain qualified expenses." Section 523(a)(8)(A)(ii) provides that a student loan is automatically discharged only if it was "an obligation to repay funds received as an educational benefit, scholarship, or stipend." Judge Jacobs reached this conclusion by applying the rules of statutory construction. Applying the doctrine of noscitur a sociis, Judge Jacobs rejected the lender's interpretation of the statute because the lender's interpretation of the statute would leave the other subsections of the statute superfluous. This decision is consistent with holdings in the Fifth and Tenth Circuits.

**Parvizi v. U.S. Dept. of Education (In re Parvizi), 19-3003 (Bankr. D. Mass. May 12, 2021)**

Debtor is 51 years old with no dependents and $650,000 in student loan debt. She earned a bachelor's degree, a masters degree in public health, and a medical degree. After medical school, debtor was terminated while completing her residency, which derailed her career as a medical doctor. At time of bankruptcy trial, the debtor earned $3,400/month as an adjunct professor. Judge Elizabeth D. Katz noted the debtor had the capability to obtain a higher paying job, and the debtor received a substantial inheritance but did not make any payments towards the loans. Nonetheless, Judge Katz held that whatever student loan debt was left after the debtor participated in an income-based repayment program for 25 years will be discharged as an undue hardship.

**Randall v. Navient Solutions (In re Randall), 19-00368 (Bankr. D. Md. June 21, 2021)**

68-year old debtor filed chapter 7 bankruptcy and received a general discharge. She then filed an adversary proceeding to discharge approximately $500,000 in student loan debt. Debtor obtained a bachelor's degree in psychology at age 51, a master's degree in human services, and took classes towards an MBA but did not receive a degree. Debtor could not obtain employment in her field of study and got a job making between $9 and $13 an hour. Judge Harner applied the *Brunner* test, adopted by the Fourth Circuit, to determine if the debtor qualified for discharge. Judge Harner found the debtor was not buying luxury or extraordinary goods, and Judge Harner determined the debtor should not be required to move into an unsafe or substandard apartment simply to repay a student loan debt. The debtor was able to pay all of her living expenses only because she worked substantial overtime, and Judge Harner concluded that it is unreasonable to require a 68-year-old woman to work 80 hour weeks for a significant time. The court ruled that the student loan debt imposed an undue hardship and discharged all but $12,000 of her debt.

As Bill Rochelle notes, "Respectfully, something is wrong with a law that won't allow a 68-year old woman to discharge all of her student loans quickly and easily when her $43,000 annual income won't cover her basic living expenses without working substantial overtime." Additionally, the adversarial and arcane nature of bankruptcy proceedings makes it incredibly difficult for debtors to obtain relief from student loans, even when they qualify for relief under the law.

## OTHER CIRCUIT COURTS

**Hooker v. Wanigas Credit Union, 20-2252 (6th Cir. Jan. 26, 2021)**

Chapter 7 debtor demanded return of garnished wages. The creditor garnished $900 of the debtor's wages during the 90-day preference period prior to filing the bankruptcy petition. The debtor's employer had sent the garnished wages to the creditor's lawyer. The creditor's lawyer kept half of the garnished wages pursuant to a charging lien and sent the remainder to the creditor. When the debtor sought a return of the garnished wages, the creditor returned the half it received from the lawyer. The debtor then filed an adversary proceeding seeking the remainder

of the garnished wages. The Sixth Circuit ruled in favor of the debtor. The Sixth Circuit held that the transfer to the lawyer amounted to a transfer to the creditor because the lawyer acted as the creditor's agent and the entire transfer was to the creditor's benefit as the amount retained by the lawyer covered the creditor's legal fees.

**Cohen v. Spyglass Media Group LLC (In re Weinstein Company Holdings LLC), 20-1750 (3d Cir. May 21, 2021)**

Bruce Cohen entered into contract with Weinstein Company Holdings, LLC, a movie company, to produce the 2012 film *Silver Linings Playbook*. The movie company agreed to give the producer $250,000 up front and 5% of the movie's net profits, but the movie company retained the film's intellectual property rights. The movie company filed for Chapter 11 bankruptcy protection years later following highly publicized, credible sexual harassment allegations against its co-founder, Harvey Weinstein. At the time the Weinstein Company filed for bankruptcy, it was in default and owed Cohen $400,000. Spyglass agreed to purchase Weinstein and the sale closed in 2018. The purchase agreement gave Spyglass the right to designate which of Weinstein's executory contracts it wished to assume as part of the sale. An executory contract can be "assumed" and then "assigned" to a buyer under § 365 if all existing defaults are cured; whereas a non-executory contract, can be sold to a buyer but the buyer does not need to worry about pre-closing breaches or defaults which remain as unsecured claims against the debtor's estate. Thus, if the Cohen Agreement was a non-executory contract, then Spyglass was only responsible for obligations on a go-forward basis once the sale closed. However, if the Cohen Agreement was an executory contract, then Spyglass was obligated to pay Cohen the $400,000 in unpaid compensation. Spyglass filed a declaratory judgment action seeking a determination that the Cohen Agreement was not executory. Spyglass filed a motion for summary judgment and the bankruptcy court found that the Cohen Agreement was non-executory. The district court affirmed.

Judge Thomas Ambro of the Second Circuit held that because Cohen had no remaining material obligations, Weinstein was free to sell or assign the contract without curing monetary defaults owed to Cohen and Cohen could not require Spyglass to cure the pre-petition default. Therefore, Cohen was left with only an unsecured claim against Weinstein. To determine what constituted an "executory contract," the Third Circuit looked to the definition proffered by Harvard Law Professor Vern Countryman in 1973. He defined an "executory contract" as "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other." Judge Ambro then applied New York state law's substantial performance rule to determine if there was a "material unperformed obligation." While the debtor's obligations to make contingent payments were clearly material, the same could not be said for Cohen's obligations. Cohen performed substantially all of his obligations under the contract when he finished producing the movie, and therefore the contract was non-executory. Nonetheless, Judge Ambro stated that parties could "contract around" the substantial performance rule and thus "override the Bankruptcy Code's intended protections for the debtor."

Bill Rochelle asks: "But what about the effect of the debtor's breach of contract? Why didn't ownership of the intellectual property revert to the producer following the debtor's breach?"

**Lorenzen v. Taggart (In re Taggart), 16-35402 (9th Cir. Nov. 24, 2020)**

This is an opinion issued after remand by the United States Supreme Court. The bankruptcy court initially found creditors in contempt of the court's discharge injunction, but the Ninth Circuit reversed. The Supreme Court of the United States took up the case and held that a creditor cannot be found in contempt of a discharge injunction if there was "an objectively reasonable basis for concluding that the creditor's conduct might be lawful." On remand, the Ninth Circuit held the creditor had an objectively reasonable basis for concluding the debtor might have "returned to the fray" in state court litigation after the discharge order, which would have made the creditor's motion for post-petition attorney fees lawful, and therefore the creditor should not have been held liable for contempt sanctions.

**Albert v. Golden (In re Albert), 20-60006 (9th Cir. June 10, 2021)**

Debtor filed for Chapter 13 bankruptcy. She sought to exempt a claim valued at $500,000 from her estate on the ground that the claim was exempt under California law. The bankruptcy court denied the exemption claim, and the debtor did not appeal that decision. The case was converted to a Chapter 7 bankruptcy. Debtor listed the claim again as exempt in the Chapter 7 case. However, the bankruptcy judge in the Chapter 7 case denied the exemption claim on the basis that the court's ruling in the Chapter 13 case precluded her from asserting the same claim in the Chapter 7 case. Debtor appealed to the bankruptcy appellate panel which affirmed, and the debtor then appealed to the 9th Circuit. She argued that pursuant to *Law v. Siegel*, 571 U.S. 415 (2014), the bankruptcy court could no longer employ judicial doctrines such as issue and claim preclusion. The Ninth Circuit rejected that argument and held that issue preclusion prohibited the debtor's claims. Judge Callahan distinguished *Law* from the instant case because in *Law*, the debtor was statutorily entitled to the exemption; whereas in the case at bar, the debtor was not entitled to the exemption by operation of previous court orders.

**Alliance WOR Properties LLC v. Illinois Methane LLC (In re HNRC Dissolution Co.), 20-5396 (6th Cir. July 12, 2021)**

Debtor had rights to mine coal in Illinois. Gas purchaser paid debtor $2.6 million for the right to extract methane from the coal bed. The gas purchaser's rights were characterized as debts running with the land. The gas purchaser also retained the right to receive a fee if the debtor started mining coal because the gas purchaser could not extract methane once coal mining started. Debtor filed Chapter 11 bankruptcy. Debtor then sold his coal mining rights to coal purchaser and published notice of the sale in a local and a national newspaper. Coal purchaser then applied for permit to mine coal, and the gas purchaser sued the coal purchaser in Illinois state court for the fee.

Coal purchaser reopened the bankruptcy case and asked the bankruptcy court to enjoin the Illinois state action. The bankruptcy court ruled in favor of the gas purchaser and the district court affirmed. Judge Larsen of the Sixth Circuit also affirmed. Judge Larsen held that the gas purchaser was a known creditor, and therefore, it was entitled to more than publication notice.

**Kinney v. HSBC Bank USA N.A. (In re Kinney), 20-1122 (10th Cir. July 23, 2021)**

Debtor confirmed a five-year Chapter 13 plan in 2014. The plan required the debtor to make monthly mortgage payments to a bank. The debtor made timely payments but missed two mortgage payments in the final months of the plan after she suffered injuries in an automobile accident. The bank filed a motion to dismiss after the scheduled expiration of the plan. The debtor opposed the bank's motion, paid her arrears, and proposed that she be granted a discharge. The bankruptcy court granted the bank's motion to dismiss, and the Tenth Circuit granted a direct appeal. The issue was whether the tendered payments were a permissible cure under the plan or an impermissible attempt to modify the plan after the end of its term. Judge Bacharach determined that "payments are 'under the plan' only if they are subject to or under the authority of the plan." Therefore, payments must be made while the plan is in existence. Tenth Circuit held that because the plan ended before the debtor made the cure payments, she was ineligible for discharge.

This decision creates a circuit split because the Third and Seventh Circuits have held courts have discretion to allow final payments after the five-year period. Bill Rochelle observes that "[t]he Tenth Circuit's strict reading creates problems, particularly if the default occurs shortly before the end of the term of the plan, leaving the debtor no time to cure. Or, what if the trustee has miscalculated required payments? Is the debtor barred from making up the shortfall after the plan ends?" This debtor might have been a good candidate for a hardship exemption. The Tenth Circuit's result seems unfair to debtors who have diligently made payments for five years to the best of their ability.

**Harris v. Jayo (In Re Harris), 19-11286 (11th Cir. July 14, 2021)**

Creditor sued debtor in Florida state court for claims including fraudulent misrepresentation, negligent misrepresentation, breach of fiduciary duty, and investment fraud. The state court struck the debtor's answer as a sanction for litigation misconduct. The state court then entered a default judgment for $1.8 million. The debtor subsequently filed a Chapter 7 petition, and the creditor initiated an adversary proceeding in the bankruptcy matter. The creditor argued that by virtue of the doctrine of collateral estoppel the debt was nondischargeable. Section 523(a)(2)(A) prohibits discharge of debts obtained through "false pretenses, a false representation, or actual fraud," and the creditor argued that the state court judgment established the debtor acted fraudulently. The bankruptcy court held the debt was nondischargeable and the district court affirmed.

Judge Adalberto Jordan of the Eleventh Circuit reversed. He assumed without deciding that the doctrine of collateral estoppel under Florida state law allowed for a general default judgment to estop future actions. However, the general default judgment in this case did not specify the specific grounds for relief and the complaint contained alternative factual allegations. Therefore, relief could have been granted in state court on the complaint without a finding of falsity or actual fraud. Thus, the creditor could not use the doctrine of collateral estoppel to establish that the debts were nondischargeable under Section 523(a)(2)(A).

**Official Committee v. Walker County Hospital District (In re Walker County Hospital District), 20-20572 (5th Cir. July 12, 2021)**

A hospital in rural Texas filed Chapter 11 bankruptcy. There were initially no bids to buy the hospital, but eventually a potential buyer made an offer conditioned on financing. The bankruptcy court approved the sale before the lender completed due diligence. The hospital then received a large payout from Medicaid. The buyer anticipated that the Medicaid payout was to occur after the buyer had completed the purchase, and thus the buyer planned to use the payout to mitigate the purchase price. However, the lender refused to provide financing unless the buyer received benefit of the Medicaid payout. The hospital then filed an emergency motion to lower the purchase price in order to satisfy the lender. The hospital's creditors opposed lowering the price, but the bankruptcy court entered an order lowering the price. The order directed any aggrieved party to immediately appeal and seek a stay. The sale of the hospital closed less than 24 hours later.

The creditors committee did not seek a stay but nevertheless filed an appeal. The district court dismissed the appeal as statutorily moot under Section 363(m). Section 363(m) states:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, **unless such authorization and such sale or lease were stayed pending appeal**.

(emphasis added). Judge Jolly of the Fifth Circuit focused on the emphasized portion of the subsection and held that the lack of a stay pending appeal was "fatal" to the creditors' case. The Court also chose not to address the creditors due process arguments because the case could be decided on statutory mootness grounds.

**Penfound v. Ruskin (In re Penfound), 19-2200 (6th Cir. Aug. 10, 2021)**

There is a growing dispute regarding whether Chapter 13 debtors can make voluntary contributions to 401(k) retirement plans. The Sixth Circuit held in *Davis v. Helbling (In re Davis)*, 960 F.3d 346 (6th Cir. 2020), that a debtor could make voluntary contributions to a

401(k) plan from the debtor's disposable income in the same amounts the debtor contributed pre-bankruptcy.

However, Judge Joan Larsen, who wrote the majority opinion in *Davis*, held in the instant case that a debtor could not make voluntary contributions to a 401(k) plan when the debtor had not been making contributions in the months prior to filing bankruptcy, even though the debtor had made contributions in prior years. The debtor had been making contributions to his 401(k) plan for most of the 17 years he spent working for a former employer, but the debtor left the former employer and took a new job in 2017. The new employer did not offer a 401(k) plan, so the debtor did not contribute to a 401(k) plan in the six months preceding his bankruptcy filing. The lower courts held that the debtor could not make voluntary 401(k) contributions as part of his bankruptcy plan, and the Sixth Circuit affirmed.

Bill Rochelle explains, "Congress needs to fix the mess it made in Section 541(b)(7) and say clearly whether chapter 13 debtors are entitled to make voluntary contributions to 401(k) retirement plans." Section 541(b)(7)(A) excludes contributions to 401(k) plans from a bankruptcy estate, but there is a hanging paragraph at the end of the section which states: "except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2)." This confusing language can be interpreted a number of different ways, with three different results: (1) Retirement contributions can never be deducted from disposable income, whether or not the debtor was making contributions before bankruptcy; (2) debtor may continue making contributions, but not more than the debtor was making before bankruptcy; or (3) debtor may make contributions after bankruptcy up to the maximum allowed by the IRS, even if debtor was not making contributions before bankruptcy.

Resolution of this issue is particularly important because most companies no longer offer defined-benefit pension plans for employees, which are protected in bankruptcy. Therefore, if a debtor cannot make contributions to a 401(k) plan while going through Chapter 13 bankruptcy, the debtor will likely experience financial problems in retirement.

**PHH Mortgage Corp. v. Sensenich (In re Gravel), 20-1 (2nd Cir. Aug. 2, 2021)**

Bankruptcy Rule 3002.1 is designed to avoid situations where Chapter 13 debtors receive a discharge but still face foreclosure on account of undisclosed post-petition charges. Rule 3002.1(c) mandates that mortgage lenders are to file notices of post-petition fees and charges within 180 days of when the charges are incurred. If a mortgage lender fails to file such a notice, Rule 3002.1(i) allows the bankruptcy court to disallow the charges and "award *other appropriate relief, including* reasonable expenses and attorneys' fees caused by the failure." (emphasis added). A large mortgage servicer repeatedly violated Rule 3002.1 by sending notices to debtors saying the debtors were not current on their mortgages and threatening foreclosure. Even after the mortgage servicer was reprimanded and sanctioned by the court, the servicer continued to violate Rule 3002.1. The bankruptcy court got fed-up and levied substantial sanctions against the mortgage servicer. The bankruptcy court based its action on the court's "inherent authority"

under Section 105 to impose punitive, non-contempt sanctions. The case was appealed to the Second Circuit.

Judge Dennis Jacobs of the Second Circuit held: (1) the *Taggart* standard for the imposition of contempt applies to all proceedings in bankruptcy court, not only for violating the discharge injunction; and (2) bankruptcy courts may not impose contempt sanctions for violations of Bankruptcy Rule 3002.1. The sanctions are to be limited to economic damages.

In *Taggar*t, the United States Supreme Court held that a creditor cannot be found in civil contempt for violating a discharge injunction if the creditor had an "objectively reasonable basis for concluding that the creditor's conduct might be lawful under the discharge order." Judge Jacobs applied that same standard to a Rule 3002.1 violation. He also stated that "without an express injunction" there was "fair ground of doubt as to whether the listed fees can form the basis for contempt." Judge Jacobs noted that the bankruptcy court had fashioned its sanction on the number of incorrect notices rather than on the total amount incorrectly charged. The majority held that the Rule expressly allowed recovery of expenses and attorney fees, but other appropriate relief under the Rule is limited to nonpunitive sanctions.

Circuit Judge Joseph Bianco wrote a dissent which was three pages longer than the majority opinion. He concurred with the broad imposition of the *Taggart* standard, but Judge Bianco asserted that contempt sanctions should be available for repeat violators of Rule 3002.1. He sees such sanctions as authorized by both the Rule itself and the bankruptcy court's inherent powers. There will likely be petitions for rehearing en banc and/or certiorari, so this is a case that might be worth following for further developments.

**FishDish LLP v. VeroBlue Farms USA Inc. (In re VeroBlue Farms USA Inc.) 19-3413 (8th Cir. Aug. 5, 2021)**

Debtor is a large company undergoing "a typical blood-and-guts reorganization." The debtor owed a first-lien debt of $54 million, which was well in excess of the debtor's assets. The debtor filed Chapter 11 bankruptcy, and the bankruptcy court allowed the debtor to obtain a $2 million loan in order to finance post-petition obligations. The lender of the $2 million received a first priority priming lien. The financing order established a challenge deadline for the official creditor's committee to raise an objection. The committee sent a challenge notice demanding that the debtor initiate an adversary proceeding against the holder of the first priority priming lien and the dominant equity holder. However, the bankruptcy court held that the objections were untimely. The plan went forward and a smaller equity holder appealed the confirmation order. The district court held that the appeal was equitably moot.

Judge James Loken of the Eighth Circuit noted that the equitable mootness doctrine had been thoughtfully criticized by many judges. He asserted that parties have started to rush implementation of reorganization plans in order to use the equitable mootness doctrine to fend off third party challenges to the plan. Judge Loken held that an appeal from confirmation of a Chapter 11 plan cannot be dismissed without

> at least a preliminary review of the merits of [the appellant's] appeal to determine the strength of [the appellant's] claims, the amount of time that would likely be required to resolve the merits of those claims on an expedited basis, and the equitable remedies available—including possible dismissal—to avoid undermining the plan and thereby harming *third parties*.

(emphasis in original). Therefore, he reversed the district court's ruling on equitable mootness and remanded the case for further consideration. The Eighth Circuit also directed courts to use the term "equitable mootness" instead of "equitable dismissal."

## DISTRICT COURTS IN OTHER CIRCUITS

**Roman Catholic Church of the Archdiocese of Santa Fe, 18-13027 (Bankr. D. N.M. May 13, 2021)**

The Archdiocese of Santa Fe filed a Chapter 11 bankruptcy petition in December 2018 because of sexual abuse claims. In 2017, the archdiocese published a list of people credibly accused of sexual abuse. One of the individuals on the list (the "accused") claimed his inclusion on the list was false, and he initiated a defamation action in state court seeking damages. The accused did not seek an injunction requiring the removal of his name from the list in the state court action. After the bankruptcy, the accused filed a $200,000 proof of claim in the bankruptcy court, and the accused filed a motion asking that the archdiocese be enjoined from including his name of the list.

Judge David T. Thuma noted there was a split of authority regarding whether it is a violation of the automatic stay for a creditor to bring a prepetition claim in bankruptcy court. The majority view is that it does not violate the automatic stay. However, Judge Thuma adopted the minority view on the grounds that the plain language of Section 362(a)(1) barred the action, doing so does not lead to absurd results, and suing the debtor in bankruptcy court is not equivalent to filing a proof of claim. In order to have his name removed from the list, Judge Thuma stated that the accused could either move for a modification of the automatic stay and commence an adversary proceeding seeking an injunction or remove the pending state court complaint and amend the complaint to seek equitable relief.

**Roman Catholic Church of the Archdiocese of Santa Fe, 18-13027 (Bankr. D. N.M. Dec. 14, 2020)**

This is a second noteworthy decision arising from the Archdiocese of Santa Fe's petition for bankruptcy. Prior to the archdiocese's Chapter 11 petition, a former parish priest filed suit in state court against the archdiocese alleging he was fired in retaliation for reporting embezzlement. The Chapter 11 petition stayed the priest's initial lawsuit, but the priest filed a second lawsuit in state court against the archbishop. The archdiocese then filed a motion for sanctions against the priest for violating the automatic stay. Judge David T. Thuma noted that

the archdiocese operated as a corporation sole. It has one officeholder, and when that officeholder retires, a replacement automatically takes his place. Therefore, the legal status of the corporation sole is not interrupted. Consequently, Judge Thuma held that, unlike an officer of an ordinary corporation, the head of a corporation sole is automatically covered by an automatic stay when the corporation sole files for bankruptcy. However, the automatic stay does not automatically stay all claims against the archbishop. For instance, if the archbishop had an auto accident, he could be sued without violating the automatic stay. Nonetheless, Judge Thuma declined to impose sanctions.

**Miner v. Mines (In re Mines), 19-08109 (Bankr. E.D.N.Y. June 3, 2021)**

Creditors initiated an arbitration action against the debtor on claims for breach of contract and fraud. The arbitrator awarded the creditors more than $160,000, including an award of treble damages under Virginia law. Debtor then filed a Chapter 7 bankruptcy petition in New York. The creditors filed a complaint seeking to declare the judgment nondischargeable under Section 523(a)(2)(A), because the creditors argued the debt was obtained by "false pretenses, a false representation, or actual fraud." The creditor relied on the doctrine of collateral estoppel to argue the debt was nondischargeable. Judge Grossman applied New York state law and determined the identity requirement for collateral estoppel was not met because the arbitrator made no specific findings as to the debtor's conduct. The creditors then argued that the arbitrator's award of treble damages established willfulness. However, the court explained that Virginia law allowed for treble damages in the absence of fraud, and Judge Grossman had no way of knowing the basis for the treble damages award. Therefore, the court ruled that the debt was dischargeable.

**Pidcock v. U.S. (In re ASPC Corp.), 19-2120 (Bankr. S.D. Ohio July 13, 2021)**

In 2018, the fee Chapter 11 debtors are required to pay the bankruptcy trustee increased. The increased fee took effect in bankruptcy trustee districts before it did so in bankruptcy administrator districts. A Chapter 11 debtor filed for bankruptcy during that interim period in a trustee district. The trustee for the creditor's trust filed an adversary proceeding contending the increased fee violated the Tax Uniformity Clause, the uniformity aspects of the Bankruptcy Code, and the United States Constitution Takings Clause.

The parties filed cross motions for summary judgment, and Bankruptcy Judge John E. Hoffman, Jr., ruled in favor of the bankruptcy trustee. Judge Hoffman found the Tax Uniformity Clause did not apply because the fee was a user fee and not a tax. He found that the Bankruptcy Clause applied, but the fee increase did not present a uniformity problem. The increased fee was meant to solve a geographically isolated problem because only trustee districts were underfunded and the delay in the effective date of the increase in administrator districts was occasioned by the Judicial Conference. There is a circuit split on this issue. The Fourth and Fifth Circuits have also held application of the fee increase was constitutional. The Second Circuit has held that it is unconstitutional. The issue will likely not be addressed by the Supreme Court until the fall of

2022 because of the procedural posture of the cases in the lower courts where this issue is being litigated.

**In re Financial Oversight and Management Board for Puerto Rico, 17-3283 (D. P.R. June 29, 2021)**

In Puerto Rico, auto owners are required to pay auto insurance premiums to the commonwealth government, but the auto owners are entitled to refunds of the premiums if the owners have private insurance. Two class actions were brought by auto owners seeking refunds. The two class action suits settled, but Puerto Rico subsequently initiated debt adjustment proceedings pursuant to PROMESA. The representative of the commonwealth moved to assume the settlement debts as executory contracts under Section 365. The creditors committee objected.

District Judge Laura Swain, sitting by designation, overruled the creditors' objections. She acknowledged that there are competing definitions for what constitutes an executory contract. The Countryman approach (discussed above in *Cohen v. Spyglass Media Group LLC*) and the functional approach, which "works backward from the purposes to be accomplished by rejection. The Contract is no longer executory if the purposes have been accomplished already." She determined that under either definition she considered, the settlement qualified as an executory contract. She also found that assumption of the settlement debt represented sound business judgment because it would avoid the accumulation of further interest payments and obviate additional legal expenses associated with continued litigation.

Bill Rochelle believes that courts should adopt the definition of executory contract proposed by Professor Jay Westbrook of the University of Texas School of Law in "The Demystification of Contracts in Bankruptcy," 91 Am. Bankr. L.J. 481 (Summer 2017), which is like the functional approach applied by the trial court. The Westbrook analysis involves first looking at two questions outside of bankruptcy: (1) what the net benefit to the estate (if any) from full performance of the contract by both parties is; and (2) what relief the counterparty to contract could get in the case of the debtor's breach. Only after answering these two state law questions, should the court consider the bankruptcy principles that: (1) with specified exceptions, the debtor must receive an all-embracing discharge from pre-bankruptcy claims; (2) unsecured creditors should share pro rata in the proceeds of the estate; (3) the value of the bankruptcy estate must be maximized; and (4) all claims must be fully resolved by the bankruptcy.

This approach is designed to make sure "that pre-bankruptcy bargains and entitlements will be changed in Chapter 11 only insofar as bankruptcy policies, like equality of treatment and rehabilitation of debtors require alteration. Properly understood, the very process of acceptance or rejection is simply the trustee's exercise of the opportunity every contract party has to perform or breach with whatever consequences non-bankruptcy law proscribes."

**In re Hunanyan, 21-10079 (Bankr. C.D. Cal. June 10, 2021)**

In a Chapter 7 case, the trustee filed a "routine application" to retain accountants "for the usual necessary estate services." However, the US trustee relied on *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevado Feliciano*, 140 S.Ct. 696 (2020), to argue that the accountants should not be paid for the services they performed before entry of the retention order. If you remember from last year, *Acevado* essentially banned entry of nunc pro tunc orders. Nonetheless, Bankruptcy Judge Maureen Tighe cited several cases post-*Acevado* in which bankruptcy courts allowed retroactive application of bankruptcy court orders. Judge Tighe observed that there are times where professional assistance is needed before a hearing can be held on the retention application. This case helps us to interpret *Acevado* to mean that a bankruptcy court possesses jurisdiction immediately upon filing of a bankruptcy petition, but the court cannot issue a nunc pro tunc order effective before it acquired jurisdiction.

**In re CEC Entertainment Inc., 20-33163 (Bankr. S.D. Tex. Dec. 14, 2020)**

The operator of chain of restaurants filed a Chapter 11 bankruptcy petition in June 2020. In August, the debtor moved to abate rent payments because pandemic restrictions inhibited the restaurant chain's ability to operate. Six landlords objected to the abatement motion. Bankruptcy Judge Marvin Isgur held that neither the bankruptcy code nor the doctrines of force majeure and frustration of purpose allowed for abatement. This holding contrasts with an opinion issued by a Virginia bankruptcy judge (In re Pier 1 Imports, Inc., 615 B.R. 196 (Bankr. E.D. Va. 2020)).

**Mendelsohn v. Central Garden & Pet Co. (In re Petland Discounts Inc.), 20-08088 (Bankr. E.D.N.Y. Jan. 26, 2021)**

The debtor paid $11,400 to a creditor within 90 days of filing for bankruptcy, and the Chapter 7 trustee sued for recovery under Sections 547 and 550 in the Eastern District of New York. The creditor was a Delaware corporation with a principal place of business in California, but it did conduct business in New York. The creditor moved to dismiss based on improper venue.

28 U.S.C. § 1409(a) allows venue of "a proceeding *arising under* title 11 or arising in or related to a case under title 11" in the district where the bankruptcy case is pending. (emphasis added). However, for debts of less that $25,000, § 1409(b) places venue in "the district in which the defendant resides" for "a proceeding *arising in* or related to" a bankruptcy case. (emphasis added). Bankruptcy Judge Robert Grossman determined that the phrases "arising under" and "arising in" are not interchangeable. Judge Grossman explained, "It is beyond question that a preference action 'arises under' title 11. Thus, a plain reading of § 1409(a) and (b) compels the Court to conclude that venue of this proceeding is proper in [the debtor's home court]." Consequently, venue was proper in the Eastern District of New York and the bankruptcy court denied the motion to dismiss.

## GENERAL INTEREST

### In re National Rifle Association of America, 21-30085 (Bankr. N.D. Tex. May 11, 2021)

After a fifteen-month investigation, the New York Attorney General filed a complaint seeking dissolution of the NRA. The NRA then filed a Chapter 11 bankruptcy petition in the Northern District of Texas. Both a former advertising firm and the New York Attorney General filed motions to dismiss the NRA's petition.

Bankruptcy Judge Harlan D. Hale dismissed the NRA's petition because it was "not filed in good faith but instead was filed as an effort to gain an unfair litigation advantage in the [action by the New York Attorney General to dissolve the NRA] and as an effort to avoid a regulatory scheme." Wayne LaPierre, the NRA's executive vice president, essentially testified that the NRA was able to pay its debts in full but filed bankruptcy to avoid dissolution by the New York Attorney General. Judge Hale held that avoiding governmental regulatory action was an improper purpose to file for bankruptcy. Judge Hale also noted several "cringeworthy facts" which came to light during an evidentiary hearing on the bankruptcy petition, "including the manner and secrecy in which authority to file the case was obtained in the first place, the related lack of express disclosure of the intended Chapter 11 case to the board of directors and most of the elected officers, the ability of the debtor to pay its debts, and the primary legal problem of the debtor being a state regulatory action."

### Legal Fees: Boy Scouts of America and Navient Solutions

Boy Scouts of America declared bankruptcy due to numerous claims of sexual abuse against the organization. The lawyers working on negotiating a resolution of the multi-billion-dollar bankruptcy then billed the estate over $267,000 for a single month of work. The attorney fee claim included first-year associates billing their work at a rate over $600 an hour, and one attorney billing at a rate of $1,725 an hour. The bankruptcy judge presiding over the case called the fees "staggering."

In *In re Navient Solutions, LLC*, 2021 WL 1885915 (Bankr. S.D.N.Y. May 11, 2021), a bankruptcy court judge cut a legal fee request for $524,051 all the way down to $40,798. Two law firms represented a putative debtor who moved to dismiss an involuntary bankruptcy petition filed against the putative debtor. The court reduced the fee request after finding that the matter had been overstaffed. For instance, nine lawyers attended one hearing on behalf of the putative debtor, and there was a duplication of services between the two firms. Also, the court found many of the legal bills gave an insufficiently detailed description of the legal services performed.

Other courts have cut fee requests when those requests include work that is not cost effective or likely to succeed. *See Taxman Clothing Co.*, 49 F.3d 310 (7th Cir. 1995) (ordering attorney to disgorge fees for pursuing claims any reasonable attorney would know are not cost erective); *In re Pugh*, 2020 WL 2836823 (ordering attorney to disgorge fees related to unreasonable Chapter 13 bankruptcy petition); and *In re Reynolds*, 835 Fed. Appx. 395, 397, 400 (10th Cir. Jan. 6, 2021) (reducing fee request to eliminate payment for "unnecessary, duplicative and excessive"

legal work). These cases demonstrate the importance of exercising good judgment in deciding what resources to devote to a particular case and what actions to pursue in furtherance of the case.

**In re Kurtenbach, 18-01607 (Bankr. N.D. Iowa Nov. 30, 2020)**

This is another case addressing the propriety of attorney fees in a bankruptcy action.

A family farmer filed a Chapter 12 bankruptcy petition. At the conclusion of the case, the creditor's counsel filed an application for $220,000 in fees and the debtor's counsel filed an application for $160,000 in fees. The debtor's counsel objected to the creditor's counsel's fee request. Bankruptcy Judge Thad Collins praised both counsel and commented that the case required more work than a typical Chapter 12 case. But, Judge Collins noted that Section 506(b) "is not a blank check for over secured creditors to incur any amount of legal fees and have them paid by the debtor." Judge Collins determined that the section required counsel to exercise restraint in making billing judgments. Judge Collins found repetitious billing entries, and he reduced the creditor's attorney fees by 30% to $154,000.

Counsel must strike a delicate balance of protecting the client's fiduciary interests while at the same time not running up so high of a bill that it unreasonably diminishes the estate.

**New Bankruptcy Judge for Northern District of Indiana**

St. Joseph Superior Court Magistrate Judge Paul E. Singleton has been appointed to a fourteen-year term to succeed Judge Harry C. Dees, Jr. as a bankruptcy court judge in the Northern District of Indiana. Judge Singleton has served as a magistrate judge in St. Joseph County since 2015. Prior to his appointment as magistrate judge, he worked at Indiana Legal Services, the Family Justice Center of St. Joseph County, and in private practice at Faegre Drinker Biddle & Reath LLP. He also served as Assistant City Attorney for the City of South Bend.

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The authors are indebted to Bill Rochelle of the American Bankruptcy Institute. Rochelle was a bankruptcy practitioner for over thirty-five years before becoming a journalist for Bloomberg News. His Daily Wire articles provide important insights and commentary regarding cases of note in the bankruptcy practice area.